NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
LITTERA SCRIPTA MANET
1985

FEDERAL REGISTER

Vol. 81 Friday,
No. 190 September 30, 2016

Book 1 of 2 Books
Pages 67091–67596

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402 is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.ofr.gov.*

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at *www.fdsys.gov*, a service of the U.S. Government Publishing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 59, 1 (January 2, 1994) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Publishing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, *gpocusthelp.com.*

The annual subscription price for the **Federal Register** paper edition is $749 plus postage, or $808, plus postage, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $165, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Publishing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 81 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Publishing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:	
Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**
General online information	**202–512–1530; 1–888–293–6498**
Single copies/back copies:	
Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800** **(Toll-Free)**

FEDERAL AGENCIES

Subscriptions:	
Assistance with Federal agency subscriptions:	
Email	*FRSubscriptions@nara.gov*
Phone	**202–741–6000**

Printed on recycled paper.

Contents

Federal Register
Vol. 81, No. 190
Friday, September 30, 2016

Agricultural Marketing Service

RULES
Container and Pack Requirements:
  Oranges and Grapefruit Grown in Lower Rio Grande Valley in Texas, 67091–67092
PROPOSED RULES
Marketing Orders:
  Hazelnuts Grown in Oregon and Washington, 67217–67219

Agriculture Department

See Agricultural Marketing Service
See Forest Service

Air Force Department

NOTICES
Meetings; Sunshine Act
  Air University Board of Visitors' Air Force Institute of Technology Subcommittee, 67332

Army Department

NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67332

Bonneville Power Administration

NOTICES
Environmental Impact Statements; Availability, etc.:
  Columbia River System Operations, 67382–67383

Bureau of Safety and Environmental Enforcement

PROPOSED RULES
Privacy Act; Exemptions, 67267–67270
NOTICES
Privacy Act; Systems of Records, 67386–67390

Census Bureau

NOTICES
Meetings:
  National Advisory Committee on Racial, Ethnic and Other Populations, 67292–67293

Children and Families Administration

RULES
Child Care and Development Fund Program, 67438–67595
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
  National Study of Title IV–E Child Welfare Waiver Demonstrations, 67353–67354
  Provision of Child Support Services in IV–D cases under the Hague Child Support Convention; Federally Approved Forms, 67355–67356
Domestic Violence Awareness Month YouTube Challenge, 67354–67355

Civil Rights Commission

NOTICES
Requests for Nominations
  Florida Advisory Committee; Texas Advisory Committee; Michigan Advisory Committee, 67291–67292

Coast Guard

RULES
Drawbridge Operations:
  Newtown Creek, Brooklyn and Queens, NY, 67170
Safety Zones:
  Pittsburgh Steelers Fireworks, 67170–67171

Commerce Department

See Census Bureau
See Foreign-Trade Zones Board
See International Trade Administration
See National Oceanic and Atmospheric Administration

Commission of Fine Arts

NOTICES
Meetings:
  Buildings, Parks and Memorials, 67326

Committee for Purchase From People Who Are Blind or Severely Disabled

NOTICES
Procurement List; Additions and Deletions, 67326–67327

Commodity Futures Trading Commission

NOTICES
Meetings; Sunshine Act, 67331–67332
Privacy Act; Systems of Records, 67327–67331

Defense Department

See Air Force Department
See Army Department
See Engineers Corps
See Navy Department

RULES
Federal Acquisition Regulations:
  Amendment Relating to Multi-Year Contract Authority for Acquisition of Property, 67773–67774
  Consolidation and Bundling, 67763–67773
  Contractors Performing Private Security Functions, 67776–67778
  Federal Acquisition Circular 2005–91; Small Entity Compliance Guide, 67781–67783
  Federal Acquisition Circular 2005–91; Introduction, 67726–67728
  Limitation on Allowable Government Contractor Employee Compensation Costs, 67778–67780
  New Designated Countries—Ukraine and Moldova, 67774–67776
  Non-Retaliation for Disclosure of Compensation Information, 67732–67735
  Prohibition on Contracting with Corporations with Delinquent Taxes or a Felony Conviction, 67728–67731
  Sole Source Contracts for Women-Owned Small Businesses, 67735–67736
  Technical Amendments, 67781
  Unique Identification of Entities Receiving Federal Awards, 67736–67763
  Updating Federal Contractor Reporting of Veterans' Employment, 67731–67732
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67333–67334

Meetings:
  Board of Regents, Uniformed Services University of the Health Sciences, 67333

Education Department

NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
  Targeted Teacher Shortage Areas, 67337

Energy Department

See Bonneville Power Administration
See Federal Energy Regulatory Commission
PROPOSED RULES
Energy Conservation Programs:
  Standards for Residential Conventional Cooking Products, 67219–67220
NOTICES
Applications to Export Electric Energy:
  CWP Energy, 67337–67338
Environmental Impact Statements; Availability, etc.:
  Recapitalization of Infrastructure Supporting Naval Spent Nuclear Fuel Handling at the Idaho National Laboratory, 67338–67340

Engineers Corps

NOTICES
Environmental Impact Statements; Availability, etc.:
  Columbia River System Operations, 67382–67383

Environmental Protection Agency

RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
  Florida; Infrastructure Requirements for the 2010 Sulfur Dioxide National Ambient Air Quality Standard, 67179–67185
  Indiana; Temporary Alternate Opacity Limits for American Electric Power, Rockport, 67186–67190
  Mississippi; Infrastructure Requirements for the 2010 Sulfur Dioxide National Ambient Air Quality Standard, 67171–67179
Availability of Data on Allocations of Cross-State Air Pollution Rule Allowances to Existing Electricity Generating Units, 67190–67191
Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category—Implementation Date Extension, 67191–67193
PROPOSED RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
  Wisconsin; NOx as a Precursor to Ozone, PM2.5 Increment Rules and Prevention of Significant Deterioration Infrastructure Requirements, 67261–67266
Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category—Implementation Date Extension, 67266–67267
NOTICES
Environmental Impact Statements; Availability, 67348–67349
Meetings:
  Board of Scientific Counselors Air, Climate, and Energy Subcommittee, 67349–67350
Peer Review Materials to Inform the Safe Drinking Water Act Decision Making on Perchlorate, 67350–67351
Requests for Comments:
  Interim List of Perchlorate in Drinking Water Expert Peer Reviewers and Draft Peer Review Charge Questions, 67347–67348

Federal Aviation Administration

RULES
Airworthiness Directives:
  Bell Helicopter Textron Canada Limited (Bell) Helicopters, 67102–67104
  General Electric Company Turbofan Engines, 67098–67100
  Honeywell International Inc. Turboprop and Turboshaft Engines, 67100–67102
Modification of Class E Airspace:
  Napa, CA, 67104–67105
Special Conditions:
  DAHER–SOCATA, Model TBM 700; Inflatable Four-Point Restraint Safety Belt with an Integrated Airbag Device, 67093–67097
  Embraer S.A., Model ERJ 190–300 Series Airplanes; Electronic Flight Control System: Control Surface Position Awareness, Multiple Modes of Operation, 67097–67098
Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments, 67105–67107, 67112–67113
Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments, 67107–67112

Federal Communications Commission

NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67351–67353

Federal Energy Regulatory Commission

RULES
Reliability Standard for Transmission System Planned Performance for Geomagnetic Disturbance Events, 67120–67140
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67343–67345
Filings:
  Wheeler, Brent E., 67342
Hydroelectric Applications:
  McMahan Hydroelectric, L.L.C., 67340–67341
Initial Market-Based Rate Filings Including Requests for Blanket Section 204 Authorizations:
  WBI Energy Transmission, Inc., 67341
Requests under Blanket Authorizations:
  Southern Star Central Gas Pipeline, Inc., 67345–67346
Schedules for Environmental Review:
  Shidler Line Abandonment Project, 67346–67347
  The Northern Lights 2017 Expansion Project, 67342

Federal Highway Administration

RULES
Regulatory Update of Transfer and Sanction Programs, 67158–67170
NOTICES
Environmental Impact Statements; Availability, etc.:
  Interstate 84 Project, Hartford County, CT, 67421
Final Federal Agency Actions:
  Proposed Highway in California, 67420–67421

Federal Motor Carrier Safety Administration

NOTICES
Exemption Applications; Denials:
  Epilepsy and Seizure Disorders, 67424–67425
Qualification of Drivers; Exemption Applications:
  Diabetes Mellitus, 67421–67422, 67425–67430
  Epilepsy and Seizure Disorders, 67422–67424

Federal Railroad Administration

NOTICES
Meetings:
  Northeast Corridor Safety Committee, 67430–67431

Federal Reserve System

PROPOSED RULES
Capital Plan and Stress Test, 67239–67260
Risk-Based Capital and Other Regulatory Requirements for Activities of Financial Holding Companies Related to Physical Commodities and Risk-Based Capital Requirements for Merchant Banking Investments, 67220–67239

Fish and Wildlife Service

RULES
Endangered and Threatened Species:
  Eastern Massasauga Rattlesnake; Status, 67193–67214
Endangered and Threatened Wildlife and Plants:
  Endangered Status for 49 Species From the Hawaiian Islands, 67786–67860
Injurious Wildlife Species:
  Listing 10 Freshwater Fish and 1 Crayfish, 67862–67899
PROPOSED RULES
Endangered and Threatened Wildlife and Plants:
  Status for the Kenk's Amphipod, 67270–67287
NOTICES
Endangered and Threatened Wildlife and Plants:
  Availability of Proposed Low-Effect Habitat Conservation Plans, Clay, Lake, Marion, and Putnam County, FL, 67376–67377

Food and Drug Administration

RULES
Food Additives:
  Permitted in Feed and Drinking Water of Animals; Feed Grade Sodium Formate, 67153–67154
Medical Devices:
  Neurological Devices; Classification of the Evoked Photon Image Capture Device, 67154–67155
New Animal Drugs:
  Approval of New Animal Drug Applications; Change of Sponsor's Address, 67149–67153
PROPOSED RULES
Food Additives:
  BASF Corp.; Filing of Food Additive Petition, 67260–67261
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
  Donor Risk Assessment Questionnaire, 67358–67360
Fee for Using a Rare Pediatric Disease Priority Review Voucher in Fiscal Year 2017, 67360–67362
Fee for Using a Tropical Disease Priority Review Voucher in Fiscal Year 2017, 67356–67358

Foreign Assets Control Office

NOTICES
Blocking or Unblocking of Persons and Properties, 67431–67432

Foreign-Trade Zones Board

NOTICES
Reorganizations and Expansions under Alternative Site Frameworks:
  Zone 214; Lenoir County, NC, 67293

Forest Service

NOTICES
Environmental Impact Statements; Availability, etc.:
  Huckleberry Landscape Restoration Project; Idaho, 67289–67291

General Services Administration

RULES
Federal Acquisition Regulations:
  Amendment Relating to Multi-Year Contract Authority for Acquisition of Property, 67773–67774
  Consolidation and Bundling, 67763–67773
  Contractors Performing Private Security Functions, 67776–67778
  Federal Acquisition Circular 2005–91; Small Entity Compliance Guide, 67781–67783
  Federal Acquisition Circular 2005–91; Introduction, 67726–67728
  Limitation on Allowable Government Contractor Employee Compensation Costs, 67778–67780
  New Designated Countries—Ukraine and Moldova, 67774–67776
  Non-Retaliation for Disclosure of Compensation Information, 67732–67735
  Prohibition on Contracting with Corporations with Delinquent Taxes or a Felony Conviction, 67728–67731
  Sole Source Contracts for Women-Owned Small Businesses, 67735–67736
  Technical Amendments, 67781
  Unique Identification of Entities Receiving Federal Awards, 67736–67763
  Updating Federal Contractor Reporting of Veterans' Employment, 67731–67732

Health and Human Services Department

See Children and Families Administration
See Food and Drug Administration
See Health Resources and Services Administration
See National Institutes of Health
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67363–67364

Health Resources and Services Administration

NOTICES
Deviations from Competition Requirements:
  Jurisdictional Approach to Curing Hepatitis C among HIV/HCV Coinfected People of Color Demonstration Project, 67362–67363

Homeland Security Department

See Coast Guard
See U.S. Citizenship and Immigration Services
See U.S. Customs and Border Protection
NOTICES
Meetings:
  Homeland Security Academic Advisory Council, 67366

Housing and Urban Development Department

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
  License for the Use of Personally Identifiable Information Protected Under the Privacy Act of 1974, 67373–67374
  Promise Zones Reporting, 67372–67373
Federal Properties Suitable as Facilities to Assist the Homeless, 67374–67375

Interior Department

See Bureau of Safety and Environmental Enforcement
See Fish and Wildlife Service
See Land Management Bureau
See National Park Service
See Ocean Energy Management Bureau
See Reclamation Bureau

Internal Revenue Service

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67432–67433
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
  Gasohol; Compressed Natural Gas and Gasoline Excise Tax, 67434–67435
  Obligations of States and Political Subdivisions Statutory Elections, 67432
  Regulation Project, 67433–67434

International Trade Administration

NOTICES

Cost Recovery Programs:
  EU–U.S. Privacy Shield Framework; Fee Schedule, 67293–67295

International Trade Commission

RULES

Submission and Consideration of Petitions for Duty Suspensions and Reductions, 67144–67149

Justice Department

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
  Bulletproof Vest Partnership, 67390–67391
  Leadership Engagement Survey, 67390

Labor Department

See Labor Statistics Bureau
See Mine Safety and Health Administration
See Occupational Safety and Health Administration

RULES

Establishing Paid Sick Leave for Federal Contractors, 67598–67724
Implementation of OMB Guidance on Nonprocurement Debarment and Suspension, 67091

PROPOSED RULES

Implementation of OMB Guidance on Nonprocurement Debarment and Suspension, 67217

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
  Program Reporting and Performance Standards System for Indian and Native American Programs, 67391–67392
Child Labor, Forced Labor, and Forced or Indentured Child Labor in the Production of Goods in Foreign Countries, etc., 67392–67393
List of Goods Produced by Child Labor or Forced Labor, 67393

Labor Statistics Bureau

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67394

Land Management Bureau

NOTICES

Applications for Withdrawal of Public Lands:
  Oregon; Public Meetings, 67377–67378
Environmental Impact Statements; Availability, etc.:
  Craters of the Moon National Monument and Preserve, ID, 67378–67379
Meetings:
  Utah Resource Advisory Council, 67377

Management and Budget Office

NOTICES

Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity, 67398–67401

Mine Safety and Health Administration

NOTICES

Affirmative Decisions on Petitions for Modification Granted in Whole or in Part, 67394–67396
Petitions for Modifications:
  Applications of Existing Mandatory Safety Standards, 67396–67397

National Aeronautics and Space Administration

RULES

Federal Acquisition Regulations:
  Amendment Relating to Multi-Year Contract Authority for Acquisition of Property, 67773–67774
  Consolidation and Bundling, 67763–67773
  Contractors Performing Private Security Functions, 67776–67778
  Federal Acquisition Circular 2005–91; Small Entity Compliance Guide, 67781–67783
  Federal Acquisition Circular 2005–91; Introduction, 67726–67728
  Limitation on Allowable Government Contractor Employee Compensation Costs, 67778–67780
  New Designated Countries—Ukraine and Moldova, 67774–67776
  Non-Retaliation for Disclosure of Compensation Information, 67732–67735
  Prohibition on Contracting with Corporations with Delinquent Taxes or a Felony Conviction, 67728–67731
  Sole Source Contracts for Women-Owned Small Businesses, 67735–67736
  Technical Amendments, 67781
  Unique Identification of Entities Receiving Federal Awards, 67736–67763
  Updating Federal Contractor Reporting of Veterans' Employment, 67731–67732

NOTICES

Meetings:
  Heliophysics Subcommittee of the NASA Advisory Council, 67401

National Highway Traffic Safety Administration

RULES

- Regulatory Update of Transfer and Sanction Programs, 67158–67170

National Institutes of Health

NOTICES

- Meetings:
  - Center for Scientific Review, 67364–67365
  - National Institute of Allergy and Infectious Diseases, 67364

National Oceanic and Atmospheric Administration

RULES

- Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic:
  - South Atlantic Greater Amberjack; Commercial Accountability Measures and Closure, 67215
- Fisheries of the Exclusive Economic Zone Off Alaska:
  - Big Skate in the Central Regulatory Area of the Gulf of Alaska, 67215–67216
  - Observer Coverage Requirements for Bering Sea and Aleutian Islands Management Area Trawl Catcher Vessels, 67113–67118

PROPOSED RULES

- Fisheries Off West Coast States:
  - Amendment 27 to the Pacific Coast Groundfish Fishery Management Plan, 67287–67288

NOTICES

- Environmental Impact Statements; Availability, etc.:
  - Pacific Island Fisheries; Aquaculture, 67312
- Fisheries off West Coast Sites:
  - Pacific Coast Groundfish Fishery; Fishing Capacity Reduction Program, Sub-loan Repayment, 67295
- Meetings:
  - Advisory Committee on U.S. Integrated Ocean Observing System, 67295–67296
  - Gulf of Mexico Fishery Management Council, 67296–67297
  - New England Fishery Management Council, 67312–67313
- Takes of Marine Mammals Incidental to Specified Activities:
  - Tidal Marsh Restoration Project, Monterey, CA, 67297–67311
- Taking of Marine Mammals Incidental to Specified Activities:
  - Construction of the East Span of the San Francisco-Oakland Bay Bridge, 67313–67326

National Park Service

NOTICES

- Environmental Assessments; Availability, etc.:
  - Special Use Permit for a Wireless Telecommunication Facility, 67379
- National Register of Historic Places:
  - Notification of Pending Nominations and Related Actions, 67379–67380

National Science Foundation

NOTICES

- Meetings:
  - Advisory Committee for Biological Sciences, 67402
  - Advisory Committee for Social, Behavioral, and Economic Sciences, 67402

Navy Department

NOTICES

- Environmental Impact Statements; Availability, etc.:
  - Land Acquisition and Airspace Establishment; Twenty-Nine Palms, California, 67334–67337

Nuclear Regulatory Commission

NOTICES

- Meetings:
  - Advisory Committee on Reactor Safeguards Subcommittee on T–H Phenomenon, 67402–67403

Occupational Safety and Health Administration

NOTICES

- Agency Information Collection Activities; Proposals, Submissions, and Approvals:
  - Construction Fall Protection Systems Criteria and Practices, and Training Requirements, 67397–67398

Ocean Energy Management Bureau

NOTICES

- Environmental Impact Statements; Availability, etc.:
  - Geological and Geophysical Activities on the Gulf of Mexico Outer Continental Shelf, 67380–67381

Postal Regulatory Commission

NOTICES

- New Postal Products, 67403–67404

Postal Service

RULES

- Enterprise Payment System and Enterprise PO Boxes Online, 67171

NOTICES

- Product Changes:
  - First-Class Package Service Negotiated Service Agreement, 67404

Reclamation Bureau

NOTICES

- Environmental Impact Statements; Availability, etc.:
  - Columbia River System Operations, 67382–67383
  - Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, New Mexico and Texas, 67381–67382
  - Navajo Generating Station-Kayenta Mine Complex Project, Arizona, 67384–67386

Securities and Exchange Commission

RULES

- Adoption of Updated EDGAR Filer Manual, 67118–67120

NOTICES

- Applications:
  - SerenityShares Investments LLC, et al., 67404–67406
- Self-Regulatory Organizations; Proposed Rule Changes:
  - Chicago Board Options Exchange, Inc., 67408–67412
  - National Stock Exchange, Inc, 67412–67414
  - The Depository Trust Co., 67406–67408

Small Business Administration

RULES

- Acquisition Process:
  - Task and Delivery Order Contracts, Bundling, Consolidation; Correction, 67093
- Small Business Government Contracting and National Defense Authorization Act Amendments, 67093

Social Security Administration

NOTICES
Administrative Fees:
  Non-Program Information, 67414–67415
  Non-Program Information; Requests for Detailed Social Security Earnings, 67414

State Department

RULES
Passports:
  Service Passports, 67156–67158
NOTICES
Designations as Global Terrorists:
  Anas El Abboubi, aka Anas el-Abboubi, aka Anas al-Abboubi, aka Anas Al-Italy, et al., 67415
Meetings:
  Shipping Coordinating Committee, 67415–67416

Surface Transportation Board

NOTICES
Construction, Acquisitions and Operation Exemptions:
  New England Transrail, LLC, D/B/A Wilmington and Woburn Terminal Railway in Wilmington and Woburn, MA, 67416–67419
Lease Exemptions Containing Interchange Commitments:
  Lehigh Railway, LLC from Norfolk Southern Railway Co., 67419–67420

Transportation Department

See Federal Aviation Administration
See Federal Highway Administration
See Federal Motor Carrier Safety Administration
See Federal Railroad Administration
See National Highway Traffic Safety Administration

Treasury Department

See Foreign Assets Control Office
See Internal Revenue Service
RULES
Importations of Pesticides and Pesticidal Devices, 67140–67144
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67435

U.S. Citizenship and Immigration Services

NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
  Petition for Nonimmigrant Worker, 67371–67372
Guidance for Industry and Staff:
  Filing Procedures for Employment Authorization and Automatic Extension of Existing Employment Authorization Documents for Liberians Eligible for Deferred Enforced Departure, 67366–67371

U.S. Customs and Border Protection

RULES
Importations of Pesticides and Pesticidal Devices, 67140–67144

Separate Parts In This Issue

Part II

Health and Human Services Department, Children and Families Administration, 67438–67595

Part III

Labor Department, 67598–67724

Part IV

Defense Department, 67726–67783
General Services Administration, 67726–67783
National Aeronautics and Space Administration, 67726–67783

Part V

Interior Department, Fish and Wildlife Service, 67786–67860

Part VI

Interior Department, Fish and Wildlife Service, 67862–67899

Reader Aids

Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents electronic mailing list, go to https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new, enter your e-mail address, then follow the instructions to join, leave, or manage your subscription.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

2 CFR
2998....67091
Proposed Rules:
2998....67217

7 CFR
906....67091
Proposed Rules:
982....67217

10 CFR
Proposed Rules:
430....67219

12 CFR
Proposed Rules:
217....67220
225 (2 documents)....67220, 67229
252....67239

13 CFR
121....67093
125....67093

14 CFR
23....67093
25....67097
39 (3 documents)....67098, 67100, 67102
71....67104
97 (4 documents)....67105, 67107, 67110, 67112

15 CFR
902....67113

17 CFR
232....67118

18 CFR
40....67120

19 CFR
12....67140
220....67144

21 CFR
510....67149
520....67149
522....67149
524....67149
529....67149
558....67149
573....67153
882....67154
Proposed Rules:
573....67260

22 CFR
51....67156

23 CFR
1270....67158
1275....67158

29 CFR
13....67598
95....67091
98....67091
Proposed Rules:
95....67217
98....67217

33 CFR
117....67170
165....67170

39 CFR
111....67171

40 CFR
52 (3 documents)....67171, 67179, 67186
97....67190
435....67191
Proposed Rules:
52....67261
435....67266

43 CFR
Proposed Rules:
2....67267

45 CFR
98....67438

48 CFR
Ch. 1 (2 documents)....67726, 67781
1 (4 documents)....67728, 67731, 67732, 67781
2 (3 documents)....67735, 67736, 67763
4 (4 documents)....67728, 67735, 67736, 67781
5....67763
6....67735
7....67763
8....67763
9 (2 documents)....67728, 67736
10....67763
12 (3 documents)....67728, 67736, 67763
15....67763
16....67763
17....67773
18....67735
19 (3 documents)....67735, 67736, 67763
22 (4 documents)....67731, 67732, 67774, 67781
23....67781
25 (2 documents)....67774, 67776
26....67781
31....67778
52 (9 documents)....67728, 67731, 67732, 67735, 67736, 67763, 67774, 67776, 67781
53....67736

50 CFR
16....67862
17 (2 documents)....67193, 67786
622....67215
679 (2 documents)....67113, 67215
Proposed Rules:
17....67270
660....67287

Rules and Regulations

Federal Register
Vol. 81, No. 190
Friday, September 30, 2016

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF LABOR

2 CFR Part 2998

29 CFR Parts 95 and 98

RIN 1291–AA38

Department of Labor Implementation of OMB Guidance on Nonprocurement Debarment and Suspension

AGENCY: Office of the Assistant Secretary for Administration and Management, Department of Labor (OASAM), Department of Labor

ACTION: Final rule; confirmation of effective date.

SUMMARY: On April 29, 2016, the Department of Labor, Office of the Assistant Secretary for Administration and Management (OASAM) published in the **Federal Register** a direct final rule to implement OMB Guidance on Nonprocurement Debarment and Suspension. The comment period for the direct final rule ended on May 31, 2016, with no comments received. For this reason, OASAM is confirming that the direct final rule became effective on May 31, 2016.

DATES: The effective date for the direct final rule that published on April 29, 2016 (81 FR 25585) was May 31, 2016.

ADDRESSES: Electronic copies of this **Federal Register** notice are available at *http://www.regulation.gov.*

FOR FURTHER INFORMATION CONTACT: Duyen Tran Ritchie, Office of the Chief Procurement Officer, (202) 693–7277 [Note: This is not a toll-free telephone number]; or by email at *Ritchie.duyen.t@dol.gov.*

SUPPLEMENTARY INFORMATION:

Confirmation of the effective date: On April 29, 2016, OASAM published a direct final rule in the **Federal Register** to implement OMB Guidance on Nonprocurement Debarment and Suspension.

OASAM received no comments on the direct final rule. Accordingly, OASAM is confirming the effective date of the direct final rule as of May 31, 2016.

List of Subjects

2 CFR Part 2998

Administrative practice and procedure, Government procurement, Grant programs, Grants administration, Reporting and recordkeeping requirements.

29 CFR Part 95

Foreign governments, Grants and agreements with institutions of higher education, hospitals, and other non-profit organizations, and with commercial organizations, Organizations under the jurisdiction of foreign governments, and International organizations.

29 CFR Part 98

Governmentwide debarment and suspension (nonprocurement).

Authority and Signature

T. Michael Kerr, Assistant Secretary of Labor for Administration and Management, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, authorized the preparation of this final rule.

Dated: September 16, 2016.

T. Michael Kerr,

Assistant Secretary for Administration and Management.

[FR Doc. 2016–23430 Filed 9–29–16; 8:45 am]

BILLING CODE 4510–7B–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 906

[Doc. No. AMS–SC–16–0021; SC16–906–1 FIR]

Oranges and Grapefruit Grown in Lower Rio Grande Valley in Texas; Relaxation of Container and Pack Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim rule implementing a recommendation from the Texas Valley Citrus Committee (Committee) that relaxed the container and pack requirements prescribed under the marketing order for oranges and grapefruit grown in the Lower Rio Grande Valley in Texas (order). The Committee locally administers the order and is comprised of producers and handlers of Texas citrus operating within the area of production. The interim rule added the word "approximate" to the size specifications of three regulated containers to make the language consistent with other containers specified under the order. This change provides uniformity in the descriptions of containers and helps prevent potential compliance violations stemming from slight variations in container dimensions.

DATES: Effective October 3, 2016.

FOR FURTHER INFORMATION CONTACT: Doris Jamieson, Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324–3375, Fax: (863) 291–8614, or Email: *Doris.Jamieson@ams.usda.gov* or *Christian.Nissen@ams.usda.gov.*

Small businesses may obtain information on complying with this and other marketing order and agreement regulations by viewing a guide at the following Web site: *http://www.ams.usda.gov/rules-regulations/moa/small-businesses;* or by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Richard.Lower@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 906, as amended (7 CFR part 906), regulating the handling of oranges and grapefruit grown in the Lower Rio Grande Valley in Texas, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 12866, 13563, and 13175.

The handling of oranges and grapefruit grown in the Lower Rio Valley in Texas is regulated by 7 CFR part 906. Prior to this change, the descriptions of three of the authorized containers specified exact dimensions whereas the remainder of the containers provide approximate dimensions. The Committee noted that with the containers with specific dimensions, container manufacturers could inadvertently generate containers that have a small variance in size from the specific requirements of the order, causing a handler to be out of compliance with order requirements. Therefore, this rule continues in effect the rule that added the word "approximate" in the description of the container sizes of the three containers with specific dimensions to make the language consistent with the descriptions of the other containers.

In an interim rule published in the **Federal Register** on June 15, 2016, and effective on June 16, 2016, (81 FR 38881, Doc. No. AMS–SC–16–0021, SC16–906–1 IR), § 906.340 paragraphs (a)(1)(i) through (iii) were amended by adding the word "approximate" to the size specifications of three regulated containers.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 170 producers of oranges and grapefruit in the production area and 13 handlers subject to regulation under the order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts of less than $750,000, and small agricultural service firms are defined as those whose annual receipts are less than $7,500,000 (13 CFR 121.201).

According to Committee data and information from the National Agricultural Statistics Service, the average grower price for Texas citrus during the 2014–15 season was around $9.53 per box, and total shipments were near 7.8 million boxes. Using the average grower price and shipment information, and assuming a normal distribution of production among all producers, the majority of producers would have annual receipts of less than $750,000. In addition, based on Committee information, the majority of handlers have annual receipts of less than $7,500,000 and could be considered small businesses under SBA's definition. Thus, the majority of Texas citrus producers and handlers may be classified as small entities.

This rule continues in effect the action that changed § 906.340 of the container, pack, and container marking requirements prescribed under the order. This rule adds the word "approximate" to the size specifications of three regulated containers to make the language consistent with other containers specified under the order. This change provides uniformity in the descriptions of containers and helps prevent potential compliance violations stemming from slight variations in container dimensions. Authority for the change is provided in § 906.40.

This action is not expected to impose any additional costs on the industry. However, it is anticipated that this action will have a beneficial impact. Adding the word "approximate" to the dimension requirements for the containers with specific dimensions could prevent possible order violations or potential extra costs associated with replacing incorrect cartons should container manufacturers inadvertently generate containers that do not meet order requirements. The benefits of this rule are expected to be equally available to all fresh orange and grapefruit growers and handlers, regardless of their size.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0189, Generic Fruit Crops. No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This rule will not impose any additional reporting or recordkeeping requirements on either small or large Texas citrus handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

Further, the Committee's meeting was widely publicized throughout the Texas citrus industry, and all interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee meetings, the November 17, 2015, meeting was a public meeting, and all entities, both large and small, were able to express their views on this issue.

Comments on the interim rule were required to be received on or before August 15, 2016. One comment was received in support of the change. The commenter stated that it made sense to add the word "approximate" to the rest of the containers to make them consistent with the other containers under the order. The commenter also made other comments which are not relevant to this rulemaking action. Therefore, for the reasons given in the interim rule, we are adopting the interim rule as a final rule, without change.

To view the interim rule, go to: *https://www.regulations.gov/document?D=AMS-SC-16-0021-0001.*

This action also affirms information contained in the interim rule concerning Executive Orders 12866, 12988, 13175, and 13563; the Paperwork Reduction Act (44 U.S.C. Chapter 35); and the E-Gov Act (44 U.S.C. 101).

After consideration of all relevant material presented, it is found that finalizing the interim rule, without change, as published in the **Federal Register** (81 FR 38881, June 15, 2016) will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 906

Grapefruit, Marketing agreements, Oranges, Reporting and recordkeeping requirements.

PART 906—[AMENDED]

■ Accordingly, the interim rule that amended 7 CFR part 906 and that was published at 81 FR 38881 on June 15, 2016, is adopted as a final rule, without change.

Dated: September 23, 2016.

Elanor Starmer,

Administrator, Agricultural Marketing Service.

[FR Doc. 2016–23502 Filed 9–29–16; 8:45 am]

BILLING CODE 3410–02–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN 3245–AG20

Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation

AGENCY: U.S. Small Business Administration.

ACTION: Final rule; correction.

SUMMARY: The U.S. Small Business Administration (SBA) is correcting a final rule that appeared in the **Federal Register** on October 2, 2013 (78 FR 61113). The rule, which described how supply procurements should be classified, mistakenly attempted to amend a regulation by removing words that did not exist in the particular paragraph. This document corrects that rule document by removing the instruction.

DATES: Effective September 30, 2016.

FOR FURTHER INFORMATION CONTACT: Michael McLaughlin, Office of Policy, Planning & Liaison, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416; 202–205–5353; *michael.mclaughlin@sba.gov.*

SUPPLEMENTARY INFORMATION: On June 28, 2013, SBA published a rule in the **Federal Register** at 78 FR 38811 that amended § 121.404(b) by removing "and the date of certification by SBA" and adding in its place "and, where applicable, the date the SBA program office requests a formal size determination in connection with a concern that otherwise appears eligible for program certification." The final rule published on October 2, 2013, (78 FR 61113) intended to amend 13 CFR 121.404(b) by removing "date of certification by SBA" and adding in its place "date the Director of the Division of Program Certification and Eligibility or the Associate Administrator for Business Development requests a formal size determination in connection with a concern that is otherwise eligible for program certification." However, the amendment could not be implemented because at that point the words to be removed did not exist in § 121.404(b). Therefore, SBA is removing that instruction from the final rule published on October 2, 2013.

In the FR Rule Doc. No. 2016–22064 in the issue of October 2, 2013, beginning on page 61113, make the following correction:

■ On page 61131, first column, remove amendatory instruction number 4c.

Dated: September 21, 2016.

A. John Shoraka,

Associate Administrator for Government Contracting and Business Development.

[FR Doc. 2016–23480 Filed 9–29–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 125

RIN 3245–AG58

Small Business Government Contracting and National Defense Authorization Act of 2013 Amendments

AGENCY: U.S. Small Business Administration.

ACTION: Correcting amendments.

SUMMARY: The U.S. Small Business Administration (SBA) is correcting a final rule that appeared in the **Federal Register** on May 31, 2016 (81 FR 34243). The rule described the limitations on subcontracting that apply to set aside contracts. The rule provides that the limitations on subcontracting apply to small business set asides above $150,000 and to 8(a), HUBZone, Service-Disabled and Veteran-Owned (SDVO) or Women-Owned Small Business (WOSB) set asides. The $150,000 threshold appears twice in 13 CFR 125.6(a), and thus could be misinterpreted as applying the threshold to 8(a), HUBZone, SDVO or WOSB set-asides. This action deletes the second $150,000 threshold that appears in 13 CFR 125.6(a).

DATES: Effective September 30, 2016.

FOR FURTHER INFORMATION CONTACT: Michael McLaughlin, Office of Policy, Planning & Liaison, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416; 202–205–5353; *michael.mclaughlin@sba.gov.*

SUPPLEMENTARY INFORMATION: The U.S. Small Business Administration (SBA) is correcting a final rule that appeared in the **Federal Register** on May 31, 2016 (81 FR 34243). The rule described the limitations on subcontracting that apply to set aside contracts. The rule provides that the limitations on subcontracting apply to small business set asides above $150,000 and to 8(a), HUBZone, Service-Disabled and Veteran-Owned (SDVO) or Women-Owned Small Business (WOSB) set asides. The $150,000 threshold appears twice in 13 CFR 125.6(a), and thus could be misinterpreted as applying the threshold to 8(a), HUBZone, SDVO or WOSB set-asides. This action deletes the second $150,000 threshold that appears in 13 CFR 125.6(a). This action is consistent with 13 CFR 12.5(f) which provides that the limitations on subcontracting do not apply to small business set aside contracts with a value greater than $3,500 but not $150,000, and 13 CFR 121.406(d) which provides that the performance requirements (limitations on subcontracting) do not apply to small business set-aside acquisitions with an estimated value between $3,500 and $150,000.

List of Subjects in 13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance, Veterans.

Accordingly, 13 CFR part 125 is corrected by making the following correcting amendments:

PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 1. The authority citation for part 125 continues to read as follows:

Authority: 15 U.S.C. 632(p), (q); 634(b)(6); 637; 644; 657f; 657r.

■ 2. Amend § 125.6 by revising paragraph (a) introductory text to read as follows:

§ 125.6 What are the prime contractor's limitations on subcontracting?

(a) *General.* In order to be awarded a full or partial small business set-aside contract with a value greater than $150,000, an 8(a) contract, an SDVO SBC contract, a HUBZone contract, a WOSB or EDWOSB contract pursuant to part 127 of this chapter, a small business concern must agree that:

* * * * *

Dated: September 15, 2016.

A. John Shoraka,

Associate Administrator for Government Contracting and Business Development.

[FR Doc. 2016–23374 Filed 9–29–16; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. FAA–2016–9172; Special Conditions No. 23–276–SC]

Special Conditions: DAHER–SOCATA, Model TBM 700; Inflatable Four-Point Restraint Safety Belt With an Integrated Airbag Device

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the installation of an inflatable four-point restraint safety belt with an integrated airbag device at the pilot and copilot seats on the DAHER–SOCATA, Model TBM 700 airplane. These airplanes, as modified by the installation of these inflatable safety belts, will have novel and unusual design features associated with the upper-torso restraint portions of the four-point safety belts, which contain an integrated airbag device. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is September 30, 2016. We must receive your comments by October 31, 2016.

ADDRESSES: Send comments identified by docket number FAA–2016–9172 using any of the following methods:

- *Federal eRegulations Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery of Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://regulations.gov,* including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Bob Stegeman, Federal Aviation Administration, Aircraft Certification Service, Small Airplane Directorate, ACE–111, 901 Locust, Room 301, Kansas City, MO; telephone (816)–329–4140; facsimile (816)–329–4090.

SUPPLEMENTARY INFORMATION: The FAA has determined, in accordance with 5 U.S.C. 553(b)(3)(B) and 553(d)(3), that notice and opportunity for prior public comment hereon are unnecessary because the substance of this special condition has been subject to the public comment process in several prior instances with no substantive comments received. The FAA, therefore, finds that good cause exists for making these special conditions effective upon issuance.

Special condition No.	Company/airplane model
23–03–01–SC[1]	AMSAFE, Incorporated, Model CH2000.
23–03–022–SC[2]	Goodrich Aircraft Interior Products, Models AT–401, AT–402, AT–502, AT–602, and AT–802.
23–04–01–SC[3]	AMSAFE, Incorporated, Models A1, A1A, and A1B.

[1] *http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgSC.nsf/0/A5B140165998E8B586256D66005553C5?OpenDocument&Highlight=inflatable%20restraint%20safety%20belt%20with%20an%20integrated%20airbag.*

[2] *http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgSC.nsf/0/8122AF4A25F6F8BE86256C83005FF817?OpenDocument&Highlight=inflatable%20four-point%20restraint%20safety%20belt%20with%20an%20integrated%20airbag.*

[3] *http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgSC.nsf/0/262C53C9CF0F4FFF86256F08004F5D26?OpenDocument&Highlight=inflatable%20restraint%20safety%20belt%20with%20an%20integrated%20airbag.*

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive.

Background

On January 5, 2016, DAHER–SOCATA (SOCATA) applied for FAA validation for the optional installation of a four-point safety belt restraint system for the pilot and copilot seats and incorporating integrated inflatable airbags for both on the Model TBM 700 airplane. The Model TBM 700 airplane is a single-engine powering a four bladed turbopropellor. It has a maximum takeoff weight of 6578 pounds (2984 kg). In addition to a pilot and copilot, it can seat up to five passengers.

The inflatable restraint systems are four-point safety belt restraint systems consisting of a lap belt and shoulder harness with an inflatable airbag attached to the shoulder harness straps. The inflatable portion of the restraint system will rely on sensors electronically activating the inflator for deployment.

If an emergency landing occurs, the airbags will inflate and provide a protective cushion between the head of the occupant (pilot and copilot) and the structure of the airplane. This will reduce the potential for head and torso injury. The inflatable restraint behaves in a manner similar to an automotive airbag; however, the airbag is integrated into the shoulder harness straps. Airbags and inflatable restraints are standard in the automotive industry; the use of an inflatable restraint system is novel for general aviation.

The FAA has determined that this project will be accomplished on the basis of providing the same level of safety as the current certification requirements of airplane occupant restraint systems. The FAA has the following two primary safety concerns with the installation of airbags or inflatable restraints that—

1. They perform properly under foreseeable operating conditions; and

2. They do not perform in a manner or at such times as to impede the pilot's

ability to maintain control of the airplane or constitute a hazard to the airplane or occupants.

The latter point has the potential to be the more rigorous of the requirements. An unexpected deployment while conducting the takeoff or landing phases of flight may result in an unsafe condition. The unexpected deployment may either startle the pilot or generate a force sufficient to cause a sudden movement of the control yoke. Both actions may result in a loss of control of the airplane. The consequences are magnified due to the low operating altitudes during these phases of flight. The FAA has considered this when establishing these special conditions.

The inflatable restraint system relies on sensors to electronically activate the inflator for deployment. These sensors could be susceptible to inadvertent activation, causing deployment in a potentially unsafe manner. The consequences of an inadvertent deployment must be considered in establishing the reliability of the system. SOCATA must show that the effects of an inadvertent deployment in flight are not a hazard to the airplane and that an inadvertent deployment is extremely improbable. In addition, general aviation aircraft are susceptible to a large amount of cumulative wear and tear on a restraint system. The potential for inadvertent deployment may increase as a result of this cumulative damage. Therefore, the impact of wear and tear resulting with an inadvertent deployment must be considered. The effect of this cumulative damage means duration of life expectations must be established for the appropriate system components in the restraint system design.

There are additional factors to be considered to minimize the chances of inadvertent deployment. General aviation airplanes are exposed to a unique operating environment, since the same airplane may be used by both experienced and student pilots. The effect of this environment on inadvertent deployment must be understood. Therefore, qualification testing of the firing hardware and software must consider the following—

1. The airplane vibration levels appropriate for a general aviation airplane; and

2. The inertial loads that result from typical flight or ground maneuvers, including gusts and hard landings.

Any tendency for the firing mechanism to activate as a result of these loads or acceleration levels is unacceptable.

Other influences on inadvertent deployment include High-Intensity Radiated Fields (HIRF) and lightning. Since the sensors that trigger deployment are electronic, they must be protected from the effects of these threats. To comply with HIRF and lightning requirements, the inflatable restraint system is considered a critical system, since its inadvertent deployment could have a hazardous affect on the airplane.

Given the level of safety of the occupant restraints currently installed, the inflatable restraint system must show that it will offer an equivalent level of protection for an emergency landing. If an inadvertent deployment occurs, the restraint must still be at least as strong as a Technical Standard Order approved belt and shoulder harnesses. There is no requirement for the inflatable portion of the restraint to offer protection during multiple impacts, where more than one impact would require protection.

Where installed, the inflatable restraint system must deploy and provide protection for each occupant under an emergency landing condition. The Model TBM 700 airplane seats are certificated to the structural requirements of § 23.562; therefore, the test emergency landing pulses identified in § 23.562 must be used to satisfy this requirement.

A wide range of occupants may use the inflatable restraint; therefore, the protection offered by this restraint should be effective for occupants that range from the fifth percentile female to the ninety-fifth percentile male. Energy absorption must be performed in a consistent manner for this occupant range.

In support of this operational capability, there must be a means to verify the integrity of this system before each flight. SOCATA may establish inspection intervals where they have demonstrated the system to be reliable between these intervals.

An inflatable restraint may be armed even though no occupant is using the seat. While there will be means to verify the integrity of the system before flight, it is also prudent to require unoccupied seats with active restraints not pose a hazard to any occupant. This will protect any individual performing maintenance inside the cockpit while the aircraft is on the ground. The restraint must also provide suitable visual warnings that would alert rescue personnel to the presence of an inflatable restraint system.

The design must also prevent the inflatable seatbelt from being incorrectly buckled or installed to avoid hindering proper deployment of the airbag. SOCATA may show that such deployment is not hazardous to the occupant and will still provide the required protection.

The cabins of the SOCATA, Model TBM 700 airplane identified in these special conditions are confined areas, and the FAA is concerned that noxious gasses may accumulate if the airbag deploys. When deployment occurs, either by design or inadvertently, there must not be a release of hazardous quantities of gas or particulate matter into the cockpit.

An inflatable restraint should not increase the risk already associated with fire. The inflatable restraint should be protected from the effects of fire to avoid creating an additional hazard such as, a rupture of the inflator, for example.

Finally, the airbag is likely to have a large volume displacement, and possibly impede the egress of an occupant. Since the bag deflates to absorb energy, it is likely that the inflatable restraint would be deflated at the time an occupant would attempt egress. However, it is appropriate to specify a time interval after which the inflatable restraint may not impede rapid egress. Ten seconds has been chosen as reasonable time. This time limit offers a level of protection throughout an impact event.

Type Certification Basis

Under the provisions of 14 CFR 21.17, SOCATA must show that the Model TBM 700 airplane continues to meet the applicable provisions of the applicable regulations in effect on the date of application for the type certificate. The regulations incorporated by reference in the type certificate are commonly referred to as the original type certification basis.

The certification basis also includes all exemptions, if any; equivalent level of safety findings, if any; and special conditions not relevant to the special conditions adopted by this rulemaking action.

If the Administrator determines that the applicable airworthiness regulations (*i.e.*, 14 CFR part 23) do not contain adequate or appropriate safety standards for the inflatable restraint, as installed on the SOCATA, Model TBM 700 airplane because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, the Model TBM 700 airplane must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36, and the

FAA must issue a finding of regulatory adequacy under section 611 of Public Law 92–574, the Noise Control Act of 1972.

The FAA issues special conditions, as defined in § 11.19, under § 11.38 and they become part of the type certification basis under § 21.17(a)(2).

Special conditions are initially applicable to the models for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same novel or unusual design feature, the special conditions would also apply to the other model.

Novel or Unusual Design Features

The SOCATA, Model TBM 700 airplane will incorporate the following novel or unusual design feature: Installation of inflatable four-point restraint safety belt with an integrated airbag device for the pilot and copilot seats.

Discussion

The purpose of the airbag is to reduce the potential for injury in the event of an accident. In a severe impact, an airbag will deploy from the shoulder harness in a manner similar to an automotive airbag. The airbag will deploy between the head of the occupant and airplane interior structure, which will provide some protection to the head of the occupant. The restraint will rely on sensors to electronically activate the inflator for deployment.

The Code of Federal Regulations states performance criteria for seats and restraints in an objective manner. However, none of these criteria are adequate to address the specific issues raised concerning inflatable restraints. Therefore, the FAA has determined that in addition to the requirements of part 21 and part 23, special conditions are needed to address the installation of this inflatable restraint.

Accordingly, these special conditions are adopted for the SOCATA, Model TBM 700 airplanes equipped with four-point inflatable restraints. Other conditions may be developed, as needed, based on further FAA review and discussions with the manufacturer and civil aviation authorities.

Applicability

As discussed above, these special conditions are applicable to the SOCATA, Model TBM 700 airplane. Should SOCATA apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one model of airplanes. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

Under standard practice, the effective date of final special conditions would be 30 days after the date of publication in the **Federal Register**; however, as the certification date for the SOCATA, Model TBM 700 airplane is imminent, the FAA finds that good cause exists to make these special conditions effective upon issuance.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances, identified above, and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. Therefore, notice and opportunity for prior public comment hereon are unnecessary and the FAA finds good cause, in accordance with 5 U.S.C. 553(b)(3)(B) and 553(d)(3), making these special conditions effective upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 23

Aircraft, Aviation safety, Signs and symbols.

Citation

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113 and 44701; 14 CFR 21.16 and 21.17; and 14 CFR 11.38 and 11.19.

The Special Conditions

The FAA has determined that this project will be accomplished on the basis of not lowering the current level of safety of the SOCATA, Model TBM 700 airplane occupant restraint systems. Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the SOCATA, Model TBM 700 airplane.

1. Installation of inflatable four-point restraint safety belt with an integrated airbag device.

a. It must be shown that the inflatable restraint will deploy and provide protection under emergency landing conditions. Compliance will be demonstrated using the dynamic test condition specified in § 23.562(b)(2). It is not necessary to account for floor warpage, as required by § 23.562(b)(3), or vertical dynamic loads, as required by § 23.562(b)(1). The means of protection must take into consideration a range of stature from a 5th percentile female to a 95th percentile male. The inflatable restraint must provide a consistent approach to energy absorption throughout that range.

b. The inflatable restraint must provide adequate protection for the occupant. In addition, unoccupied seats that have an active restraint must not constitute a hazard to any occupant.

c. The design must prevent the inflatable restraint from being incorrectly buckled and incorrectly installed, such that the airbag would not properly deploy. It must be shown that such deployment is not hazardous to the occupant and will provide the required protection.

d. It must be shown that the inflatable restraint system is not susceptible to inadvertent deployment as a result of wear and tear or the inertial loads resulting from in-flight or ground maneuvers (including gusts and hard landings) that are likely to be experienced in service.

e. It must be extremely improbable for an inadvertent deployment of the restraint system to occur, or an inadvertent deployment must not impede the pilot's ability to maintain control of the airplane or cause an unsafe condition or hazard to the airplane. In addition, a deployed inflatable restraint must be at least as strong as a Technical Standard Order, TSO–C114, certificated belt and shoulder harness.

f. It must be shown that deployment of the inflatable restraint system is not hazardous to the occupant or will not result in injuries that could impede rapid egress. This assessment should include occupants whose restraint is loosely fastened.

g. It must be shown that an inadvertent deployment that could cause injury to a standing or sitting person is improbable. In addition, the restraint must also provide suitable visual warnings that would alert rescue personnel to the presence of an inflatable restraint system.

h. It must be shown that the inflatable restraint will not impede rapid egress of the occupants 10 seconds after its deployment.

i. To comply with HIRF and lightning requirements, the inflatable restraint system is considered a critical system since its deployment could have a hazardous affect on the airplane.

j. It must be shown that the inflatable restraints will not release hazardous quantities of gas or particulate matter into the cabin.

k. The inflatable restraint system installation must be protected from the effects of fire such that no hazard to occupants will result.

l. There must be a means to verify the integrity of the inflatable restraint activation system before each flight or it must be demonstrated to reliably operate between inspection intervals.

m. A life limit must be established for appropriate system components.

n. Qualification testing of the internal firing mechanism must be performed at vibration levels appropriate for a general aviation airplane.

Issued in Kansas City, Missouri, on September 22, 2016.

Pat Mullen,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–23564 Filed 9–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2016–9225; Special Conditions No. 25–639–SC]

Special Conditions: Embraer S.A., Model ERJ 190–300 Series Airplanes; Electronic Flight Control System: Control Surface Position Awareness, Multiple Modes of Operation

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Embraer S.A. Model ERJ 190–300 series airplanes. These airplanes will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. This design feature is a fly-by-wire electronic flight control system (EFCS) and no direct coupling from the flight deck controller to the control surface. As a result, the pilot is not aware of the actual control surface position. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: This action is effective on Embraer S.A. on September 30, 2016. We must receive your comments by November 14, 2016.

ADDRESSES: Send comments identified by docket number FAA–2016–9225 using any of the following methods:

- *Federal eRegulations Portal:* Go to *http://www.regulations.gov/* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov/,* including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov/.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov/* at any time. Follow the online instructions for accessing the docket or go to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Joe Jacobsen, FAA, Airplane and Flightcrew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone 425–227–2011; facsimile 425–227–1149.

SUPPLEMENTARY INFORMATION: The substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective upon publication in the **Federal Register**.

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

We will consider all comments we receive by the closing date for comments. We may change these special conditions based on the comments we receive.

Background

On September 13, 2013, Embraer S.A. applied for an amendment to Type Certificate (TC) No. A57NM to include the new Model ERJ 190–300 series airplanes. The ERJ 190–300, which is a derivative of the ERJ 190–100 STD currently approved under TC No. A57NM, is a 97–114 passenger transport category airplane with two Pratt & Whitney Model PW1900G engines, a new wing design with a high aspect ratio and raked wingtip, and digital fly-by-wire EFCS with closed loop control for all surfaces and with full envelope protection.

The EFCS technology has outpaced the current airworthiness standards; therefore, the FAA required special conditions to ensure appropriate mode recognition by the flightcrew for events that significantly change the operating mode of the EFCS.

Type Certification Basis

Under the provisions of Title 14, Code of Federal Regulations (14 CFR) 21.101, Embraer S.A. must show that the ERJ 190–300 meets the applicable provisions of the regulations listed in Type Certificate No. A57NM or the applicable regulations in effect on the date of application for the change, except for earlier amendments as agreed upon by the FAA. Embraer S.A. must show that the ERJ 190–300 meets the applicable provisions of 14 CFR part 25, as amended by Amendments 25–1 through 25–137.

If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 25) do not contain adequate or appropriate safety standards for the ERJ 190–300 because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design features, or should any other model already included on the same type certificate be modified to incorporate the same novel or unusual design feature, these special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the ERJ 190–300 must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise-certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type certification basis under § 21.101.

Novel or Unusual Design Features

The ERJ 190–300 will incorporate the following novel or unusual design features: A fly-by-wire EFCS and no direct coupling from the flight deck controller to the control surface.

Discussion

As a result of the EFCS and lack of direct coupling from the flight deck controller to the control surface, the pilot is not aware of the actual control surface position. Some unusual flight conditions, arising from atmospheric conditions and/or airplane or engine failures, may result in full or nearly full surface deflection. Unless the flightcrew is made aware of excessive deflection or impending control surface limiting, piloted or auto-flight system control of the airplane might be inadvertently continued in such a manner to cause loss of control or other unsafe stability or performance characteristics. The airworthiness standards do not contain adequate or appropriate safety standards for the conditions that result from the EFCS and lack of direct coupling from the flight deck controller to the control surface.

To establish a level of safety equivalent to that established in the regulations, these special conditions are established. These special conditions require that the flightcrew receive a suitable flight control position annunciation when a flight condition exists in which nearly full surface authority (not crew-commanded) is being used. Suitability of such a display must take into account that some pilot-demanded maneuvers (*e.g.*, rapid roll) are necessarily associated with intended full performance, which may saturate the surface. Therefore, simple alerting systems function in both intended and unexpected control-limiting situations. As a result, they must be properly balanced between providing necessary crew awareness and being a potential nuisance to the flightcrew. A monitoring system that compares airplane motion and surface deflection with pilot inputs could help reduce nuisance alerting.

These special conditions also address flight control system mode annunciation. Suitable mode annunciation must be provided to the flightcrew for events that significantly change the operating mode of the system but do not merit the classic “failure warning.”

These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

Applicability

As discussed above, these special conditions are applicable to the ERJ 190–300 series airplanes. Should Embraer S.A. apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, these special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one model of airplanes. It is not a rule of general applicability.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. Therefore, because a delay would significantly affect the certification of the airplane, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions upon publication in the **Federal Register**. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

■ The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Embraer S.A. Model ERJ 190–300 series airplanes.

1. In addition to the requirements of 14 CFR 25.143, 25.671, and 25.672, the following requirements apply:

a. The system design must ensure that the flightcrew is made suitably aware whenever the primary control means nears the limit of control authority.

Note: The term “suitably aware” indicates annunciations provided to the flightcrew are appropriately balanced between nuisance and that necessary for crew awareness.

b. If the design of the flight control system has multiple modes of operation, a means must be provided to indicate to the flightcrew any mode that significantly changes or degrades the normal handling or operational characteristics of the airplane.

Issued in Renton, Washington, on September 23, 2016.

Michael Kaszycki,

Assistant Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–23665 Filed 9–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–5307; Directorate Identifier 2016–NE–08–AD; Amendment 39–18658; AD 2016–19–09]

RIN 2120–AA64

Airworthiness Directives; General Electric Company Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all General Electric Company (GE) GE90–76B, GE90–77B, GE90–85B, GE90–90B, and GE90–94B turbofan engines with high-pressure compressor (HPC) stage 8–10 spool, part numbers (P/Ns) 1694M80G04, 1844M90G01, or

1844M90G02, installed. This AD was prompted by reports of cracks found on the seal teeth of the HPC stage 8–10 spool. This AD requires eddy current inspections (ECIs) or fluorescent penetrant inspections (FPIs) of the HPC stage 8–10 spool seal teeth and removing from service those parts that fail inspection. We are issuing this AD to prevent failure of the HPC stage 8–10 spool, uncontained rotor release, damage to the engine, and damage to the airplane.

DATES: This AD is effective November 4, 2016.

ADDRESSES: For service information identified in this final rule, contact General Electric Company, GE-Aviation, Room 285, 1 Neumann Way, Cincinnati, OH 45215, phone: 513–552–3272; email: *aviation.fleetsupport@ge.com*. You may view this service information at the FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–5307.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–5307; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: John Frost, Aerospace Engineer, Engine Certification Office, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7756; fax: 781–238–7199; email: *john.frost@faa.gov*.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all GE GE90–76B, GE90–77B, GE90–85B, GE90–90B, and GE90–94B turbofan engines with HPC stage 8–10 spool, P/Ns 1694M80G04, 1844M90G01, or 1844M90G02, installed. The NPRM published in the **Federal Register** on April 11, 2016 (81 FR 21286). The NPRM was prompted by reports of cracks found on the seal teeth of the HPC stage 8–10 spool during shop visits. The cracks initiated due to higher than intended temperatures at the seal teeth and damage to seal teeth coating from heavy rubs into the honeycomb. GE is developing a modification to address the unsafe condition.

The NPRM proposed to require ECIs or FPIs of the HPC stage 8–10 spool seal teeth and removing from service those parts that fail inspection. We are issuing this AD to prevent failure of the HPC stage 8–10 spool, uncontained rotor release, damage to the engine, and damage to the airplane.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the NPRM and the FAA's response to each comment.

Support of the NPRM as Written

Boeing and United Airlines support the NPRM as written.

Request To Clarify Performance of ECI and FPI

Nao Seto requested that the FAA clarify with which service information the ECI and FPI will be performed.

We agree. We added a statement to compliance paragraph (e) in this AD indicating the GE service documents in which guidance can be found for performing the ECI and the FPI.

Request To Clarify Supplementary Information

General Electric Aviation requested that the Discussion paragraph be changed to read as follows: "Based on recent testing, change the root cause of crack initiation from that of degraded surface properties caused by an alloy depletion zone (ADZ) to cracks initiated due to higher than intended temperatures at the seal teeth and damage to seal teeth coating from heavy rubs into the honeycomb." Recent testing and analysis have shown that the temperatures in the seal teeth are higher than design intent. This elevated temperature increases the stress in the region of the seal teeth, aligning with the cracking observed. GE also completed testing to determine the impact of alloy depletion zone on material capability. Testing showed material capability was not impacted.

We agree. We oversaw the recent testing and analysis which supports the requested change. We changed the Discussion paragraph of this AD accordingly.

Request To Add Ultrasonic Inspection (USI) to the Compliance

GE requested that USI be added to the Compliance section as an alternate inspection method. Additionally, GE requested that we revise the Related Information paragraph (h)(2) of this AD by updating the service information to revision 1 based on the qualifying USI procedure.

We disagree. USI procedures are not an acceptable alternative to the existing ECI and FPI procedures specified in this AD. A USI is not a viable procedure for compliance at this time, therefore, we are not updating the service information in paragraph (h)(2) to Revision 1. We may consider an AMOC after sufficient substantiated data is presented to the FAA. We did not change this AD.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this AD as proposed.

Related Service Information

We reviewed GE Service Bulletins SB 72–1141 R00, dated December 2, 2015; and SB 72–1142 R00, dated November 30, 2015. The service information describes procedures for inspecting the HPC stage 8–10 spool seal teeth.

Costs of Compliance

We estimate that this AD affects 54 engines installed on airplanes of U.S. registry. We also estimate that it will take about 1 hour per engine to comply with this AD. The average labor rate is $85 per hour. We estimate 14 parts will fail inspection at a pro-rated cost of $400,000 per part. Based on these figures, we estimate the total cost of this AD to U.S. operators to be $5,604,590.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a "significant regulatory action" under Executive Order 12866,

(2) Is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2016–19–09 General Electric Company: Amendment 39–18658; Docket No. FAA–2016–5307; Directorate Identifier 2016–NE–08–AD.

(a) Effective Date

This AD is effective November 4, 2016.

(b) Affected ADs

None.

(c) Applicability

This AD applies to General Electric Company (GE) GE90–76B, GE90–77B, GE90–85B, GE90–90B, and GE90–94B turbofan engines with a high-pressure compressor (HPC) stage 8–10 spool, part numbers 1694M80G04, 1844M90G01, or 1844M90G02, installed.

(d) Unsafe Condition

This AD was prompted by reports of cracks found on the seal teeth of the HPC stage 8–10 spool. We are issuing this AD to prevent failure of the HPC stage 8–10 spool, uncontained rotor release, damage to the engine, and damage to the airplane.

(e) Compliance

Comply with this AD within the compliance times specified, unless already done.

(1) Perform an eddy current inspection (ECI) or fluorescent penetrant inspection (FPI) of the seal teeth of the HPC stage 8–10 spool as follows:

(i) For HPC stage 8–10 spools with fewer than 11,000 cycles since new (CSN) on the effective day of this AD, inspect at the next shop visit after reaching 6,000 CSN, not to exceed 12,500 CSN.

(ii) For HPC stage 8–10 spools with 11,000 CSN or more on the effective day of this AD, inspect within the next 1,500 cycles in service.

(iii) Thereafter, inspect the seal teeth of the HPC stage 8–10 spool at each shop visit.

(2) Remove from service any HPC stage 8–10 spool that fails the ECI or FPI required by paragraph (e)(1) of this AD and replace with a part eligible for installation.

(3) Guidance on performing the ECI and the FPI can be found in GE Service Bulletins (SBs) SB 72–1141 R00, dated December 2, 2015 and SB 72–1142 R00, dated November 30, 2015.

(f) Definition

For the purpose of this AD, an engine shop visit is the induction of an engine into the shop for maintenance during which the compressor discharge pressure seal face is exposed.

(g) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, FAA, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request. You may email your request to: *ANE-AD-AMOC@faa.gov.*

(h) Related Information

(1) For more information about this AD, contact John Frost, Aerospace Engineer, Engine Certification Office, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7756; fax: 781–238–7199; email: *john.frost@faa.gov.*

(2) GE SB 72–1141, R00, dated December 2, 2015 and GE SB 72–1142, R00, dated November 30, 2015, which are not incorporated by reference in this AD, can be obtained from GE, using the contact information in paragraph (h)(3) of this AD.

(3) For service information identified in this AD, contact General Electric Company, GE-Aviation, Room 285, 1 Neumann Way, Cincinnati, OH 45215, phone: 513–552–3272; email: *aviation.fleetsupport@ge.com.*

(4) You may view this service information at the FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

(i) Material Incorporated by Reference

None.

Issued in Burlington, Massachusetts, on September 26, 2016.

Colleen M. D'Alessandro,
Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2016–23740 Filed 9–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2015–4866; Directorate Identifier 2015–NE–33–AD; Amendment 39–18648; AD 2016–18–17]

RIN 2120–AA64

Airworthiness Directives; Honeywell International Inc. Turboprop and Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Honeywell International Inc. (Honeywell) TPE331 model turboprop engines and TSE331–3U model turboshaft engines. This AD was prompted by the discovery of cracks in a 2nd stage compressor impeller during a routine shop visit. This AD requires removal of the 2nd stage compressor impeller. We are issuing this AD to prevent failure of the compressor impeller, uncontained part release, damage to the engine, and damage to the airplane.

DATES: This AD is effective November 4, 2016.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–4866; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Joseph Costa, Aerospace Engineer, Los

Angeles Aircraft Certification Office, FAA, Transport Airplane Directorate, 3960 Paramount Blvd., Lakewood, CA 90712–4137; phone: 562–627–5246; fax: 562–627–5210; email: *joseph.costa@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Honeywell TPE331 model turboprop engines and TSE331–3U model turboshaft engines. The NPRM published in the **Federal Register** on March 15, 2016 (81 FR 13764) ("the NPRM"). The NPRM was prompted by the discovery of cracks in a 2nd stage compressor impeller during a routine shop visit. The NPRM proposed to require removal of the 2nd stage compressor impeller. We are issuing this AD to prevent failure of the compressor impeller, uncontained part release, damage to the engine, and damage to the airplane.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the NPRM and the FAA's response to each comment.

Request To Change Compliance

Bearskin Airlines and Turbine Standard, LTD requested that the compliance time interval be changed because many TPE331 engine operators are on a Continuous Airworthiness Maintenance (CAM) program. This program does not require impeller inspections per the overhaul manual and the impeller is not considered as "overhauled". AD compliance under CAM may be interpreted as being within 200 cycles or 30 to 45 days.

Other commenters requested that the compliance time be changed to a less aggressive time interval appropriate to the unsafe condition. Many high-usage operators have suspect impellers that currently exceed 7,000 cycles since the last compressor inspection.

We agree. We changed compliance interval in paragraph (e)(1) of this AD.

Request To Allow Other Inspection Facilities To Return Impellers to Service

Turbine Standard, LTD requested that this AD allow other inspection facilities to return impellers to service. There are many inspection facilities that are capable of inspecting the 2nd stage compressor impeller.

We partially agree. We agree that many inspection facilities are capable of performing a focused inspection of the 2nd stage compressor impeller. We disagree with allowing other inspection and regrinding facilities to return impellers to service. This AD does not address inspection or regrinding of the curvic area of the 2nd stage compressor impeller. Regrinding of the curvic area of the 2nd stage compressor impeller involves machining of a critical rotating part, which must be approved by the FAA. We did not change this AD.

Request To Change Costs of Compliance

Honeywell; Perimeter Aviation, LP; and Intercontinental Jet Service Corp. requested that the costs of compliance be changed because the NPRM is not representative of the impeller's replacement costs. Honeywell quotes the cost of a new 2nd stage compressor impeller at $11,922.50.

We partially agree. We agree with the comment because the costs were not clearly defined. We disagree with the comment because replacement costs are based on pro-rated costs that are estimated at 50% of new parts costs. Since issuing the NPRM, the FAA estimated that 30% of impellers will be scrapped; therefore, we changed the costs of compliance accordingly.

Request To Include Service Information

The European Aviation Safety Agency, Honeywell, and Candler & Associates, Inc. requested that service information be included in this AD. Having the service information available would aid in understanding any differences between this AD and the service information.

We agree. We added Honeywell Service Bulletin (SB) TPE331–72–2208, dated July 29, 2014, as related information in this AD.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this AD with the changes described previously.

We also determined that these changes will not increase the economic burden on any operator or increase the scope of this AD.

Related Service Information

We reviewed Honeywell SB TPE331–72–2208, dated July 29, 2014. The SB describes procedures for replacing the 2nd stage compressor impeller.

Costs of Compliance

We estimate that this AD will affect 4,000 engines installed on airplanes of U.S. registry. We estimate that it will take 2 hours per engine to comply with this AD. The average labor rate is $85 per hour. We also estimate that required parts will cost about $4,404.50 per engine. Based on these figures, we estimate the total cost of this AD on U.S. operators to be $18,298,000.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a "significant regulatory action" under Executive Order 12866,

(2) Is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2016–18–17 Honeywell International Inc. (Type Certificate Previously Held by AlliedSignal Inc., Garrett Engine Division; Garrett Turbine Engine Company; and AiResearch Manufacturing Company of Arizona): Amendment 39–18648; Docket No. FAA–2015–4866; Directorate Identifier 2015–NE–33–AD.

(a) Effective Date

This AD is effective November 4, 2016.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Honeywell International Inc. (Honeywell) TPE331–3U, –3UW, –5, –5A, –5AB, –5B, –6, –6A, –8, –10, –10AV, –10GP, –10GT, –10N, –10P, –10R, –10T, –10U, –10UA, –10UF, –10UG, –10UGR, –10UR, and –11U model turboprop engines, and TSE331–3U model turboshaft engines, with a 2nd stage compressor impeller, part number (P/N) 893482–1 through –5, inclusive, or P/N 3107056–1 or P/N 3107056–2, installed.

(d) Unsafe Condition

This AD was prompted by the discovery of cracks in a 2nd stage compressor impeller during a routine shop visit. We are issuing this AD to prevent failure of the compressor impeller, uncontained part release, damage to the engine, and damage to the airplane.

(e) Compliance

Comply with this AD within the compliance times specified, unless already done.

(1) Remove from service the 2nd stage compressor impeller at next removal of the 2nd stage compressor impeller from the engine or before exceeding 11,500 cycles in service after the effective date of this AD, whichever occurs first.

(2) Reserved.

(f) Installation Prohibition

After the effective date of this AD, do not install a 2nd stage compressor impeller, part number (P/N) 893482–1 through –5, inclusive, or P/N 3107056–1 or P/N 3107056–2, into any engine.

(g) Alternative Methods of Compliance (AMOCs)

The Manager, Los Angeles Aircraft Certification Office, FAA, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request.

(h) Related Information

(1) For more information about this AD, contact Joseph Costa, Aerospace Engineer, Los Angeles Aircraft Certification Office, FAA, Transport Airplane Directorate, 3960 Paramount Blvd., Lakewood, CA 90712–4137; phone: 562–627–5246; fax: 562–627–5210; email: *joseph.costa@faa.gov.*

(2) Honeywell SB TPE331–72–2208, dated July 29, 2014, which is not incorporated by reference in this AD, can be obtained from Honeywell, using the contact information in paragraph (h)(3) of this AD.

(3) For Honeywell service information identified in this AD, contact Honeywell International Inc., 111 S 34th Street, Phoenix, AZ 85034–2802; phone: 800–601–3099; Internet: *https://myaerospace.honeywell.com/wps/portal/!ut/.*

(4) You may view this service information at FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

(i) Material Incorporated by Reference

None.

Issued in Burlington, Massachusetts, on August 26, 2016.

Colleen M. D'Alessandro,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2016–23263 Filed 9–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9144; Directorate Identifier 2016–SW–014–AD; Amendment 39–18667; AD 2016–20–01]

RIN 2120–AA64

Airworthiness Directives; Bell Helicopter Textron Canada Limited (Bell) Helicopters

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for Bell Model 427 and Model 429 helicopters. This AD requires replacing certain engine and transmission oil check valves. This AD also prohibits installing the affected check valves on any helicopter. This AD is prompted by a report of several cracked or leaking check valves. These actions are intended to detect and prevent a cracked or leaking check valve which could result in loss of lubrication to the engine or transmission, failure of the engine or transmission, and subsequent loss of control of the helicopter.

DATES: This AD becomes effective October 17, 2016.

We must receive comments on this AD by November 29, 2016.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Docket:* Go to *http://www.regulations.gov.* Follow the online instructions for sending your comments electronically.
- *Fax:* 202–493–2251.
- *Mail:* Send comments to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to the "Mail" address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9144; or in person at the Docket Operations Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the Transport Canada AD, the economic evaluation, any comments received, and other information. The street address for the Docket Operations Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

For service information identified in this final rule, contact Bell Helicopter Textron Canada Limited, 12,800 Rue de l'Avenir, Mirabel, Quebec J7J1R4; telephone (450) 437–2862 or (800) 363–8023; fax (450) 433–0272; or at *http://www.bellcustomer.com/files/.* You may review the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177.

FOR FURTHER INFORMATION CONTACT: Rao Edupuganti, Aviation Safety Engineer, Regulations and Policy Group, Rotorcraft Directorate, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email *rao.edupuganti@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not provide you with notice and an opportunity to provide your comments prior to it becoming effective.

However, we invite you to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that resulted from adopting this AD. The most helpful comments reference a specific portion of the AD, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit them only one time. We will file in the docket all comments that we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this rulemaking during the comment period. We will consider all the comments we receive and may conduct additional rulemaking based on those comments.

Discussion

On December 7, 2015, Transport Canada issued AD No. CF–2015–29 to correct an unsafe condition for certain serial-numbered Bell Model 427 and Model 429 helicopters. Transport Canada advises that part numbered 209–062–520–001 check valves manufactured by Circor Aerospace as replacement parts have been found cracked or leaking on several helicopters. According to Transport Canada, these check valves are used in the lubrication systems of the Model 429 engines and main rotor transmission and the Model 427 engines. Finally, Transport Canada advises that loss of lubrication may cause catastrophic failure of the transmission or the engine, which could result in loss of control of the helicopter.

Transport Canada AD No. CF–2015–29 requires a one-time inspection of the transmission and engine check valves for cracks and leaks. If there is a crack or leaking fluid, the Transport Canada AD requires replacing the check valve before further flight. Otherwise, the Transport Canada AD requires replacing each check valve within 60 days for the main rotor transmission and one year for the engine with a check valve marked "TQL" as shown in the manufacturer's service bulletins. The Transport Canada AD also prohibits installing a part number (P/N) 209–062–520–001 check valve on any helicopter if the check valve was manufactured by Circor Aerospace, marked "Circle Seal," and manufactured between October 2011 and March 2015.

FAA's Determination

These helicopters have been approved by the aviation authority of Canada and are approved for operation in the United States. Pursuant to our bilateral agreement with Canada, Transport Canada, its technical representative, has notified us of the unsafe condition described in its AD. We are issuing this AD because we evaluated all information provided by Transport Canada and determined the unsafe condition exists and is likely to exist or develop on other helicopters of these same type designs.

Related Service Information

We reviewed Bell Alert Service Bulletin (ASB) 427–15–37 for Model 427 helicopters and Bell ASB 429–15–23 for Model 429 helicopters, both dated September 4, 2015. Both ASBs describe procedures for inspecting and replacing the check valve, P/N 209–062–520–001, installed on certain serial-numbered Model 427 and Model 429 helicopters.

AD Requirements

This AD requires, within 25 hours time-in-service (TIS), replacing the transmission and engine oil check valves.

This AD also prohibits installing a check valve P/N 209–062–520–001 that was manufactured by Circor Aerospace, marked "Circle Seal," and marked with a manufacturing date code of "10/11" (October 2011) through "03/15" (March 2015) on any helicopter.

Differences Between This AD and the Transport Canada AD

The Transport Canada AD requires inspecting the valves for cracks and leaks to determine when they must be replaced. This AD requires replacing all check valves within 25 hours TIS.

Costs of Compliance

We estimate that this AD affects 105 (29 Model 427 and 76 Model 429) helicopters of U.S. Registry.

We estimate that operators may incur the following costs in order to comply with this AD. At an average labor rate of $85, replacing each check valve (transmission or engine) will require about 1 work-hour, and required parts will cost $85. For the Model 427, we estimate a total cost of $170 per helicopter and $4,930 for the U.S. fleet. For the Model 429, we estimate a total cost of $340 per helicopter and $25,840 for the U.S. fleet. According to Bell's service information some of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage by Bell. Accordingly, we have included all costs in our cost estimate.

FAA's Justification and Determination of the Effective Date

Providing an opportunity for public comments prior to adopting these AD requirements would delay implementing the safety actions needed to correct this known unsafe condition. Therefore, we find that the risk to the flying public justifies waiving notice and comment prior to the adoption of this rule because the actions required by this AD must be accomplished within 25 hours TIS, a very short interval for helicopters used in offshore transportation.

Since an unsafe condition exists that requires the immediate adoption of this AD, we determined that notice and opportunity for public comment before issuing this AD are impracticable and that good cause exists for making this amendment effective in less than 30 days.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed, I certify that this AD:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);

3. Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction; and

4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared an economic evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2016–20–01 Bell Helicopter Textron Canada Limited (Bell): Amendment 39–18667; Docket No. FAA–2016–9144; Directorate Identifier 2016–SW–014–AD.

(a) Applicability

This AD applies to Bell Model 427 and 429 helicopters, certificated in any category, with an engine and transmission oil check valve part number (P/N) 209–062–520–001 manufactured by Circor Aerospace, marked "Circle Seal" and with a manufacturing date code of "10/11" (October 2011) through "03/15" (March 2015), installed.

(b) Unsafe Condition

This AD defines the unsafe condition as a cracked or leaking check valve. This condition, if not detected and corrected, could result in loss of lubrication to the engine or transmission, failure of the transmission or engine, and loss of control of the helicopter.

(c) Effective Date

This AD becomes effective October 17, 2016.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(e) Required Actions

(1) Within 25 hours time-in-service:

(i) Replace each transmission oil check valve.

(ii) For Model 429 helicopters, replace each engine oil check valve.

(2) After the effective date of this AD, do not install any check valve P/N 209–062–520–001 manufactured by Circor Aerospace, marked "Circle Seal" and with a manufacturing date code of "10/11" (October 2011) through "03/15" (March 2015), on any helicopter.

(f) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Safety Management Group, FAA, may approve AMOCs for this AD. Send your proposal to: Rao Edupuganti, Aviation Safety Engineer, Regulations and Policy Group, Rotorcraft Directorate, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email *9-ASW-FTW-AMOC-Requests@faa.gov.*

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office, before operating any aircraft complying with this AD through an AMOC.

(g) Additional Information

(1) Bell Alert Service Bulletin (ASB) 427–15–37 for Model 427 helicopters and Bell ASB 429–15–23 for Model 429 helicopters, both dated September 4, 2015, which are not incorporated by reference, contain additional information about the subject of this final rule. For service information identified in this final rule, contact Bell Helicopter Textron Canada Limited, 12,800 Rue de l'Avenir, Mirabel, Quebec J7J1R4; telephone (450) 437–2862 or (800) 363–8023; fax (450) 433–0272; or at *http://www.bellcustomer.com/files/.* You may review a copy of the service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177.

(2) The subject of this AD is addressed in Transport Canada AD No. CF–2015–29, dated December 7, 2015. You may view the Transport Canada AD on the Internet at *http://www.regulations.gov* by searching for and locating it in Docket No. FAA–2016–9144.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 6300 Engine and Transmission Lubrication System.

Issued in Fort Worth, Texas, on September 16, 2016.

Scott A. Horn,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2016–23345 Filed 9–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2016–5574; Airspace Docket No. 16–AWP–5]

Modification of Class E Airspace; Napa, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies the Class E airspace extending upward from 700 feet above the surface at Napa County Airport, Napa, CA, by removing an irregular shaped area located approximately 20 miles southwest of Napa County Airport. This airspace area is discontinuous from the airspace surrounding Napa County Airport and is not essential to instrument flight rules (IFR) operations at the airport. This action also updates the airport's geographic coordinates, and is necessary for the safety and management of instrument flight rules (IFR) operations at the airport, with the minimum amount of airspace restriction.

DATES: Effective 0901 UTC, January 5, 2017. The Director of the Federal Register approves this incorporation by reference action under Title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.11A and publication of conforming amendments.

ADDRESSES: FAA Order 7400.11A, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *http://www.faa.gov/air_traffic/publications/.* For further information, you can contact the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE., West Bldg. Ground Floor, Rm. W12–140, Washington, DC 20590; Telephone: 1–800–647–5527, or 202–366–9826. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11A at NARA, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal-regulations/ibr_locations.html.*

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

FOR FURTHER INFORMATION CONTACT: Tom Clark, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue SW., Renton, WA 98057; telephone (425) 203–4511.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies controlled airspace at Napa County Airport, Napa, CA.

History

On July 19, 2016, the FAA published in the **Federal Register** a notice of proposed rulemaking (NPRM) to modify Class E airspace extending upward from 700 feet above the surface at Napa County Airport, Napa, CA (81 FR 46850) Docket FAA–2016–5574. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.11A, dated August 3, 2016, and effective September 15, 2016, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.11A, Airspace Designations and Reporting Points, dated August 3, 2016, and effective September 15, 2016. FAA Order 7400.11A is publicly available as listed in the ADDRESSES section of this document. FAA Order 7400.11A lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 modifies Class E airspace extending upward from 700 feet above the surface at Napa County Airport, Napa, CA, by removing an irregular shaped area located approximately 20 miles southwest of the airport. This airspace area is discontinuous from the airspace surrounding Napa County Airport and is not necessary to support IFR operations. This action also updates the airport geographic coordinates to Lat. 38°12′48″ N., Long. 122°16′51″ W., to coincide with the FAA's aeronautical database.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures," paragraph 5–6.5a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11A, Airspace Designations and Reporting Points, dated August 3, 2016, and effective September 15, 2016, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AWP CA E5 Napa, CA [Modified]

Napa County Airport, CA
(Lat. 38°12′48″ N., long. 122°16′51″ W.)

That airspace extending upward from 700 feet above the surface within a 6.5 mile radius of Napa County Airport.

Issued in Seattle, Washington, on September 21, 2016.

Tracey Johnson,

Manager, Operations Support Group, Western Service Center.

[FR Doc. 2016–23423 Filed 9–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31094; Amdt. No. 3711]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures (ODPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective September 30, 2016. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of September 30, 2016.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops–M30, 1200 New Jersey Avenue SE., West Bldg., Ground Floor, Washington, DC 20590–0001.

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Navigation Products, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedure Standards Branch (AFS–420), Flight Technologies and Programs Divisions, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) Telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends Title 14 of the Code of Federal Regulations, Part 97 (14 CFR part 97), by establishing, amending, suspending, or removes SIAPS, Takeoff Minimums and/or ODPS. The complete regulatory description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA forms are FAA Forms 8260–3, 8260–4, 8260–5, 8260–15A, and 8260–15B when required by an entry on 8260–15A.

The large number of SIAPs, Takeoff Minimums and ODPs, their complex nature, and the need for a special format make publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAPs, Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure, and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPS, Takeoff Minimums and/or ODPS as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as Amended in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPs and Takeoff Minimums and ODPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making some SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26,1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air traffic control, Airports, Incorporation by reference, Navigation (air).

Issued in Washington, DC, on August 26, 2016.

John S. Duncan,

Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or removing Standard Instrument Approach Procedures and/or Takeoff Minimums and Obstacle Departure Procedures effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

Effective 13 October 2016

Melbourne, AR, Melbourne Muni—John E Miller Field, RNAV (GPS) RWY 3, Amdt 2
Melbourne, AR, Melbourne Muni—John E Miller Field, RNAV (GPS) RWY 21, Amdt 2
Oakland, CA, Metropolitan Oakland Intl, ILS OR LOC RWY 30, ILS RWY 30 (SA CAT I), ILS RWY 30 (CATII), ILS RWY 30 (CAT III), Amdt 29A
Oakland, CA, Metropolitan Oakland Intl, ILS OR LOC/DME RWY 28R, Amdt 37A
Tampa, FL, Peter O Knight, RNAV (GPS) RWY 36, Amdt 2D
Cordele, GA, Crisp County—Cordele, LOC RWY 10, Orig-D
Washington, GA, Washington-Wilkes County, RNAV (GPS) RWY 13, Amdt 1A

Effective 10 November 2016

Chalkyitsik, AK, Chalkyitsik, Takeoff Minimums and Obstacle DP, Amdt 1
Chevak, AK, Chevak, Takeoff Minimums and Obstacle DP, Amdt 1
Kotlik, AK, Kotlik, Takeoff Minimums and Obstacle DP, Amdt 1
Russian Mission, AK, Russian Mission, Takeoff Minimums and Obstacle DP, Amdt 2
Danville, AR, Danville Muni, RNAV (GPS) RWY 11, Orig
Danville, AR, Danville Muni, RNAV (GPS) RWY 29, Orig
Danville, AR, Danville Muni, Takeoff Minimums and Obstacle DP, Orig
Phoenix, AZ, Phoenix-Mesa Gateway, RNAV (GPS) RWY 12C, Amdt 1B
Camarillo, CA, Camarillo, Takeoff Minimums and Obstacle DP, Amdt 4
Colusa, CA, Colusa County, Takeoff Minimums and Obstacle DP, Orig-A
Fallbrook, CA, Fallbrook Community Airpark, FALLBROOK ONE Graphic DP
Fallbrook, CA, Fallbrook Community Airpark, Takeoff Minimums and Obstacle DP, Amdt 1
Fresno, CA, Fresno Chandler Executive, NDB OR GPS–B, Amdt 7C, CANCELED
Hemet, CA, Hemet-Ryan, Takeoff Minimums and Obstacle DP, Amdt 3
Los Angeles, CA, Los Angeles Intl, Takeoff Minimums and Obstacle DP, Amdt 13
Denver, CO, Denver Intl, RNAV (GPS) Y RWY 16L, Amdt 1B
Montrose, CO, Montrose Rgnl, ILS OR LOC/DME RWY 17, Amdt 2D
Montrose, CO, Montrose Rgnl, RNAV (GPS) RWY 13, Orig-C
Montrose, CO, Montrose Rgnl, RNAV (GPS) RWY 35, Orig-C
Montrose, CO, Montrose Rgnl, RNAV (GPS) Y RWY 17, Orig-C
Montrose, CO, Montrose Rgnl, RNAV (GPS) Z RWY 17, Orig-C
Montrose, CO, Montrose Rgnl, VOR RWY 13, Amdt 9C
Telluride, CO, Telluride Rgnl, LOC RWY 9, Amdt 3A
Tinian Island, CQ, Tinian Intl, NDB–A, Amdt 3
Greensboro, GA, Greene County Rgnl, RNAV (GPS) RWY 25, Amdt 2
Greensboro, GA, Greene County Rgnl, VOR–B, Amdt 3
Monticello, IN, White County, RNAV (GPS) RWY 18, Amdt 1
Monticello, IN, White County, RNAV (GPS) RWY 36, Amdt 1
Monticello, IN, White County, Takeoff Minimums and Obstacle DP, Amdt 3
Hopkinsville, KY, Hopkinsville-Christian County, LOC RWY 26, Amdt 4, CANCELED
Hopkinsville, KY, Hopkinsville-Christian County, NDB RWY 26, Amdt 7, CANCELED
Hyannis, MA, Barnstable Muni-Boardman/Polando Field, VOR RWY 6, Amdt 10
Plymouth, MA, Plymouth Muni, RNAV (GPS) RWY 15, Orig
Butte, MT, Bert Mooney, VOR OR GPS–B, Amdt 1C
Great Falls, MT, Great Falls Intl, GPS RWY 34, Orig, CANCELED
Falls City, NE, Brenner Field, NDB–A, Amdt 3C, CANCELED
Astoria, OR, Astoria Rgnl, ASTORIA TWO Graphic DP
Astoria, OR, Astoria Rgnl, Takeoff Minimums and Obstacle DP, Amdt 6
Corvallis, OR, Corvallis Muni, ILS OR LOC RWY 17, Amdt 4
Corvallis, OR, Corvallis Muni, RNAV (GPS) RWY 17, Amdt 1
Corvallis, OR, Corvallis Muni, Takeoff Minimums and Obstacle DP, Amdt 6A
Hermiston, OR, Hermiston Muni, Takeoff Minimums and Obstacle DP, Orig-A
Paris, TN, Henry County, NDB RWY 2, Amdt 3, CANCELED
Waynesboro, VA, Eagle's Nest, RNAV (GPS) RWY 6, Amdt 1
Waynesboro, VA, Eagle's Nest, RNAV (GPS) RWY 24, Amdt 1
Ellensburg, WA, Bowers Field, RNAV (GPS) RWY 25, Amdt 1A
Ellensburg, WA, Bowers Field, RNAV (GPS)–C, Orig-C
Ellensburg, WA, Bowers Field, VOR–B, Amdt 3C
Ellensburg, WA, Bowers Field, VOR/DME–A, Amdt 3A
Oak Harbor, WA, A J Eisenberg, RADAR–1, CANCELED
Wenatchee, WA, Pangborn Memorial, Takeoff Minimums and Obstacle DP, Amdt 5
Wenatchee, WA, Pangborn Memorial, WENATCHEE ONE Graphic DP
Pulaski, WI, Carter, VOR OR GPS–A, Amdt 4, CANCELED
Big Piney, WY, Miley Memorial Field, RNAV (GPS) RWY 31, Orig-C
Gillette, WY, Gillette-Campbell County, ILS OR LOC RWY 34, Amdt 4
Gillette, WY, Gillette-Campbell County, RNAV (GPS) RWY 16, Orig-A
Gillette, WY, Gillette-Campbell County, RNAV (GPS) RWY 34, Orig-A
Gillette, WY, Gillette-Campbell County, Takeoff Minimums and Obstacle DP, Amdt 5
Gillette, WY, Gillette-Campbell County, VOR RWY 16, Orig-A
Gillette, WY, Gillette-Campbell County, VOR/DME RWY 34, Amdt 1, CANCELED

RESCINDED: On August 4, 2016 (81 FR 51339), the FAA published an Amendment in Docket No. 31085, Amdt No. 3703 to Part 97 of the Federal Aviation Regulations under section 97.33. The following entry, effective September 15, 2016, is hereby rescinded in its entirety:

Fort Myers, FL, Southwest Florida Intl, RNAV (GPS) RWY 6, Amdt 2

RESCINDED: On August 25, 2016 (81 FR 58387), the FAA published an Amendment in Docket No. 31089, Amdt No. 3707 to Part 97 of the Federal Aviation Regulations under section 97.33, 97.23. The following entries, effective September 15, 2016, are hereby rescinded in their entirety:

Clinton, OK, Clinton Rgnl, RNAV (GPS) RWY 17, Amdt 3
Clinton, OK, Clinton Rgnl, RNAV (GPS) RWY 35, Amdt 4
Clinton, OK, Clinton Rgnl, VOR/DME–A, Orig, CANCELED
Elk City, OK, Elk City Rgnl Business, RNAV (GPS) RWY 17, Amdt 2
Elk City, OK, Elk City Rgnl Business, RNAV (GPS) RWY 35, Amdt 2
Weatherford, OK, Thomas P Stafford, RNAV (GPS) RWY 35, Amdt 3
Canadian, TX, Hemphill County, RNAV (GPS) RWY 4, Amdt 2
Wheeler, TX, Wheeler Muni, RNAV (GPS) RWY 17, Orig-A, CANCELED
Wheeler, TX, Wheeler Muni, RNAV (GPS) RWY 35, Orig-A, CANCELED
Wheeler, TX, Wheeler Muni, RNAV (GPS)–A, Orig
Wheeler, TX, Wheeler Muni, RNAV (GPS)–B, Orig
Wheeler, TX, Wheeler Muni, VOR/DME–A, Amdt 2, CANCELED

[FR Doc. 2016–23406 Filed 9–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31095; Amdt. No. 3712]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide for the safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective September 30, 2016. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of September 30, 2016.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops–M30, 1200 New Jersey

Avenue SE., West Bldg., Ground Floor, Washington, DC, 20590–0001;

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Navigation Products, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA).

For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center online at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedure Standards Branch (AFS–420) Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (NFDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR 97.20. The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained on FAA form documents is unnecessary.

This amendment provides the affected CFR sections, and specifies the SIAPs and Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPs, Takeoff Minimums and ODPs as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP and Takeoff Minimums and ODP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP and Takeoff Minimums and ODP as modified by FDC permanent NOTAMs.

The SIAPs and Takeoff Minimums and ODPs, as modified by FDC permanent NOTAM, and contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for these SIAP and Takeoff Minimums and ODP amendments require making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making these SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air traffic control, Airports, Incorporation by reference, Navigation (air).

Issued in Washington, DC, on August 26, 2016.

John S. Duncan,

Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal Regulations, Part 97, (14 CFR part 97), is amended by amending Standard Instrument Approach Procedures and Takeoff Minimums and ODPs, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

§§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33, 97.35 [Amended]

■ 2. Part 97 is amended to read as follows:

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

* * * *Effective Upon Publication*

AIRAC date	State	City	Airport	FDC No.	FDC date	Subject
13–Oct–16	CA	San Francisco	San Francisco Intl	6/0046	8/15/16	RNAV (GPS) X RWY 28R, Amdt 1A.
13–Oct–16	CA	San Francisco	San Francisco Intl	6/0047	8/15/16	RNAV (GPS) PRM X RWY 28R (SIMULTANEOUS CLOSE PARALLEL), Amdt 1A.
13–Oct–16	CA	San Francisco	San Francisco Intl	6/0048	8/15/16	LDA PRM RWY 28R (SIMULTANEOUS CLOSE PARALLEL), Amdt 2A.
13–Oct–16	CA	San Francisco	San Francisco Intl	6/0049	8/15/16	LDA/DME RWY 28R, Amdt 2A.
13–Oct–16	CA	San Francisco	San Francisco Intl	6/0050	8/15/16	ILS OR LOC RWY 28R, ILS RWY 28R (SA CAT I), ILS RWY 28R (CAT II–III), Amdt 13A.
13–Oct–16	TX	Perryton	Perryton Ochiltree County	6/0457	8/11/16	RNAV (GPS) RWY 17, Orig-A.
13–Oct–16	TX	Perryton	Perryton Ochiltree County	6/0458	8/11/16	RNAV (GPS) RWY 35, Amdt 1A.
13–Oct–16	TX	Perryton	Perryton Ochiltree County	6/0459	8/11/16	NDB–A, Amdt 4A.
13–Oct–16	WI	Minocqua-Woodruff	Lakeland/Noble F Lee Memorial Field.	6/0534	8/23/16	RNAV (GPS) RWY 18, Orig.
13–Oct–16	NM	Grants	Grants-Milan Muni	6/1350	8/15/16	RNAV (GPS) RWY 13, Orig.
13–Oct–16	ND	Rugby	Rugby Muni	6/2712	8/15/16	RNAV (GPS) RWY 30, Orig-A.
13–Oct–16	ND	Rugby	Rugby Muni	6/2714	8/15/16	RNAV (GPS) RWY 12, Orig-A.
13–Oct–16	MI	Gaylord	Gaylord Rgnl	6/2719	8/11/16	RNAV (GPS) RWY 9, Orig-A.
13–Oct–16	MI	Gaylord	Gaylord Rgnl	6/2720	8/11/16	RNAV (GPS) RWY 27, Orig-A.
13–Oct–16	OK	Oklahoma City	Will Rogers World	6/3132	8/15/16	RNAV (GPS) Y RWY 17L, Amdt 3A.
13–Oct–16	LA	Alexandria	Alexandria Intl	6/3303	8/23/16	VOR/DME RWY 14, Orig-B.
13–Oct–16	OK	Idabel	Mc Curtain County Rgnl	6/3469	8/15/16	RNAV (GPS) RWY 20, Orig.
13–Oct–16	MO	Mexico	Mexico Memorial	6/3471	8/15/16	RNAV (GPS) RWY 24, Amdt 1C.
13–Oct–16	IN	French Lick	French Lick Muni	6/3700	8/23/16	RNAV (GPS) RWY 26, Orig-A.
13–Oct–16	IN	French Lick	French Lick Muni	6/3701	8/23/16	RNAV (GPS) RWY 8, Amdt 1A.
13–Oct–16	WV	Clarksburg	North Central West Virginia.	6/5614	8/11/16	VOR–A, Amdt 1.
13–Oct–16	MI	Owosso	Owosso Community	6/5851	8/19/16	RNAV (GPS) RWY 11, Amdt 1B.
13–Oct–16	MI	Owosso	Owosso Community	6/5852	8/19/16	RNAV (GPS) RWY 29, Amdt 1B.
13–Oct–16	MI	Owosso	Owosso Community	6/5854	8/19/16	VOR/DME RWY 29, Amdt 1B.
13–Oct–16	IN	Lafayette	Purdue University	6/6114	8/19/16	ILS RWY 10, Amdt 11.
13–Oct–16	IN	Lafayette	Purdue University	6/6115	8/19/16	RNAV (GPS) RWY 10, Amdt 1.
13–Oct–16	IN	Lafayette	Purdue University	6/6116	8/19/16	VOR–A, Amdt 26.
13–Oct–16	IN	Lafayette	Purdue University	6/6117	8/19/16	RNAV (GPS) RWY 28, Amdt 1.
13–Oct–16	WI	Land O' Lakes	Kings Land O' Lakes	6/7434	8/22/16	RNAV (GPS) RWY 32, Orig.
13–Oct–16	WI	Land O' Lakes	Kings Land O' Lakes	6/7435	8/22/16	RNAV (GPS) RWY 14, Orig.
13–Oct–16	IL	Cahokia/St Louis	St Louis Downtown	6/7439	8/19/16	RNAV (GPS) RWY 30R, Orig-A.
13–Oct–16	KS	Goodland	Renner Fld/Goodland Muni/.	6/7987	8/19/16	ILS OR LOC RWY 30, Amdt 2A.
13–Oct–16	KS	Goodland	Renner Fld/Goodland Muni/.	6/7988	8/19/16	RNAV (GPS) RWY 12, Amdt 2.
13–Oct–16	KS	Goodland	Renner Fld/Goodland Muni/.	6/7989	8/19/16	RNAV (GPS) RWY 30, Amdt 1A.
13–Oct–16	KS	Goodland	Renner Fld/Goodland Muni/.	6/7990	8/19/16	VOR RWY 30, Amdt 9A.
13–Oct–16	KS	Goodland	Renner Fld/Goodland Muni/.	6/7991	8/19/16	RNAV (GPS) RWY 23, Amdt 1A.

AIRAC date	State	City	Airport	FDC No.	FDC date	Subject
13–Oct–16	TX	La Porte	La Porte Muni	6/7997	8/19/16	RNAV (GPS) RWY 30, Amdt 2A.
13–Oct–16	MN	Duluth	Duluth Intl	6/8581	8/19/16	ILS OR LOC RWY 27, Amdt 10A.
13–Oct–16	IL	Bloomington/Normal	Central Il Rgnl Arpt At Bloomington-Normal.	6/8584	8/22/16	ILS OR LOC RWY 29, Amdt 11.
13–Oct–16	DE	Georgetown	Delaware Coastal	6/8745	8/11/16	RNAV (GPS) RWY 22, Amdt 2B.
13–Oct–16	DE	Georgetown	Delaware Coastal	6/8746	8/11/16	VOR RWY 22, Amdt 7A.
13–Oct–16	MI	Gaylord	Gaylord Rgnl	6/8956	8/11/16	VOR RWY 27, Amdt 2A.
13–Oct–16	FL	Miami	Miami Intl	6/9444	8/15/16	RNAV (RNP) Y RWY 27, Amdt 2.
13–Oct–16	KY	Louisville	Louisville Intl-Standiford Field.	6/9490	8/11/16	RNAV (RNP) Z RWY 35L, Amdt 1B.

[FR Doc. 2016–23410 Filed 9–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31097; Amdt. No. 3714]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide for the safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective September 30, 2016. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of September 30, 2016.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops–M30, 1200 New Jersey Avenue SE., West Bldg., Ground Floor, Washington, DC 20590–0001;
2. The FAA Air Traffic Organization Service Area in which the affected airport is located;
3. The office of Aeronautical Navigation Products, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,
4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center online at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedure Standards Branch (AFS–420) Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (NFDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR 97.20. The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained on FAA form documents is unnecessary.

This amendment provides the affected CFR sections, and specifies the SIAPs and Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPs, Takeoff Minimums and ODPs as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP and Takeoff Minimums and ODP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP and Takeoff Minimums and ODP as modified by FDC permanent NOTAMs.

The SIAPs and Takeoff Minimums and ODPs, as modified by FDC permanent NOTAM, and contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to

SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for these SIAP and Takeoff Minimums and ODP amendments require making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making these SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air traffic control, Airports, Incorporation by reference, Navigation (air).

Issued in Washington, DC, on September 9, 2016.

John S. Duncan,

Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal regulations, Part 97, (14 CFR part 97), is amended by amending Standard Instrument Approach Procedures and Takeoff Minimums and ODPs, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

§§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33, 97.35 [Amended]

■ 2. Part 97 is amended to read as follows:

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

* * * *Effective Upon Publication*

AIRAC date	State	City	Airport	FDC No.	FDC Date	Subject
13–Oct–16	NC	Mount Olive	Mount Olive Muni	6/0392	8/26/16	RNAV (GPS) RWY 5, Orig.
13–Oct–16	NC	Mount Olive	Mount Olive Muni	6/0428	8/26/16	RNAV (GPS) RWY 23, Orig-A.
13–Oct–16	IN	Evansville	Evansville Rgnl	6/0540	8/30/16	ILS OR LOC RWY 4, Amdt 3.
13–Oct–16	IN	Evansville	Evansville Rgnl	6/0543	8/30/16	ILS OR LOC RWY 22, Amdt 22.
13–Oct–16	IN	Evansville	Evansville Rgnl	6/0545	8/30/16	NDB RWY 22, Amdt 14.
13–Oct–16	IN	Evansville	Evansville Rgnl	6/0546	8/30/16	RNAV (GPS) RWY 18, Amdt 2.
13–Oct–16	IN	Evansville	Evansville Rgnl	6/0547	8/30/16	RNAV (GPS) RWY 22, Amdt 1.
13–Oct–16	IN	Evansville	Evansville Rgnl	6/0550	8/30/16	RNAV (GPS) RWY 36, Amdt 2.
13–Oct–16	IN	Evansville	Evansville Rgnl	6/0551	8/30/16	RNAV (GPS) RWY 4, Amdt 1.
13–Oct–16	PA	Mount Pocono	Pocono Mountains Muni	6/1142	8/26/16	RNAV (GPS) RWY 5, Orig-A.
13–Oct–16	PA	Mount Pocono	Pocono Mountains Muni	6/1143	8/26/16	VOR/DME RWY 13, Amdt 8A.
13–Oct–16	FL	Miami	Miami Executive	6/3008	8/26/16	ILS OR LOC RWY 9R, Amdt 11A.
13–Oct–16	FL	Miami	Miami Executive	6/3009	8/26/16	RNAV (GPS) RWY 27L, Amdt 2A.
13–Oct–16	FL	Miami	Miami Executive	6/3010	8/26/16	RNAV (GPS) RWY 27R, Orig-A.
13–Oct–16	FL	Miami	Miami Executive	6/3011	8/26/16	RNAV (GPS) RWY 9L, Orig-B.
13–Oct–16	FL	Miami	Miami Executive	6/3012	8/26/16	RNAV (GPS) RWY 9R, Amdt 2A.
13–Oct–16	TX	Brownsville	Brownsville/South Padre Island Intl.	6/3466	8/30/16	Takeoff Minimums and Obstacle DP, Orig.
13–Oct–16	TX	Brownsville	Brownsville/South Padre Island Intl.	6/3467	8/30/16	VOR OR TACAN–A, Amdt 1B.
13–Oct–16	IL	Chicago/Rockford	Chicago/Rockford Intl	6/3693	8/26/16	ILS OR LOC RWY 7, ILS RWY 7 (SA CAT I), ILS RWY 7 (CAT II & III), Amdt 1C.
13–Oct–16	OK	Oklahoma City	Will Rogers World	6/4501	8/30/16	RNAV (GPS) RWY 31, Amdt 1A.

AIRAC date	State	City	Airport	FDC No.	FDC Date	Subject
13–Oct–16	NY	Le Roy	Le Roy	6/5296	8/26/16	RNAV (GPS) RWY 28, Orig-A.
13–Oct–16	NY	Le Roy	Le Roy	6/5297	8/26/16	VOR–A, Amdt 1A.
13–Oct–16	NY	Le Roy	Le Roy	6/5298	8/26/16	RNAV (GPS) RWY 10, Orig-A.
13–Oct–16	OK	Oklahoma City	Will Rogers World	6/6066	8/25/16	RADAR 1, Amdt 21.
13–Oct–16	ME	Bangor	Bangor Intl	6/9055	8/26/16	RADAR 1, Amdt 4D.

[FR Doc. 2016–23414 Filed 9–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31096; Amdt. No. 3713]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures (ODPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective September 30, 2016. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of September 30, 2016.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops-M30, 1200 New Jersey Avenue SE., West Bldg., Ground Floor, Washington, DC 20590–0001.

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Navigation Products, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedure Standards Branch (AFS–420), Flight Technologies and Programs Divisions, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) Telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends Title 14 of the Code of Federal Regulations, Part 97 (14 CFR part 97), by establishing, amending, suspending, or removes SIAPS, Takeoff Minimums and/or ODPS. The complete regulatory description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA forms are FAA Forms 8260–3, 8260–4, 8260–5, 8260–15A, and 8260–15B when required by an entry on 8260–15A.

The large number of SIAPs, Takeoff Minimums and ODPs, their complex nature, and the need for a special format make publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAPs, Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure, and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPS, Takeoff Minimums and/or ODPS as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as Amended in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPs and Takeoff Minimums and ODPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making some SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26,1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air traffic control, Airports, Incorporation by reference, Navigation (air).

Issued in Washington, DC, on September 9, 2016.

John S. Duncan,

Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or removing Standard Instrument Approach Procedures and/or Takeoff Minimums and Obstacle Departure Procedures effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

Effective 10 November 2016

Gulkana, AK, Gulkana, Takeoff Minimums and Obstacle DP, Amdt 7A
Napakiak, AK, Napakiak, RNAV (GPS) RWY 16, Orig-A
Napakiak, AK, Napakiak, RNAV (GPS) RWY 34, Orig-A
Scammon Bay, AK, Scammon Bay, RNAV (GPS)–B, Orig-A
Camden, AR, Harrell Field, VOR/DME RWY 1, Amdt 10B
Groveland, CA, Pine Mountain Lake, Takeoff Minimums and Obstacle DP, Amdt 1
Lodi, CA, Lodi, Takeoff Minimums and Obstacle DP, Amdt 2A
Lodi, CA, Lodi, VOR–A, Amdt 3A
Oakdale, CA, Oakdale, Takeoff Minimums and Obstacle DP, Amdt 1
Stockton, CA, Stockton Metropolitan, ILS OR LOC RWY 29R, Amdt 20B
Stockton, CA, Stockton Metropolitan, VOR RWY 29R, Amdt 18E, CANCELED
Tampa, FL, Tampa Executive, RNAV (GPS) RWY 5, Orig-C
Macon, GA, Middle Georgia Rgnl, ILS OR LOC RWY 5, Amdt 2
Macon, GA, Middle Georgia Rgnl, RNAV (GPS) RWY 5, Amdt 2
Macon, GA, Middle Georgia Rgnl, RNAV (GPS) RWY 14, Amdt 2D
Macon, GA, Middle Georgia Rgnl, RNAV (GPS) RWY 23, Amdt 2D
Macon, GA, Middle Georgia Rgnl, RNAV (GPS) RWY 32, Amdt 1D
Macon, GA, Middle Georgia Rgnl, VOR RWY 14, Amdt 10C
Macon, GA, Middle Georgia Rgnl, VOR RWY 23, Amdt 4D
Macon, GA, Middle Georgia Rgnl, Takeoff Minimums and Obstacle DP, Amdt 3B
Beverly, MA, Beverly Rgnl, RNAV (GPS) RWY 9, Orig
Beverly, MA, Beverly Rgnl, RNAV (GPS) RWY 27, Amdt 1
Beverly, MA, Beverly Rgnl, RNAV (GPS) RWY 34, Orig-D
Brunswick, ME, Brunswick Executive, ILS OR LOC RWY 1R, Amdt 1
Brunswick, ME, Brunswick Executive, RNAV (GPS) RWY 1R, Amdt 2
Shamokin, PA, Northumberland County, Takeoff Minimums and Obstacle DP, Amdt 2
State College, PA, University Park, ILS OR LOC RWY 24, Amdt 9B
State College, PA, University Park, RNAV (GPS) RWY 6, Amdt 2
State College, PA, University Park, RNAV (GPS) RWY 24, Amdt 1
Zelienople, PA, Zelienople Muni, RNAV (GPS) RWY 17, Amdt 1
Zelienople, PA, Zelienople Muni, RNAV (GPS) RWY 35, Amdt 1
Pulaski, WI, Carter, Takeoff Minimums and Obstacle DP, Orig, CANCELED

[FR Doc. 2016–23411 Filed 9–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Part 679

[Docket No. 160225146–6851–02]

RIN 0648–BF80

Fisheries of the Exclusive Economic Zone Off Alaska; Observer Coverage Requirements for Bering Sea and Aleutian Islands Management Area Trawl Catcher Vessels

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues regulations to modify observer coverage requirements for catcher vessels participating in the trawl limited access fisheries in the Bering Sea and Aleutian Islands management area (BSAI). This final rule allows the owner of a trawl catcher vessel to request, on an annual basis, that NMFS place the vessel in the full observer coverage category for all directed fishing for groundfish using trawl gear in the BSAI in the following calendar year. These regulations are necessary to relieve vessel owners who request full observer coverage of the reporting requirements and observer fee liability associated with the partial observer coverage category. Additionally, this final rule makes minor technical corrections to observer program regulations. This final rule is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (BSAI FMP), and other applicable laws.

DATES: Effective October 31, 2016.

ADDRESSES: Electronic copies of the Regulatory Impact Review (RIR), the Initial Regulatory Flexibility Analysis (IRFA), and the Categorical Exclusion prepared for this action are available from *www.regulations.gov* (search NOAA–NMFS–2016–0020) or from the NMFS Alaska Region Web site at *alaskafisheries.noaa.gov.*

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this rule may be submitted by mail to NMFS Alaska Region, P.O. Box 21668, Juneau, AK

99802–1668, Attn: Ellen Sebastian, Records Officer; in person at NMFS Alaska Region, 709 West 9th Street, Room 420A, Juneau, AK; by email to *OIRA_Submission@omb.eop.gov;* or by fax to 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Alicia M. Miller, 907–586–7228.

SUPPLEMENTARY INFORMATION:

Background

NMFS published a proposed rule to modify observer coverage requirements for catcher vessels participating in the trawl limited access fisheries in the BSAI on July 7, 2016 (81 FR 44251). The comment period on the proposed rule ended on August 8, 2016. Following is a brief description of the North Pacific Groundfish and Halibut Observer Program (Observer Program) and elements of the Observer Program impacted by this final rule. The preamble of the proposed rule (81 FR 44251, July 7, 2016) provides a more detailed description of the Observer Program and this action.

The Observer Program

Regulations implementing the Observer Program require observer coverage on fishing vessels and at processing plants to allow NMFS-certified observers (observers) to obtain information necessary for the conservation and management of the BSAI and Gulf of Alaska groundfish and halibut fisheries. The Observer Program was implemented in 1990 (55 FR 4839, February 12, 1990). In 2013, NMFS restructured the funding and deployment systems of the Observer Program (77 FR 70062, November 21, 2012). Under the restructured Observer Program, all vessels and processors in the groundfish and halibut fisheries off Alaska are placed into one of two categories: (1) The full observer coverage category, where vessels and processors obtain observer coverage by contracting directly with observer providers; and (2) the partial observer coverage category, where NMFS has the flexibility to deploy observers when and where they are needed, as described in the annual deployment plan that is developed by NMFS in consultation with the North Pacific Fishery Management Council (Council). NMFS funds observer deployment in the partial observer coverage category by assessing a 1.25 percent fee on the ex-vessel value of retained groundfish and halibut from vessels that are not in the full observer coverage category.

Regulations implementing the restructured Observer Program in 2013 placed all trawl catcher vessels in the full observer coverage category when participating in a catch share program with transferable prohibited species catch (PSC) limits. For trawl catcher vessels in the BSAI, the catch share programs with transferable PSC limits are the American Fisheries Act (AFA) pollock fisheries in the Bering Sea and the Western Alaska Community Development Quota (CDQ) groundfish fisheries. All other trawl catcher vessels subject to observer coverage requirements in the BSAI are in the partial observer coverage category when participating in the BSAI trawl limited access fisheries.

Throughout this final rule, the trawl fisheries in the BSAI that are not part of a catch share program with transferable PSC limits are referred to collectively as "the BSAI trawl limited access fisheries." Vessels participating in the BSAI trawl limited access fisheries primarily target Pacific cod or yellowfin sole. The BSAI trawl limited access fisheries are managed with halibut and crab PSC limits that apply to the directed fishery as a whole or to operational category and gear type. Section 3.5 in the RIR provides additional information about the BSAI trawl limited access fisheries, the Observer Program, and observer coverage categories.

Need for This Final Rule

Since 2013, for reasons detailed in the proposed rule for this action (81 FR 44251, July 7, 2016), NMFS has implemented an interim policy that allows an owner of a BSAI trawl catcher vessel to request, on an annual basis, placement in the full observer coverage category by submitting a letter of request to NMFS. Under the interim policy, the owner of a trawl catcher vessel complies with full observer coverage requirements but is not placed in the full observer coverage category by regulation. Therefore, the owner must continue to comply with the partial observer coverage category reporting requirements and associated observer fee liability. This results in the vessel owner paying costs for partial and full observer coverage and additional reporting requirements for those vessel owners that have requested full observer coverage under the interim policy. This final rule replaces the interim policy and establishes in regulation a process for the owner of a trawl catcher vessel to request placement in the full observer coverage category.

The major provisions of this final rule are summarized below. Additional detail about the rationale for the major provisions is found in the proposed rule for this action (81 FR 44251, July 7, 2016) and Sections 3.6 and 3.7 of the RIR.

1. Annual Request for Full Observer Coverage

This final rule allows the owner of a trawl catcher vessel to annually request full observer coverage in lieu of partial observer coverage for directed fishing for groundfish using trawl gear in the BSAI in the following year. This final rule establishes a regulatory process to allow the owner of a trawl catcher vessel to submit a request for full observer coverage to NMFS. NMFS will then place the vessel in the full observer coverage category for all directed fishing for groundfish using trawl gear in the BSAI in the following year.

This final rule does not restrict which trawl catcher vessel owners may request full observer coverage, allowing the owner of any trawl catcher vessel to request full observer coverage for all directed fishing for groundfish using trawl gear in the BSAI in the following year. This final rule does not alter existing observer coverage requirements for trawl catcher vessels delivering unsorted codends to a mothership in the BSAI.

2. Annual Deadline

This final rule establishes an annual deadline of October 15 for a trawl catcher vessel owner to request placement in the full observer coverage category for the following year.

This Final Rule

This final rule revises regulations at 50 CFR part 679 to establish a process to allow the owner of a trawl catcher vessel to request, on an annual basis, that NMFS place the vessel in the full observer coverage category for all directed fishing for groundfish using trawl gear in the BSAI in the following calendar year. This final rule adds a paragraph at § 679.51(a)(2)(i)(C)(*4*) describing a new vessel type under the list of catcher vessels in the full observer coverage category to allow this annual request for placement in the full observer coverage category for one year. This final rule adds a new paragraph at § 679.51(a)(4) to describe the requirements for this annual process.

The owner of a trawl catcher vessel that requests full observer coverage in lieu of partial observer coverage for all directed fishing for groundfish in the BSAI trawl limited access fisheries in the following year will submit the request to NMFS using the Observer Declare and Deploy System (ODDS), which is described at § 679.51(a)(1)(ii). Once a request is received, NMFS will consider the request and will notify the vessel owner whether the request is approved or denied. This notification will occur through ODDS. Once NMFS has notified the vessel owner that a request to be placed in the full observer coverage category for the following year is approved, the owner and operator of the trawl catcher vessel are subject to full observer coverage requirements as described at § 679.51(a)(2) for all directed fishing for groundfish using trawl gear in the BSAI in the following year. Once approved by NMFS for placement in the full observer coverage category, a trawl catcher vessel cannot be placed in the partial observer coverage category until the next year. Until NMFS provides notification of approval, a catcher vessel remains in the partial observer coverage category as described at § 679.51(a)(1)(i).

The owner of a trawl catcher vessel placed in the full observer coverage category contracts directly with a permitted full coverage observer provider to procure observer services as described at § 679.51(d). The owner of a trawl catcher vessel in the full observer coverage category is not required to log fishing trips in ODDS under § 679.51(a)(1), and landings made by a vessel in the full observer coverage category are not subject to the 1.25 percent partial observer coverage fee under § 679.55.

This final rule establishes an annual deadline of October 15 for a trawl catcher vessel owner to request that a trawl catcher vessel operating in the BSAI be placed in the full observer coverage category for the following year as described at § 679.51(a)(4)(iii). NMFS will approve all requests that contain the information required by ODDS submitted on or before October 15. If NMFS denies a request to place a catcher vessel in the full observer coverage category, the catcher vessel will remain in the partial observer coverage category as described at § 679.51(a)(1)(i).

This final rule specifies at § 679.51(a)(4)(v) that if NMFS denies a request for placement in the full observer coverage category, NMFS will issue an Initial Administrative Determination, which will explain in writing the reasons for the denial. Under § 679.51(a)(4)(vi), the vessel owner can appeal a denial to the National Appeals Office according to the procedures in 15 CFR part 906.

This final rule makes minor technical corrections to Observer Program regulations, and corrects inaccurate cross references in § 679.84 and § 679.93 to observer coverage requirements in § 679.51. This final rule also standardizes references to the observer sampling station and the Observer Sampling Manual throughout part 679, and updates check-in/check-out report submission methods by removing a discontinued email address in § 679.5.

Comments and Responses

During the comment period for the proposed rule, NMFS received two letters of comment from two individuals, each letter containing two substantive comments. NMFS' responses to these comments are presented below.

Comment 1: Both commenters expressed support for this action, noting that the vessels they represent will be positively impacted by this action and that the proposed rule is consistent with changes requested by industry in 2012, as well as the recommendations made by the Council in February 2016.

Response: NMFS acknowledges this comment.

Comment 2: Both commenters support all provisions of the final rule as proposed, and request the action be implemented as soon as possible.

Response: NMFS acknowledges this comment. To ensure this action is effective and allow at least 15 days for vessel owners to submit a full observer coverage request for the 2017 calendar year, an implementation year deadline has been added to this final rule as described in the following section.

Changes From the Proposed Rule

This final rule includes changes to the regulatory text published in the proposed rule. These changes are necessary to define an initial implementation deadline for the 2017 calendar year and to make a minor editorial correction to existing regulatory text that was inadvertently altered in the proposed rule.

Initial Implementation Deadline for 2017

The proposed rule for this action (81 FR 44251, July 7, 2016) proposed an annual deadline of October 15 for a trawl catcher vessel owner to request that a trawl catcher vessel operating in the BSAI be placed in the full observer coverage category for the following year. Because the effective date of this final rule is after October 15, 2016, the deadline for the 2017 calendar year is 15 days after the effective date of this final rule. This deadline for 2017 is necessary to provide an adequate amount of time after publication of the final rule in the **Federal Register** for the owner of a trawl catcher vessel to submit a full observer coverage request to NMFS.

Other Changes

NMFS corrects § 679.51(a)(2)(i)(C)(*2*) by changing "while" to "when" to be consistent with the terminology used in existing regulations.

NMFS removed the cross reference correction in § 679.21 from this final rule because the cross reference was corrected in the final rule to implement salmon bycatch management measures under Amendment 110 to the BSAI FMP (81 FR 37534, June 10, 2016).

OMB Revisions to Paperwork Reduction Act References in 15 CFR 902.1(b)

Section 3507(c)(B)(i) of the Paperwork Reduction Act requires that agencies inventory and display a current control number assigned by the Director, Office of Management and Budget (OMB), for each agency information collection. Section 902.1(b) identifies the location of NOAA regulations for which OMB approval numbers have been issued. Because this final rule revises and adds data elements within a collection-of-information for recordkeeping and reporting requirements, 15 CFR 902.1(b) is revised to reference correctly the sections resulting from this final rule.

Classification

Pursuant to section 304(b)(1)(A) and 305(d) of the Magnuson-Stevens Act, the Administrator, Alaska Region, NMFS, determined that this final rule is necessary for the conservation and management of the BSAI trawl limited access fisheries and is consistent with the BSAI FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a final regulatory flexibility analysis, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. The preamble to the proposed rule (81 FR 44251, July 7, 2016) and the preamble to this final rule serve as the small entity compliance guide for this action. Copies of the proposed rule, this final rule, and additional information about how to comply with other requirements of the Observer Program are available on the

NMFS Alaska Region Web site (*https://alaskafisheries.noaa.gov/fisheries/observer-program*).

Final Regulatory Flexibility Analysis

Section 604 of the Regulatory Flexibility Act (RFA) requires an agency to prepare a final regulatory flexibility analysis (FRFA) after being required by that section or any other law to publish a general notice of proposed rulemaking and when an agency promulgates a final rule under section 553 of Title 5 of the U.S. Code. The following paragraphs constitute the FRFA for this action. Section 604 describes the required contents of a FRFA: (1) A statement of the need for, and objectives of, the rule; (2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; (3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA) in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments; (4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available; (5) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and (6) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

Need for and Objectives of This Rule

A description of the need for, and objectives of, this rule is contained in the preamble to the proposed rule and this final rule and is not repeated here. This FRFA incorporates the Initial Regulatory Flexibility Analysis (IRFA) (see **ADDRESSES**) and the summary of the IRFA in the proposed rule (81 FR 44251, July 7, 2016).

Summary of Significant Issues Raised During Public Comment

NMFS published a proposed rule to modify observer coverage requirements for catcher vessels participating in the BSAI trawl limited access fisheries on July 7, 2016 (81 FR 44251). An IRFA was prepared and summarized in the Classification section of the preamble to the proposed rule. The comment period on the proposed rule ended on August 8, 2016. NMFS received two letters of comment, each in support of the action as proposed. These comments letters did not address the IRFA. The commenters did request the rulemaking process be completed as soon as possible. The Chief Counsel for Advocacy of the SBA did not file any comments on the proposed rule.

Number and Description of Small Entities Directly Regulated by this Rule

This final rule directly regulates the owners of trawl catcher vessels that participate in the BSAI trawl limited access fisheries. The SBA has established size standards for all major industry sectors in the United States. For RFA purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $11 million for all its affiliated operations worldwide.

This final rule provides the owners of BSAI trawl catcher vessels that currently are placed in the partial observer coverage category the opportunity for placement in the full observer coverage category. In 2014, 100 catcher vessels used trawl gear in the BSAI. NMFS estimates that 13 of these trawl catcher vessels are directly regulated small entities. The owners of three of these catcher vessels requested to be placed in the full observer coverage category for all their BSAI trawl limited access fisheries during at least one year from 2013 through 2015.

Reporting, Recordkeeping and Other Compliance Requirements

This final rule includes one new reporting requirement and eliminates one reporting requirement for a vessel owner who requests placement of their vessel in the full observer coverage category for a year. Any trawl catcher vessel owner who requests placement of their trawl catcher vessel in the full observer coverage category will be required to submit a request to NMFS. This request is a new reporting requirement and only applies to those catcher vessel owners who request placement of their vessel in the full observer coverage category. The reporting requirement to log fishing trips in ODDS does not apply to vessels in the full observer coverage category; therefore, this final rule removes the reporting requirement for these directly regulated small entities to log fishing trips in ODDS.

Description of Significant Alternatives to This Rule That Minimize Economic Impacts on Small Entities

The RFA requires identification of any significant alternatives to this rule that accomplish the stated objectives, consistent with applicable statutes, and that would minimize any significant economic impact of this rule on small entities. This final rule is expected to create a net benefit for the directly regulated small entities because it offers trawl catcher vessel owners an opportunity to change their observer coverage category. The benefits of this final rule to trawl catcher vessel owners are expected to outweigh the costs of paying for an observer to be on board the vessel during all groundfish fishing in the BSAI trawl limited access fisheries, and the cost of the annual request to NMFS. If the benefits to a catcher vessel owner do not outweigh the costs, a catcher vessel owner can choose not to request their vessel be placed in the full observer coverage category, and therefore, would not be impacted by this final rule.

The Council considered the status quo (Alternative 1) and two action alternatives (Alternative 2 and Alternative 3). Alternative 3 included one option and three suboptions. The preferred alternative (Alternative 3 with Suboption 3) described in this final rule provides the owners of BSAI trawl catcher vessels an option of requesting, on an annual basis, placement in the full observer coverage category rather than remaining in the partial observer coverage category. No new requirements are imposed under the preferred alternative unless the catcher vessel owner requests placement in the full observer coverage category. Of the action alternatives analyzed, the preferred alternative provides the most flexibility for the owner of a trawl catcher vessel to request full observer coverage in lieu of partial observer coverage.

Alternative 1 (status quo) would have continued to offer catcher vessel owners the option of carrying full observer coverage under the interim policy, but would not remove the requirement in regulations for continued payment of the partial observer coverage fee in addition to the cost of full observer coverage. Alternative 2 is more restrictive than the preferred alternative because it would have permanently placed AFA trawl catcher vessels in the full observer coverage category rather than offering the vessel owners an option to request full observer coverage on an annual basis. Alternative 3 Option 1 would have allowed only the owners of AFA trawl catcher vessels to request placement in the full observer coverage category, rather than providing the opportunity to the owners of all BSAI trawl catcher vessels. Alternative 3 Suboption 1 would have established an earlier deadline to submit the request for full observer coverage than under the preferred alternative. Directly regulated small entities opposed the earlier deadline because they wanted more time to make business decisions about observer coverage in the following year. Alternative 3 Suboption 2 would have established a one-time request to be placed in the full observer coverage category rather than an annual request as under the preferred alternative. In summary, the preferred alternative of Alternative 3 with Suboption 3 (this final rule) offers the widest range of options to the widest range of directly regulated small entities, as compared to all other alternatives.

Collection-of-Information Requirements

This final rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by the OMB under Control No. 0648–0731. The public reporting burden for Request for Full Observer Coverage Category is estimated to average 5 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments on these burden estimates or any other aspects of the collection of information, including suggestions for reducing the burden, to NMFS (see **ADDRESSES**), by email to *OIRA_Submission@omb.eop.gov,* or fax to (202) 395–5806.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number. All currently approved NOAA collections of information may be viewed at *http://www.cio.noaa.gov/services_programs/prasubs.html.*

List of Subjects

15 CFR Part 902

Reporting and recordkeeping requirements.

50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: September 22, 2016.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS amends 15 CFR part 902 and 50 CFR part 679 as follows:

Title 15—Commerce and Foreign Trade

PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS

■ 1. The authority citation for part 902 continues to read as follows:

Authority: 44 U.S.C. 3501 *et seq.*

■ 2. In § 902.1, in the table in paragraph (b), under the entry “50 CFR” revise entry for “679.51” to read as follows:

§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) * * *

CFR part or section where the information collection requirement is located	Current OMB control No. (all numbers begin with 0648–)
* *	* *
50 CFR:	
* *	* *
679.51	–0206, –0269, –0272, –0318, –0401, –0513, –0545, –0565, –0731.
* *	* *

Title 50—Wildlife and Fisheries

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 3. The authority citation for 50 CFR part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.*; 1801 *et seq.*; 3631 *et seq.*; Pub. L. 108–447; Pub. L. 111–281.

■ 4. In § 679.51:

■ a. Revise paragraphs (a)(2)(i)(C)(*2*) and (*3*); and

■ b. Add paragraphs (a)(2)(i)(C)(*4*) and (a)(4).

The revisions and additions read as follows:

§ 679.51 Observer requirements for vessels and plants.

* * * * *

(a) * * *

(2) * * *

(i) * * *

(C) * * *

(*2*) Using trawl gear or hook-and-line gear when groundfish CDQ fishing (see § 679.2), except for catcher vessels less than or equal to 46 ft LOA using hook-and-line gear when groundfish CDQ fishing under § 679.32(c)(3)(iii);

(*3*) Participating in the Rockfish Program; or

(*4*) Using trawl gear in the BSAI if the vessel has been placed in the full observer coverage category under paragraph (a)(4) of this section.

* * * * *

(4) *BSAI trawl catcher vessel placement in the full observer coverage category for one year*—(i) *Applicability.* The owner of a catcher vessel in the partial observer coverage category under paragraph (a)(1)(i) of this section may request to be placed in the full observer coverage category for all directed fishing for groundfish using trawl gear in the BSAI for a calendar year.

(ii) *How to request full observer coverage for one year.* A trawl catcher vessel owner must complete a full observer coverage request and submit it to NMFS using ODDS. ODDS is described in paragraph (a)(1)(ii) of this section.

(iii) *Deadline.* For 2017, a full observer coverage request must be submitted by November 15, 2016. For 2018 and every year after 2018, a full observer coverage request must be submitted by October 15 of the year prior to the calendar year in which the catcher vessel would be placed in the full observer coverage category.

(iv) *Notification.* NMFS will notify the vessel owner through ODDS of approval or denial to place a trawl catcher vessel in the full observer coverage category. Unless otherwise specified in paragraph (a)(2) of this section, a trawl catcher vessel remains in the partial observer coverage category under paragraph (a)(1)(i) of this section until a request to place a trawl catcher vessel in the full observer coverage category has been approved by NMFS. Once placement in the full observer coverage category is approved by NMFS, a trawl catcher vessel cannot be placed in the partial observer coverage category until the following year.

(v) *Initial Administrative Determination (IAD).* If NMFS denies a request to place a trawl catcher vessel in the full observer coverage category, NMFS will provide an IAD, which will explain the basis for the denial.

(vi) *Appeal.* If the owner of a trawl catcher vessel wishes to appeal NMFS' denial of a request to place a trawl catcher vessel in the full observer coverage category, the owner may appeal the determination under the appeals procedure set out at 15 CFR part 906.

* * * * *

§§ 679.5, 679.28, 679.52, 679.53, 679.84, and 679.93 [Amended]

■ 5. At each of the locations shown in the "Location" column, remove the phrase indicated in the "Remove" column and add in its place the phrase indicated in the "Add" column.

Location	Remove	Add
§ 679.5(h)(1)	, or by e-mail to *erreports.alaskafisheries@noaa.gov*	.
§ 679.28(d)(9)(ii)	Observer sample station	Observer sampling station
§ 679.52(b)(1)(iii)(B)(*2*)	Observer manual	Observer Sampling Manual
§ 679.52(b)(2)(i)	Observer Manual	Observer Sampling Manual
§ 679.52(b)(11)(x)(A)(*4*)	Observer manual	Observer Sampling Manual
§ 679.53(b)(2)(i)	Observer Manual	Observer Sampling Manual
§ 679.84(c)(3)	§ 679.50(c)(7)(i)	§ 679.51(a)(2)
§ 679.84(e)	§ 679.50(c)(7)(ii)	§ 679.51(a)(2)
§ 679.84(f)(1)	§ 679.50(c)(7)(ii)	§ 679.51(a)(2)
§ 679.84(f)(2)	§ 679.50(c)(7)(ii)	§ 679.51(a)(2)
§ 679.93(c)(3)	§ 679.50(c)(6)	§ 679.51(a)(2)
§ 679.93(c)(6)	observer sample station	observer sampling station
§ 679.93(d)(2)	§ 679.50(c)(6)(ii)	§ 679.51(a)(2)

[FR Doc. 2016–23536 Filed 9–29–16; 8:45 am]

BILLING CODE 3510–22–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 232

[Release Nos. 33–10217; 34–78883; 39–2512; IC–32269]

Adoption of Updated EDGAR Filer Manual

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (the Commission) is adopting revisions to the Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) Filer Manual and related rules to reflect updates to the EDGAR system. The updates are being made primarily to support the new submission form types N–MFP2 and N–MFP2/A for money market mutual funds; allow unregistered money market fund to file a report on submission form types N–CR and N–CR/A; update the date format for ABS–EE Asset Data schemas from MM/YYYY to MM–DD–YYYY for CMBS Asset Class: Item 2(c)(12), and Debt Securities Asset Class: Debt Securities, Item 5(f)(3); update the codes and descriptions referencing CMSA to reference CREFC for CMBS Asset Class Item 2(d)(28)(xii) and CMBS Asset Class Item 2(d)(28)(xiii); allow a Large Trader whose most recent Form 13H submission was a Form 13H–I (Inactive) to submit a Form 13H–T (Termination) regardless of elapsed time; and make documentation updates to Chapter 5 and Chapter 6 of the "EDGAR Filer Manual, Volume II: EDGAR Filing" relating to eXtensible Business Reporting Language (XBRL) format. The EDGAR system was upgraded to support the new submission form types N–MFP2 and N–MFP2/A for money market mutual funds on August 29, 2016. The EDGAR system is scheduled to be upgraded to support the other functionalities on September 19, 2016.

DATES: Effective September 30, 2016. The incorporation by reference of the EDGAR Filer Manual is approved by the Director of the Federal Register as of September 30, 2016.

FOR FURTHER INFORMATION CONTACT: In the Division of Investment Management, for questions concerning Form N–MFP2 and Form N–CR, contact Heather Fernandez at (202) 551–6708; in the Division of Corporate Finance, for questions concerning Form ABS–EE, contact Vik Sheth at (202) 551–3818; in the Division of Trading and Markets, for questions concerning Form 13H, contact Kathy Bateman at (202) 551–4345; and in the Division of Economic and Risk Analysis, for questions concerning eXtensible Business Reporting Language (XBRL) disseminations; contact Walter Hamscher at (202) 551–5397.

SUPPLEMENTARY INFORMATION: We are adopting an updated EDGAR Filer Manual, Volume II. The Filer Manual describes the technical formatting requirements for the preparation and submission of electronic filings through the EDGAR system.[1] It also describes the requirements for filing using EDGARLink Online and the Online Forms/XML Web site.

The revisions to the Filer Manual reflect changes within Volume II entitled EDGAR Filer Manual, Volume II: "EDGAR Filing," Version 38 (September 2016). The updated manual will be incorporated by reference into the Code of Federal Regulations.

The Filer Manual contains all the technical specifications for filers to submit filings using the EDGAR system. Filers must comply with the applicable provisions of the Filer Manual in order to assure the timely acceptance and processing of filings made in electronic format.[2] Filers may consult the Filer Manual in conjunction with our rules governing mandated electronic filing when preparing documents for electronic submission.[3]

The EDGAR system will be upgraded to Release 16.3 on September 19, 2016 and will introduce the following changes:

---

[1] We originally adopted the Filer Manual on April 1, 1993, with an effective date of April 26, 1993. Release No. 33–6986 (April 1, 1993) [58 FR 18638]. We implemented the most recent update to the Filer Manual on June 13, 2016. *See* Release No. 33–10095 (July 1, 2016) [81 FR 43047].

[2] *See* Rule 301 of Regulation S–T (17 CFR 232.301).

[3] *See* Release No. 33–10095 in which we implemented EDGAR Release 16.2. For additional history of Filer Manual rules, please see the cites therein.

An unregistered money market fund will now be able to file a report on submission form types N–CR and N–CR/A. When submitting N–CR and N–CR/A filings, filers that are unregistered money market funds can optionally provide values for the following fields:

- Filer Investment Company Type
- Series ID
- Class (Contract) ID

ABS–EE Asset Data schemas will be updated to change the date format from MM/YYYY to MM–DD–YYYY for the following Asset Class Items:

- CMBS Asset Class: Item 2(c)(12), First Loan Payment Due Date
- Debt Securities Asset Class: Item 5(f)(3), Demand Resolution Date

In addition, the codes and descriptions referencing CMSA will be updated to reference CREFC for the following Asset Class Items:

- CMBS Asset Class: Item 2(d)(28)(xii), Net Operating Income Net Cash Flow Securitization Code
- CMBS Asset Class: Item 2(d)(28)(xiii), Net Operating Income Net Cash Flow Code

The ABS–EE Asset Data schemas will also be updated to allow whole integer numbers in decimal fields. For more information, see the updated "EDGAR ABS XML Technical Specification" document located on the SEC's Public Web site (*https://www.sec.gov/info/edgar/tech-specs*).

A Large Trader whose most recent Form 13H submission was a Form 13H–I (Inactive) will now be able to subsequently submit a Form 13H–T (Termination), regardless of the elapsed time.

Documentation only corrections relating to eXtensible Business Reporting Language (XBRL) formatting were made to Chapter 5, "Constructing Attached Documents and Document Types" and Chapter 6 "Interactive Data" of the EDGAR Filer Manual: Volume II.

On August 29, 2016, EDGAR Release 16.2.4 was updated to include two new submission form types—N–MFP2 and N–MFP2/A—to incorporate the amendments to Form N–MFP adopted by the Commission on September 16, 2015.

These two new submission form types will be accepted from the EDGAR Filing Web site via filer-constructed XML submissions, as described in the "EDGAR Form N–MFP2 XML Technical Specification" document available on the SEC's Public Web site (*https://www.sec.gov/info/edgar/tech-specs*).

EDGAR will only accept TEST submissions for submission form types N–MFP2 and N–MFP2/A until October 13, 2016. Beginning on October 14, 2016, submission form types N–MFP2 and N–MFP2/A will be accepted as LIVE or TEST submissions. After that date, filers will be prevented from submitting existing submission form type N–MFP1 beginning October 14, 2016. Filers will also be prevented from submitting existing submission form type N–MFP1/A beginning October 14, 2017.

Along with the adoption of the Filer Manual, we are amending Rule 301 of Regulation S–T to provide for the incorporation by reference into the Code of Federal Regulations of today's revisions. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

The updated EDGAR Filer Manual will be available for Web site viewing and printing; the address for the Filer Manual is *https://www.sec.gov/info/edgar/edmanuals.htm*. You may also obtain paper copies of the EDGAR Filer Manual from the following address: Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m.

Since the Filer Manual and the corresponding rule changes relate solely to agency procedures or practice, publication for notice and comment is not required under the Administrative Procedure Act (APA).[4] It follows that the requirements of the Regulatory Flexibility Act[5] do not apply.

The effective date for the updated Filer Manual and the rule amendments is September 30, 2016. In accordance with the APA,[6] we find that there is good cause to establish an effective date less than 30 days after publication of these rules. The EDGAR system upgrade to Release 16.3 is scheduled to become available on September 19, 2016. The Commission believes that establishing an effective date less than 30 days after publication of these rules is necessary to coordinate the effectiveness of the updated Filer Manual with these system upgrades.

Statutory Basis

We are adopting the amendments to Regulation S–T under Sections 6, 7, 8, 10, and 19(a) of the Securities Act of 1933,[7] Sections 3, 12, 13, 14, 15, 23, and 35A of the Securities Exchange Act of 1934,[8] Section 319 of the Trust Indenture Act of 1939,[9] and Sections 8, 30, 31, and 38 of the Investment Company Act of 1940.[10]

List of Subjects in 17 CFR Part 232

Incorporation by reference, Reporting and recordkeeping requirements, Securities.

Text of the Amendment

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 1. The authority citation for part 232 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll*, 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, and 7201 *et seq.*; and 18 U.S.C. 1350.

* * * * *

■ 2. Section 232.301 is revised to read as follows:

§ 232.301 EDGAR Filer Manual.

Filers must prepare electronic filings in the manner prescribed by the EDGAR Filer Manual, promulgated by the Commission, which sets out the technical formatting requirements for electronic submissions. The requirements for becoming an EDGAR Filer and updating company data are set forth in the updated EDGAR Filer Manual, Volume I: "General Information," Version 24 (December 2015). The requirements for filing on EDGAR are set forth in the updated EDGAR Filer Manual, Volume II: "EDGAR Filing," Version 38 (September 2016). Additional provisions applicable to Form N–SAR filers are set forth in the EDGAR Filer Manual, Volume III: "N–SAR Supplement," Version 5 (September 2015). All of these provisions have been incorporated by reference into the Code of Federal Regulations, which action was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You must comply with these requirements in order for documents to be timely received and accepted. The EDGAR Filer Manual is available for Web site viewing and printing; the address for the Filer Manual is *https://www.sec.gov/info/edgar/edmanuals.htm*. You can obtain paper copies of the EDGAR Filer Manual from the following address: Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. You can also inspect the document at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

---

[4] 5 U.S.C. 553(b).

[5] 5 U.S.C. 601–612.

[6] 5 U.S.C. 553(d)(3).

[7] 15 U.S.C. 77f, 77g, 77h, 77j, and 77s(a).

[8] 15 U.S.C. 78c, 78*l*, 78m, 78n, 78o, 78w, and 78*ll*.

[9] 15 U.S.C. 77sss.

[10] 15 U.S.C. 80a–8, 80a–29, 80a–30, and 80a–37.

By the Commission.

Dated: September 20, 2016.

Brent J. Fields,

Secretary.

[FR Doc. 2016–23562 Filed 9–29–16; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 40

[Docket No. RM15–11–000; Order No. 830]

Reliability Standard for Transmission System Planned Performance for Geomagnetic Disturbance Events

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) approves Reliability Standard TPL–007–1 (Transmission System Planned Performance for Geomagnetic Disturbance Events). The North American Electric Reliability Corporation (NERC), the Commission-certified Electric Reliability Organization, submitted Reliability Standard TPL–007–1 for Commission approval in response to a Commission directive in Order No. 779. Reliability Standard TPL–007–1 establishes requirements for certain registered entities to assess the vulnerability of their transmission systems to geomagnetic disturbance events (GMDs), which occur when the sun ejects charged particles that interact with and cause changes in the earth's magnetic fields. Applicable entities that do not meet certain performance requirements, based on the results of their vulnerability assessments, must develop a plan to achieve the performance requirements. In addition, the Commission directs NERC to develop modifications to Reliability Standard TPL–007–1: To modify the benchmark GMD event definition set forth in Attachment 1 of Reliability Standard TPL–007–1, as it pertains to the required GMD Vulnerability Assessments and transformer thermal impact assessments, so that the definition is not based solely on spatially-averaged data; to require the collection of necessary geomagnetically induced current monitoring and magnetometer data and to make such data publicly available; and to include a one-year deadline for the development of corrective action plans and two and four-year deadlines to complete mitigation actions involving non-hardware and hardware mitigation, respectively. The Commission also directs NERC to submit a work plan and, subsequently, one or more informational filings that address specific GMD-related research areas.

DATES: This rule will become effective November 29, 2016.

FOR FURTHER INFORMATION CONTACT:

Regis Binder (Technical Information), Office of Electric Reliability, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, Telephone: (301) 665–1601, *Regis.Binder@ferc.gov.*

Matthew Vlissides (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, Telephone: (202) 502–8408, *Matthew.Vlissides@ferc.gov.*

SUPPLEMENTARY INFORMATION:

Order No. 830

Final Rule

1. Pursuant to section 215 of the Federal Power Act (FPA), the Commission approves Reliability Standard TPL–007–1 (Transmission System Planned Performance for Geomagnetic Disturbance Events).[1] The North American Electric Reliability Corporation (NERC), the Commission-certified Electric Reliability Organization (ERO), submitted Reliability Standard TPL–007–1 for Commission approval in response to a Commission directive in Order No. 779.[2] Reliability Standard TPL–007–1 establishes requirements for certain registered entities to assess the vulnerability of their transmission systems to geomagnetic disturbance events (GMDs), which occur when the sun ejects charged particles that interact with and cause changes in the earth's magnetic fields. Reliability Standard TPL–007–1 requires applicable entities that do not meet certain performance requirements, based on the results of their vulnerability assessments, to develop a plan to achieve the requirements. Reliability Standard TPL–007–1 addresses the directives in Order No. 779 by requiring applicable Bulk-Power System owners and operators to conduct initial and on-going vulnerability assessments regarding the potential impact of a benchmark GMD event on the Bulk-Power System as a whole and on Bulk-Power System components.[3] In addition, Reliability Standard TPL–007–1 requires applicable entities to develop and implement corrective action plans to mitigate identified vulnerabilities.[4] Potential mitigation strategies identified in the proposed Reliability Standard include, but are not limited to, the installation, modification or removal of transmission and generation facilities and associated equipment.[5] Accordingly, Reliability Standard TPL–007–1 constitutes an important step in addressing the risks posed by GMD events to the Bulk-Power System.

2. In addition, pursuant to section 215(d)(5) of the FPA, the Commission directs NERC to develop modifications to Reliability Standard TPL–007–1: (1) To revise the benchmark GMD event definition set forth in Attachment 1 of Reliability Standard TPL–007–1, as it pertains to the required GMD Vulnerability Assessments and transformer thermal impact assessments, so that the definition is not based solely on spatially-averaged data; (2) to require the collection of necessary geomagnetically induced current (GIC) monitoring and magnetometer data and to make such data publicly available; and (3) to include a one-year deadline for the completion of corrective action plans and two- and four-year deadlines to complete mitigation actions involving non-hardware and hardware mitigation, respectively.[6] The Commission directs NERC to submit these revisions within 18 months of the effective date of this Final Rule. The Commission also directs NERC to submit a work plan (GMD research work plan) within six months of the effective date of this Final Rule and, subsequently, one or more

---

[1] 16 U.S.C. 824o.

[2] *Reliability Standards for Geomagnetic Disturbances*, Order No. 779, 78 FR 30,747 (May 23, 2013), 143 FERC ¶ 61,147, *reh'g denied*, 144 FERC ¶ 61,113 (2013).

[3] *See* Reliability Standard TPL–007–1, Requirement R4; *see also* Order No. 779, 143 FERC ¶ 61,147 at PP 67, 71.

[4] *See* Reliability Standard TPL–007–1, Requirement R7; *see also* Order No. 779, 143 FERC ¶ 61,147 at P 79.

[5] *See* Reliability Standard TPL–007–1, Requirement R7.

[6] 16 U.S.C. 824o(d)(5).

informational filings that address specific GMD-related research areas.

I. Background

A. Section 215 and Mandatory Reliability Standards

3. Section 215 of the FPA requires the Commission to certify an ERO to develop mandatory and enforceable Reliability Standards, subject to Commission review and approval. Once approved, the Reliability Standards may be enforced in the United States by the ERO, subject to Commission oversight, or by the Commission independently.[7]

B. GMD Primer

4. GMD events occur when the sun ejects charged particles that interact with and cause changes in the earth's magnetic fields.[8] Once a solar particle is ejected, it can take between 17 to 96 hours (depending on its energy level) to reach earth.[9] A geoelectric field is the electric potential (measured in volts per kilometer (V/km)) on the earth's surface and is directly related to the rate of change of the magnetic fields.[10] A geoelectric field has an amplitude and direction and acts as a voltage source that can cause GICs to flow on long conductors, such as transmission lines.[11] The magnitude of the geoelectric field amplitude is impacted by local factors such as geomagnetic latitude and local earth conductivity.[12] Geomagnetic latitude is the proximity to earth's magnetic north and south poles, as opposed to earth's geographic poles. Local earth conductivity is the ability of the earth's crust to conduct electricity at a certain location to depths of hundreds of kilometers down to the earth's mantle. Local earth conductivity impacts the magnitude (*i.e.*, severity) of the geoelectric fields that are formed during a GMD event by, all else being equal, a lower earth conductivity resulting in higher geoelectric fields.[13]

C. Order No. 779

5. In Order No. 779, the Commission directed NERC, pursuant to section 215(d)(5) of the FPA, to develop and submit for approval proposed Reliability Standards that address the impact of geomagnetic disturbances on the reliable operation of the Bulk-Power System. The Commission based its directive on the potentially severe, wide-spread impact on the reliable operation of the Bulk-Power System that can be caused by GMD events and the absence of existing Reliability Standards to address GMD events.[14]

6. Order No. 779 directed NERC to implement the directive in two stages. In the first stage, the Commission directed NERC to submit, within six months of the effective date of Order No. 779, one or more Reliability Standards (First Stage GMD Reliability Standards) that require owners and operators of the Bulk-Power System to develop and implement operational procedures to mitigate the effects of GMDs consistent with the reliable operation of the Bulk-Power System.[15]

7. In the second stage, the Commission directed NERC to submit, within 18 months of the effective date of Order No. 779, one or more Reliability Standards (Second Stage GMD Reliability Standards) that require owners and operators of the Bulk-Power System to conduct initial and on-going assessments of the potential impact of benchmark GMD events on Bulk-Power System equipment and the Bulk-Power System as a whole. The Commission directed that the Second Stage GMD Reliability Standards must identify benchmark GMD events that specify what severity of GMD events a responsible entity must assess for potential impacts on the Bulk-Power System.[16] Order No. 779 explained that if the assessments identified potential impacts from benchmark GMD events, the Reliability Standards should require owners and operators to develop and implement a plan to protect against instability, uncontrolled separation, or cascading failures of the Bulk-Power System, caused by damage to critical or vulnerable Bulk-Power System equipment, or otherwise, as a result of a benchmark GMD event. The Commission directed that the development of this plan could not be limited to considering operational procedures or enhanced training alone but should, subject to the potential impacts of the benchmark GMD events identified in the assessments, contain strategies for protecting against the potential impact of GMDs based on factors such as the age, condition, technical specifications, system configuration or location of specific equipment.[17] Order No. 779 observed that these strategies could, for example, include automatically blocking GICs from entering the Bulk-Power System, instituting specification requirements for new equipment, inventory management, isolating certain equipment that is not cost effective to retrofit or a combination thereof.

D. Order No. 797

8. In Order No. 797, the Commission approved Reliability Standard EOP–010–1 (Geomagnetic Disturbance Operations).[18] NERC submitted Reliability Standard EOP–010–1 for Commission approval in compliance with the Commission's directive in Order No. 779 corresponding to the First Stage GMD Reliability Standards. In Order No. 797–A, the Commission denied the Foundation for Resilient Societies' (Resilient Societies) request for rehearing of Order No. 797. The Commission stated that the rehearing request "addressed a later stage of efforts on geomagnetic disturbances (*i.e.*, NERC's future filing of Second Stage GMD Reliability Standards) and [that Resilient Societies] may seek to present those arguments at an appropriate time in response to that filing." [19] In particular, the Commission stated that GIC monitoring requirements should be addressed in the Second Stage GMD Reliability Standards.[20]

E. NERC Petition and Reliability Standard TPL–007–1

9. On January 21, 2015, NERC petitioned the Commission to approve Reliability Standard TPL–007–1 and its associated violation risk factors and violation severity levels, implementation plan, and effective dates.[21] NERC also submitted a proposed definition for the term "Geomagnetic Disturbance Vulnerability Assessment or GMD Vulnerability

---

[7] *Id.* 824o(e).

[8] North American Electric Reliability Corp., 2012 Special Reliability Assessment Interim Report: Effects of Geomagnetic Disturbances on the Bulk Power System at i–ii (February 2012), *http://www.nerc.com/files/2012GMD.pdf* (GMD Interim Report).

[9] *Id.* ii.

[10] *Id.*

[11] *Id.*

[12] NERC Petition, Ex. D (White Paper on GMD Benchmark Event Description) at 4.

[13] *Id.*

[14] Order No. 779, 143 FERC ¶ 61,147 at P 3.

[15] *Id.* P 2.

[16] *Id.*

[17] *Id.*

[18] *Reliability Standard for Geomagnetic Disturbance Operations*, Order No. 797, 79 FR 35,911 (June 25, 2014), 147 FERC ¶ 61,209, *reh'g denied*, Order No. 797–A, 149 FERC ¶ 61,027 (2014).

[19] Order No. 797–A, 149 FERC ¶ 61,027 at P 2.

[20] *Id.* P 27 (stating that the Commission continues "to encourage NERC to address the collection, dissemination, and use of geomagnetic induced current data, by NERC, industry or others, in the Second Stage GMD Reliability Standards because such efforts could be useful in the development of GMD mitigation methods or to validate GMD models").

[21] Reliability Standard TPL–007–1 is not attached to this final rule. Reliability Standard TPL–007–1 is available on the Commission's eLibrary document retrieval system in Docket No. RM15–11–000 and on the NERC website, *www.nerc.com.* NERC submitted an errata on February 2, 2015 containing a corrected version of Exhibit A (Proposed Reliability Standard TPL–007–1).

Assessment'' for inclusion in the NERC Glossary of Terms (NERC Glossary). NERC maintains that Reliability Standard TPL–007–1 is just, reasonable, not unduly discriminatory or preferential and in the public interest. NERC further contends that Reliability Standard TPL–007–1 satisfies the directive in Order No. 779 corresponding to the Second Stage GMD Reliability Standards.

10. NERC states that Reliability Standard TPL–007–1 applies to planning coordinators, transmission planners, transmission owners and generation owners who own or whose planning coordinator area or transmission planning area includes a power transformer with a high side, wye-grounded winding connected at 200 kV or higher.[22] NERC explains that the applicability criteria for qualifying transformers in Reliability Standard TPL–007–1 are the same as that for the First Stage GMD Reliability Standard in Reliability Standard EOP–010–1, which the Commission approved in Order No. 797.

11. Reliability Standard TPL–007–1 contains seven requirements. Requirement R1 requires planning coordinators and transmission planners to determine the individual and joint responsibilities in the planning coordinator's planning area for maintaining models and performing studies needed to complete the GMD Vulnerability Assessment required in Requirement R4.

12. Requirement R2 requires planning coordinators and transmission planners to maintain system models and GIC system models needed to complete the GMD Vulnerability Assessment required in Requirement R4.

13. Requirement R3 requires planning coordinators and transmission planners to have criteria for acceptable system steady state voltage limits for their systems during the benchmark GMD event described in Attachment 1 (Calculating Geoelectric Fields for the Benchmark GMD Event).

14. Requirement R4 requires planning coordinators and transmission planners to conduct a GMD Vulnerability Assessment every 60 months using the benchmark GMD event described in Attachment 1 to Reliability Standard TPL–007–1. The benchmark GMD event is based on a 1-in-100 year frequency of occurrence and is composed of four elements: (1) A reference peak geoelectric field amplitude of 8 V/km derived from statistical analysis of historical magnetometer data; (2) a scaling factor to account for local geomagnetic latitude; (3) a scaling factor to account for local earth conductivity; and (4) a reference geomagnetic field time series or wave shape to facilitate time-domain analysis of GMD impact on equipment.[23] The product of the first three elements is referred to as the regional geoelectric field peak amplitude.[24]

15. Requirement R5 requires planning coordinators and transmission planners to provide GIC flow information, to be used in the transformer thermal impact assessment required in Requirement R6, to each transmission owner and generator owner that owns an applicable transformer within the applicable planning area.

16. Requirement R6 requires transmission owners and generator owners to conduct thermal impact assessments on solely and jointly owned applicable transformers where the maximum effective GIC value provided in Requirement R5 is 75 amperes per phase (A/phase) or greater.

17. Requirement R7 requires planning coordinators and transmission planners to develop corrective action plans if the GMD Vulnerability Assessment concludes that the system does not meet the performance requirements in Table 1 (Steady State Planning Events).

F. Notice of Proposed Rulemaking

18. On May 14, 2015, the Commission issued a notice of proposed rulemaking (NOPR) proposing to approve Reliability Standard TPL–007–1.[25] In addition, the Commission proposed to direct that NERC develop three modifications to Reliability Standard TPL–007–1. First, the Commission proposed to direct NERC to revise the benchmark GMD event definition in Reliability Standard TPL–007–1 so that the definition is not based solely on spatially-averaged data. Second, the Commission proposed to direct NERC to revise Reliability Standard TPL–007–1 to require the installation of GIC monitors and magnetometers where necessary. Third, the Commission proposed to direct NERC to revise Reliability Standard TPL–007–1 to require corrective action plans (Requirement R7) to be developed within one year and, with respect to the mitigation actions called for in the corrective action plans, non-hardware mitigation actions to be completed within two years of finishing development of the corrective action plan and hardware mitigation to be completed within four years. The NOPR also proposed to direct NERC to submit a work plan and, subsequently, one or more informational filings that address specific GMD-related research areas and sought comment on certain issues relating to the transformer thermal impact assessments (Requirement R6) and the meaning of language in Table 1 of Reliability Standard TPL–007–1.

19. On August 20, 2015 and October 2, 2015, the Commission issued notices setting supplemental comment periods regarding specific documents. On March 1, 2016, Commission staff led a technical conference on Reliability Standard TPL–007–1 and issues raised in the NOPR.[26]

20. On April 28, 2016, NERC made a filing notifying the Commission that "NERC identified new information that may necessitate a minor revision to a figure in one of the supporting technical white papers. This revision would not require a change to any of the Requirements of the proposed Reliability Standard." [27] On June 28, 2016, NERC submitted the revised technical white papers referenced in the April 28, 2016 filing. On June 29, 2016, the Commission issued a notice setting a supplemental comment period regarding the revised technical white papers submitted by NERC on June 28, 2016.

21. In response to the NOPR and subsequent notices, 28 entities filed initial and supplemental comments. We address below the issues raised in the NOPR and comments. The Appendix to this Final Rule lists the entities that filed comments in response to the NOPR and in response to the supplemental comment period notices.

II. Discussion

22. Pursuant to section 215(d) of the FPA, the Commission approves Reliability Standard TPL–007–1 as just, reasonable, not unduly discriminatory or preferential and in the public interest. While we recognize that scientific and operational research regarding GMD is ongoing, we believe

---

[22] A power transformer with a "high side wye-grounded winding" refers to a power transformer with windings on the high voltage side that are connected in a wye configuration and have a grounded neutral connection. NERC Petition at 13 n.32.

[23] *See* Reliability Standard TPL–007–1, Att. 1; *see also* NERC Petition, Ex. D (White Paper on GMD Benchmark Event Description) at 5.

[24] NERC Petition, Ex. D (White Paper on GMD Benchmark Event Description) at 5.

[25] *Reliability Standard for Transmission System Planned Performance for Geomagnetic Disturbance Events,* Notice of Proposed Rulemaking, 80 FR 29,990 (May 26, 2015), 151 FERC ¶ 61,134 (2015) (NOPR).

[26] Written presentations at the March 1, 2016 Technical Conference and the Technical Conference transcript referenced in this Final Rule are accessible through the Commission's eLibrary document retrieval system in Docket No. RM15–11–000.

[27] NERC April 28, 2016 Filing at 1.

that the potential threat to the bulk electric system warrants Commission action at this time, including efforts to conduct critical GMD research and update Reliability Standard TPL–007–1 as appropriate.

23. First, we find that Reliability Standard TPL–007–1 addresses the directives in Order No. 779 corresponding to the development of the Second Stage GMD Reliability Standards. Reliability Standard TPL–007–1 does this by requiring applicable Bulk-Power System owners and operators to conduct, on a recurring five-year cycle,[28] initial and on-going vulnerability assessments regarding the potential impact of a benchmark GMD event on the Bulk-Power System as a whole and on Bulk-Power System components.[29] In addition, Reliability Standard TPL–007–1 requires applicable entities to develop and implement corrective action plans to mitigate vulnerabilities identified through those recurring vulnerability assessments.[30] Potential mitigation strategies identified in the proposed Reliability Standard include, but are not limited to, the installation, modification or removal of transmission and generation facilities and associated equipment.[31] Accordingly, Reliability Standard TPL–007–1 constitutes an important step in addressing the risks posed by GMD events to the Bulk-Power System.

24. The Commission also approves the inclusion of the term "Geomagnetic Disturbance Vulnerability Assessment or GMD Vulnerability Assessment" in the NERC Glossary; Reliability Standard TPL–007–1's associated violation risk factors and violation severity levels; and NERC's proposed implementation plan and effective dates. The Commission also affirms, as raised for comment in the NOPR, that cost recovery for prudent costs associated with or incurred to comply with Reliability Standard TPL–007–1 and future revisions to the Reliability Standard will be available to registered entities.[32]

25. While we conclude that Reliability Standard TPL–007–1 satisfies the directives in Order No. 779, based on the record developed in this proceeding, the Commission determines that Reliability Standard TPL–007–1 should be modified to reflect the new information and analyses discussed below, as proposed in the NOPR. Accordingly, pursuant to section 215(d)(5) of the FPA, the Commission directs NERC to develop and submit modifications to Reliability Standard TPL–007–1 concerning: (1) The calculation of the reference peak geoelectric field amplitude component of the benchmark GMD event definition; (2) the collection and public availability of necessary GIC monitoring and magnetometer data; and (3) deadlines for completing corrective action plans and the mitigation measures called for in corrective action plans. The Commission directs NERC to develop and submit these revisions for Commission approval within 18 months of the effective date of this Final Rule.

26. Furthermore, to improve the understanding of GMD events generally, the Commission directs NERC to submit within six months from the effective date of this Final Rule a GMD research work plan.[33] Specifically, we direct NERC to: (1) Further analyze the area over which spatial averaging should be calculated for stability studies, including performing sensitivity analyses on squares less than 500 km per side (e.g., 100 km, 200 km); (2) further analyze earth conductivity models by, for example, using metered GIC and magnetometer readings to calculate earth conductivity and using 3–D readings; (3) determine whether new analyses and observations support modifying the use of single station readings around the earth to adjust the spatially averaged benchmark for latitude; (4) research, as discussed below, aspects of the required thermal impact assessments; and (5) in NERC's discretion, conduct any GMD-related research areas generally that may impact the development of new or modified GMD Reliability Standards. We expect that work completed through the GMD research work plan, as well as other analyses facilitated by the increased collection and availability of GIC monitoring and magnetometer data directed herein, will lead to further modifications to Reliability Standard TPL–007–1 as our collective understanding of the threats posed by GMD events improves.

27. Below we discuss the following issues raised in the NOPR and NOPR comments: (1) The benchmark GMD event definition described in Reliability Standard TPL–007–1, Attachment 1 (Calculating Geoelectric Fields for the Benchmark GMD Event); (2) transformer thermal impact assessments in Requirement R6; (3) GMD research work plan; (4) collection and public availability of GIC monitoring and magnetometer data; (5) completion of corrective action plans in Requirement R7; (6) meaning of "minimized" in Table 1 (Steady State Planning Events) of Reliability Standard TPL–007–1; (7) NERC's proposed implementation plan and effective dates; and (8) other issues.

A. Benchmark GMD Event Definition

NERC Petition

28. NERC states that the purpose of the benchmark GMD event is to "provide a defined event for assessing system performance during a low probability, high magnitude GMD event."[34] NERC explains that the benchmark GMD event represents "the most severe GMD event expected in a 100-year period as determined by a statistical analysis of recorded geomagnetic data."[35] The benchmark GMD event definition is used in the GMD Vulnerability Assessments and thermal impact assessment requirements of Reliability Standard TPL–007–1 (Requirements R4 and R6).

29. As noted above, NERC states that the benchmark GMD event definition has four elements: (1) A reference peak geoelectric field amplitude of 8 V/km derived from statistical analysis of historical magnetometer data; (2) a scaling factor to account for local geomagnetic latitude; (3) a scaling factor to account for local earth conductivity; and (4) a reference geomagnetic field time series or wave shape to facilitate time-domain analysis of GMD impact on equipment.[36]

30. The standard drafting team determined that a 1-in-100 year GMD event would cause an 8 V/km reference peak geoelectric field amplitude at 60 degree geomagnetic latitude using Québec's earth conductivity.[37] The standard drafting team stated that:

> the reference geoelectric field amplitude was determined through statistical analysis using . . . field measurements from geomagnetic observatories in northern Europe and the reference (Quebec) earth model . . . . The Quebec earth model is generally resistive and the geological structure is relatively well understood. The statistical analysis resulted in a conservative peak geoelectric field amplitude of approximately 8 V/km . . . .

---

[28] A detailed explanation of the five-year GMD Vulnerability Assessment and mitigation cycle is provided in paragraph 103, *infra.*

[29] *See* Reliability Standard TPL–007–1, Requirement R4; *see also* Order No. 779, 143 FERC ¶ 61,147 at PP 67, 71.

[30] *See* Reliability Standard TPL–007–1, Requirement R7; *see also* Order No. 779, 143 FERC ¶ 61,147 at P 79.

[31] *See* Reliability Standard TPL–007–1, Requirement R7.

[32] NOPR, 151 FERC ¶ 61,134 at P 49 n.60.

[33] Following submission of the GMD research work plan, the Commission will notice the filing for public comment and issue an order addressing its proposed content and schedule.

[34] NERC Petition at 15.

[35] *Id.*

[36] NERC Petition, Ex. D (White Paper on GMD Benchmark Event Description) at 5.

[37] *Id.*

> The frequency of occurrence of this benchmark GMD event is estimated to be approximately 1 in 100 years.[38]

31. The standard drafting team explained that it used field measurements taken from the IMAGE magnetometer chain, which covers Northern Europe, for the period 1993–2013 to calculate the reference peak geoelectric field amplitude used in the benchmark GMD event definition.[39] As described in NERC's petition, the standard drafting team "spatially averaged" four different station groups of IMAGE data, each spanning a square area of approximately 500 km (roughly 310 miles) in width.[40] The standard drafting team justified the use of spatial averaging by stating that Reliability Standard TPL–007–1 is designed to "address wide-area effects caused by a severe GMD event, such as increased var absorption and voltage depressions. Without characterizing GMD on regional scales, statistical estimates could be weighted by local effects and suggest unduly pessimistic conditions when considering cascading failure and voltage collapse."[41]

32. NERC states that the benchmark GMD event includes scaling factors to enable applicable entities to tailor the reference peak geoelectric field to their specific location for conducting GMD Vulnerability Assessments. NERC explains that the scaling factors in the benchmark GMD event definition are applied to the reference peak geoelectric field amplitude to adjust the 8 V/km value for different geomagnetic latitudes and earth conductivities.[42]

33. The standard drafting team also identified a reference geomagnetic field time series from an Ottawa magnetic observatory during a 1989 GMD event that affected Québec.[43] The standard drafting team used this time series to estimate a geoelectric field, represented as a time series (*i.e.*, 10-second values over a period of days), that is expected to occur at 60 degree geomagnetic latitude during a 1-in-100 year GMD event. NERC explains that this time series is used to facilitate time-domain analysis of GMD impacts on equipment.[44]

34. In the sub-sections below, we discuss two issues concerning the benchmark GMD event definition addressed in the NOPR: (1) Reference peak geoelectric field amplitude; and (2) geomagnetic latitude scaling factor.

1. Reference Peak Geoelectric Field Amplitude

NOPR

35. The NOPR proposed to approve the benchmark GMD event definition. The NOPR stated that the "benchmark GMD event definition proposed by NERC complies with the directive in Order No. 779 . . . [c]onsistent with the guidance provided in Order No. 779, the benchmark GMD event definition proposed by NERC addresses the potential widespread impact of a severe GMD event, while taking into consideration the variables of geomagnetic latitude and local earth conductivity."[45]

36. In addition, the NOPR proposed to direct NERC to develop modifications to Reliability Standard TPL–007–1. Specifically, the NOPR proposed to direct NERC to modify the reference peak geoelectric field amplitude component of the benchmark GMD event definition so that it is not calculated based solely on spatially-averaged data. The NOPR explained that this could be achieved, for example, by requiring applicable entities to conduct GMD Vulnerability Assessments (and, as discussed below, thermal impact assessments) using two different benchmark GMD events: The first benchmark GMD event using the spatially-averaged reference peak geoelectric field value (8 V/km) and the second using the non-spatially averaged peak geoelectric field value cited in the GMD Interim Report (20 V/km). The NOPR stated that the revised Reliability Standard could then require applicable entities to take corrective actions, using engineering judgment, based on the results of both assessments. The NOPR explained that applicable entities would not always be required to mitigate to the level of risk identified by the non-spatially averaged analysis; instead, the selection of mitigation would reflect the range of risks bounded by the two analyses, and be based on engineering judgment within this range, considering all relevant information. The NOPR stated that, alternatively, NERC could propose an equally efficient and effective modification that does not rely exclusively on the spatially-averaged reference peak geoelectric field value.

Comments

37. NERC does not support revising the benchmark GMD event definition. NERC maintains that the spatially-averaged reference peak geoelectric field amplitude value in Reliability Standard TPL–007–1 is "technically-justified, scientifically sound, and has been published in a peer-reviewed research journal covering geomagnetism and other topics."[46] NERC contends that the standard drafting team determined that using the non-spatially averaged 20 V/km figure in the GMD Interim Report would "consistently overestimate the geoelectric field of a 1-in-100 year GMD event."[47] NERC states that, by contrast, spatial averaging "properly associates the relevant spatial scales for the analyzed and applied geoelectric fields and would not distort the complexity of the potential impacts of a GMD event."[48] NERC claims that the 500 km-wide square areas used to determine the areas of spatial averaging are "based on consideration of transmission systems and geomagnetic observation patterns . . . [and are] an appropriate scale for a system-wide impact in a transmission system."[49] To support this position, NERC cites a June 2015 peer-reviewed publication authored in part by some members of the standard drafting team.[50]

38. Industry commenters, largely represented by the Trade Associations' comments, do not support revising the benchmark GMD event definition.[51] The Trade Associations' reasons largely mirror NERC's. While recognizing that the spatially-averaged reference peak geoelectric field amplitude is lower than

---

[38] *Id.* (footnotes omitted).

[39] *Id.* at 8. The International Monitor for Auroral Geomagnetic Effects (IMAGE) consists of 31 magnetometer stations in northern Europe maintained by 10 institutes from Estonia, Finland, Germany, Norway, Poland, Russia, and Sweden. *See* IMAGE website, *http://space.fmi.fi/image/beta/?page=home#*.

[40] As applied by the standard drafting team, spatial averaging refers to the averaging of geoelectric field amplitude readings within a given area. NERC Petition, Ex. D (White Paper on GMD Benchmark Event Description) at 9.

[41] NERC Petition, Ex. D (White Paper on GMD Benchmark Event Description) at 9.

[42] NERC Petition at 18–19.

[43] NERC Petition, Ex. D (White Paper on GMD Benchmark Event Description) at 5–6, 15–16 ("the reference geomagnetic field waveshape was selected after analyzing a number of recorded GMD events . . . the March 13–14, 1989 GMD event, measured at NRCan's Ottawa geomagnetic observatory, was selected as the reference geomagnetic field waveform because it provides generally conservative results when performing thermal analysis of power transformers").

[44] *Id.* at 5–6.

[45] NOPR, 151 FERC ¶ 61,134 at P 32.

[46] NERC Comments at 6.

[47] *Id.* at 7.

[48] *Id.* at 8.

[49] *Id.*

[50] *See* Pulkkinen, A., Bernabeu, E., Eichner, J., Viljanen, A., Ngwira, C., "Regional-Scale High-Latitude Extreme Geoelectric Fields Pertaining to Geomagnetically Induced Currents," Earth, Planets and Space (June 19, 2015) (2015 Pulkkinen Paper).

[51] Trade Associations Comments at 13–18. AEP, APS, ATC, BPA, CEA, Hydro One, ITC, Joint ISOs/RTOs and Exelon indicated that they do not support the NOPR proposal in separate comments and/or by joining the Trade Associations' comments. *See* AEP Comments at 3; APS Comments at 2; ATC Comments at 3; BPA Comments at 3–4; CEA Comments at 8–13; Hydro One Comments 1–2; ITC Comments at 3–5; Joint ISOs/RTOs Comments at 4–5; Exelon Comments at 2.

the non-spatially averaged figure, the Trade Associations contend that the non-spatially averaged value is inappropriate because: (1) The peak geoelectric field only affects relatively small areas and quickly declines with distance from the peak; (2) Reliability Standard TPL–007–1 is intended to address the wide-scale effects of a GMD event; and (3) the benchmark GMD event definition is designed to provide a realistic estimate of wide-area effects caused by a severe GMD event. The Trade Associations contend that a non-spatially averaged reference peak geoelectric field amplitude "would be weighted by local effects and suggest unrealistic conditions for system analysis . . . [which] could lead to unnecessary costs for customers, while yielding very little tangible benefit to reliability." [52] Like NERC, the Trade Associations cite to the 2015 Pulkkinen Paper to support the use of 500 km-wide squares in performing the spatial averaging analysis. The Trade Associations note, however, that the selection of 500 km is "only the beginning . . . [of the] exploration of spatial geoelectric field structures pertaining to extreme GIC." [53]

39. The Trade Associations, while not supportive of the NOPR proposal, recommend that if the Commission remains concerned about relying on NERC's proposed spatially-averaged reference peak geoelectric field amplitude, the Commission should:

> allow NERC to further determine the appropriate localized studies to be performed by moving the "local hot spot" around a planning area. This approach may better ensure that the peak values only impact a local area instead of unrealistically projecting uniform peak values over a broad area. This approach also should better align with the Commission's concerns because this type of study would more accurately reflect the real-world impact of a GMD event on the [Bulk-Power System]. The Trade Associations understand that existing planning tools may not yet have such capabilities, but the tools can be modified to allow such study.[54]

40. Industry commenters raise other concerns with the NOPR proposal. CEA states that it would be inappropriate to rely on the non-spatially averaged 20 V/km reference peak geoelectric field figure because that figure is found in a single publication. CEA also contends that it is impractical to use "engineering judgment" to weigh the GMD Vulnerability Assessments using the spatially-averaged and non-spatially averaged reference peak geoelectric field amplitudes, as described in the NOPR.[55] ITC states that NERC's proposal is reasonable and that the reference peak geoelectric field amplitude value can be revised periodically based on new information. Joint ISOs/RTOs state that the Commission should afford due weight to NERC's technical expertise.

41. A September 2015 paper prepared by the Los Alamos National Laboratory states that it analyzed the IMAGE data using a different methodology to calculate reference peak geoelectric field amplitude values based on each of eight different magnetometer installations in Northern Europe. However, unlike the standard drafting team, the Los Alamos Paper did not spatially average the IMAGE data. The authors calculated peak geoelectric field amplitudes ranging from 8.4 V/km to 16.6 V/km, with a mean of the eight values equal to 13.2 V/km.[56] The authors used a statistical formula and probability distribution to determine their 1-in-100 year GMD event parameters, as opposed to the 20 V/km non-spatially averaged event from the 2012 paper cited in the GMD Interim Report that visually extrapolated the data.

42. Roodman contends that "NERC's 100-year benchmark GMD event is appropriately conservative in magnitude (except perhaps in the southern-most US) if unrealistic in some other respects." [57] Roodman states that "overall NERC's analytical frame does not strongly clash with the data." [58] However, Roodman contends that actual data support local hot-spots in a larger region of lower magnitude geoelectric fields that are not typically uniform in magnitude or direction.[59] Roodman addresses comments by Kappenman against the benchmark GMD event by stating that the Oak Ridge Report's Meta-R-319 study, authored by Kappenman, modeled a 1-in-100 year GMD event based largely on misunderstandings of historic GMDs, both in magnitude and geographic footprint.[60] Roodman recommends that the Commission "require a much larger array of events for simulation" in light of the "deep uncertainty and complexity of the GMD." [61]

43. Commenters opposed to the benchmark GMD event definition proposed by NERC maintain that the standard drafting team significantly underestimated the reference peak geoelectric field amplitude value for a 1-in-100 year GMD event by relying on data from the IMAGE system and by applying spatial averaging to that data set.[62] For example, Resilient Societies states that the standard drafting team should have analyzed "real-world data from within the United States and Canada, including magnetometer readings from the [USGS] and Natural Resources Canada observatories . . . [h]ad NERC and the Standard Drafting Team collected and analyzed available real-world data, they would have likely found that the severity of GMD in 1-in-100 Year reference storm had been set far below a technically justified level and without a 'strong technical basis.' " [63] Likewise, Kappenman contends that there are multiple examples where the benchmark GMD event and the standard drafting team's model for calculating geoelectric fields under-predict actual, historical GIC readings.[64] Commenters opposed to NERC's proposal variously argue that the reference peak geoelectric field amplitude should be set at a level commensurate with the 1921 Railroad Storm or 1859 Carrington Event or at the 20 V/km level cited in the GMD Interim Report.[65]

Commission Determination

44. The Commission approves the reference peak geoelectric field amplitude figure proposed by NERC. In addition, the Commission, as proposed in the NOPR, directs NERC to develop revisions to the benchmark GMD event definition so that the reference peak geoelectric field amplitude component

---

[52] Trade Associations Comments at 15.

[53] *Id.* at 17 (quoting 2015 Pulkkinen Paper at 6).

[54] *Id.* at 16.

[55] *See also* Hydro One Comments at 1–2; Resilient Societies Comments at 24–25.

[56] Rivera, M., Backhaus, S., "Review of the GMD Benchmark Event in TPL–007–1," Los Alamos National Laboratory (September 2015) (Los Alamos Paper).

[57] Roodman Comments at 4. Roodman criticizes the proposed benchmark GMD event definition because it assumes that the induced electrical field resulting from a GMD event is spatially uniform. Roodman also contends that a GMD event that is less than a 1-in-100 year storm could potentially damage transformers. *Id.* at 12–14.

[58] Roodman Comments at 9.

[59] *Id.* at 10, 12–13.

[60] *Id.* at 5–6 (citing Oak Ridge National Laboratory, Geomagnetic Storms and Their Impacts on the U.S. Power Grid: Meta–R–319 at pages I–1 to I–3 (January 2010), *http://www.ornl.gov/sci/ees/etsd/pes/pubs/ferc_Meta-R-319.pdf* (Meta–R–319 Study).

[61] *Id.* at 15.

[62] *See, e.g.,* JINSA Comments at 2; Emprimus Comments at 1. *See also* Gaunt Comments at 9 (indicating that the proposed benchmark GMD event definition may underestimate the effects of a 1-in-100 GMD event).

[63] Resilient Societies Comments at 20–21.

[64] Kappenman Comments at 15–29.

[65] *See, e.g.,* EIS Comments at 2 (advocating use of 20 V/km); Gaunt Comments at 6–9 (contending that NERC's proposed figure results in a "possible underestimation of the effects of GICs" without suggesting an alternative figure); JINSA Comments at 2 (advocating use of 20 V/km); Emprimus Comments at 1 (advocating use of 20 V/km); Briggs Comments at 1 (advocating that the benchmark GMD event should be a "Carrington Class solar superstorm").

is not based solely on spatially-averaged data. The Commission directs NERC to submit this revision within 18 months of the effective date of this Final Rule.

45. NERC and industry comments do not contain new information to support relying solely on spatially-averaged data to calculate the reference peak geoelectric field amplitude in the benchmark GMD event definition. The 2015 Pulkkinen Paper contains the same justifications for spatial averaging as those presented in NERC's petition. In addition, the 2015 Pulkkinen Paper validates the NOPR's concerns with relying solely on spatial averaging generally and with the method used by the standard drafting team to spatially average the IMAGE data specifically. The 2015 Pulkkinen Paper, for example, states that "regional scale geoelectric fields have not been considered earlier from the statistical and extreme analyses standpoint" and "selection of an area of 500 km [for spatial averaging] . . . [is] subjective."[66] Further, the 2015 Pulkkinen Paper notes that "we emphasize that the work described in this paper is only the beginning in our exploration of spatial geoelectric field structures pertaining to extreme GIC . . . [and] [w]e will . . . expand the statistical analyses to include characterization of multiple different spatial scales."[67] On the latter point, NERC "agrees that such research would provide additional modeling insights and supports further collaborative efforts between space weather researchers and electric utilities through the NERC GMD Task Force."[68] These statements support the NOPR's observation that the use of spatial averaging in this context is new, and thus there is a dearth of information or research regarding its application or appropriate scale.

46. While we believe our directive addresses concerns with relying solely on spatially-averaged data, we reiterate the position expressed in the NOPR that a GMD event will have a peak value in one or more location(s) and the amplitude will decline over distance from the peak; and, as a result, imputing the highest peak geoelectric field value in a planning area to the entire planning area may incorrectly overestimate GMD impacts.[69] Accordingly, our directive should not be construed to prohibit the use of spatial averaging in some capacity, particularly if more research results in a better understanding of how spatial averaging can be used to reflect actual GMD events.

47. The NOPR proposed to direct NERC to revise Reliability Standard TPL–007–1 so that the reference peak geoelectric field value is not based solely on spatially-averaged data. NERC and industry comments largely focused on the NOPR's discussion of one possible example to address the directive (*i.e.*, by running GMD Vulnerability Assessments using spatially-averaged and non-spatially averaged reference peak geoelectric field amplitudes). However, while the method discussed in the NOPR is one possible option, the NOPR did not propose to direct NERC to develop revisions based on that option or any specific option. The Trade Associations' comments, discussed above, demonstrate that there is another way to address the NOPR directive (*i.e.*, by performing planning models that also assess planning areas for localized "hot spots"). This approach may have merit if, for example, the geographic size of the hot spot is supported by actual data and the hot spot is centered over one or more locations that include an entity's facilities that become critical during a GMD event. Without pre-judging how NERC proposes to address the Commission's directive, NERC's response to this directive should satisfy the NOPR's concern that reliance on spatially-averaged data alone does not address localized peaks that could potentially affect the reliable operation of the Bulk-Power System.

48. We believe our directive should also largely address the comments submitted by entities opposed to NERC's proposed reference peak geoelectric field amplitude. Those commenters endorsed using a higher reference peak geoelectric field amplitude value, such as the 20 V/km cited in the GMD Interim Report. At the outset, we observe that the comments critical of the standard drafting team's use of the IMAGE data only speculate that had the standard drafting team used other sources, the calculated reference peak geoelectric field amplitude value would have been higher.[70] Moreover, among the commenters critical of NERC's proposal, there is disagreement over the magnitude of historical storms which some of these commenters would use as a model.[71] While NERC has discretion on how to propose to address our directive, NERC could revise Reliability Standard TPL–007–1 to apply a higher reference peak geoelectric field amplitude value to assess the impact of localized hot spots on the Bulk-Power System, as suggested by the Trade Associations. The effects of such hot spots could include increases in GIC levels, volt-ampere reactive power consumption, harmonics on the Bulk-Power System (and associated misoperations) and transformer heating. Moreover, the directive to revise Reliability Standard TPL–007–1 and, as discussed below, the directives to research geomagnetic latitude scaling factors and earth conductivity models as part of the GMD research work plan and to revise Reliability Standard TPL–007–1 to require the collection of necessary GIC monitoring and magnetometer data to validate GMD models should largely address or at least help to focus-in on factors that may be causing any inaccuracies in the standard drafting team's model.

49. Consistent with Order No. 779, the Commission does not specify a particular reference peak geoelectric field amplitude value that should be applied to hot spots given present uncertainties. While 20 V/km would seem to be a possible value, the Los Alamos Paper suggests that the 20 V/km figure may be too high. The Los Alamos Paper analyzed the non-spatially averaged IMAGE data to calculate a reference peak geoelectric field amplitude range (*i.e.*, 8.4 V/km to 16.6 V/km) that is between NERC's proposed spatially-averaged value of 8 V/km and the non-spatially averaged 20 V/km figure cited in the GMD Interim Report.

50. Although the NOPR did not propose to direct NERC to submit revisions to Reliability Standard TPL–007–1 by a certain date with respect to the benchmark GMD event definition, the Commission determines that it is appropriate to impose an 18-month deadline from the effective date of this Final Rule. As discussed below, the Commission approves the five-year implementation period for Reliability Standard TPL–007–1 proposed by NERC. Having NERC submit revisions to the benchmark GMD event definition within 18 months of the effective date of this Final Rule, with the Commission acting promptly on the revised Reliability Standard, should afford

---

[66] 2015 Pulkkinen Paper at 2.

[67] *Id.* at 6.

[68] NERC Comments at 8.

[69] NOPR, 151 FERC ¶ 61,134 at P 35.

[70] *See, e.g.*, Resilient Societies Comments at 21 ("Had NERC and the Standard Drafting Team collected and analyzed available real-world data, they *would have likely found* that the severity of GMD in 1-in-100 Year reference storm had been set far below a technically justified level . . ." (emphasis added)).

[71] *See, e.g.*, Gaunt Comments at 13 (stating that the 1859 Carrington Event is "probably outside the re-occurrence frequency of 1:100 years adopted by NERC for the benchmark event"); Briggs Comments at 1 (advocating using a "'Carrington Class' super storm" as the benchmark GMD event).

enough time to apply the revised benchmark GMD event definition in the first GMD Vulnerability Assessment under the timeline set forth in Reliability Standard TPL–007–1's implementation plan. If circumstances, such as the complexity of the revised benchmark GMD event, require it, NERC may propose and justify a revised implementation plan.

2. Geomagnetic Latitude Scaling Factor

NOPR

51. The NOPR proposed to approve the geomagnetic latitude scaling factor in NERC's proposed benchmark GMD event definition. However, the NOPR sought comment on whether, in light of studies indicating that GMD events could have pronounced effects on lower geomagnetic latitudes, a modification is warranted to reduce the impact of the scaling factors.[72]

Comments

52. NERC contends that the geomagnetic latitude scaling factor in Reliability Standard TPL–007–1 "accurately models the reduction of induced geoelectric fields that occurs over the mid-latitude region during a 100-year GMD event scenario . . . [and] describes the observed drop in geoelectric field that has been exhibited in analysis of major recorded geomagnetic storms." [73] NERC maintains that modifying the scaling factor is not technically justified based on the publications cited in the NOPR. NERC states that the first paper cited in the NOPR is based on models that are not mature and reflect a 1-in-150 year storm. NERC contends that the second paper does not clearly show that the purported transformer damage in South Africa was the result of abnormally high GICs during the October 2003 Halloween Storm. NERC further states that the standard drafting team analyzed the October 2003 Halloween Storm when developing the proposed geomagnetic latitude scaling factor.

53. The Trade Associations support the geomagnetic latitude scaling factor proposed by NERC. Like NERC, the Trade Associations contend that the papers cited in the NOPR do not support modifications because the models in the first paper "remain highly theoretical and not sufficiently validated" and because the second paper likely involved other causal factors leading to the transformer failure.[74] Joint ISOs/RTOs also support the geomagnetic latitude scaling factor proposed by NERC. ITC states that NERC's proposal is a "reasonable approach given the current state of the science pertaining to GMD . . . [but] that as the science pertaining to GMD matures and more data becomes available, the scaling factors should be revisited and revised." [75] ITC suggests revisiting the geomagnetic latitude scaling factor every five years to incorporate any new developments in GMD science.

54. Several commenters question or disagree with the geomagnetic latitude scaling factors in Reliability Standard TPL–007–1 based on simulations and reports of damage to transformers in areas expected to be at low risk due to their geomagnetic latitude.[76] EIS contends that the proposed geomagnetic latitude scaling factor's assumption of a storm centered at 60 degrees geomagnetic latitude is inconsistent with a study relied upon by NERC.[77] The Los Alamos Paper's analysis suggests that NERC's proposed geomagnetic latitude scaling factors, while they fit well with weaker historical GMD events from which they were derived, may not accurately represent the effects of a 1-in-100 year GMD event at lower geomagnetic latitudes. The Los Alamos Paper states that a model of the electrojet is needed to "effectively extrapolate the small to moderate disturbance data currently in the historical record to disturbances as large as the TPL–007–1 Benchmark Event." [78] The Los Alamos Paper uses a larger number of geomagnetic disturbances (122 instead of 12) and a wider range of observatories by using the world-wide SuperMAG magnetometer array data, which includes the INTERMAGNET data used to support NERC's geomagnetic latitude scaling factors. The Los Alamos Paper shows that for more severe storms (Dst < -300, for which there are nine storms in the data set) the NERC scaling factors tend to be low, off by a factor of up to two or three at some latitudes. The Los Alamos Paper also recommends "an additional degree of conservatism in the mid-geomagnetic latitudes" until such time as a model is developed.[79] The Los Alamos Paper authors recommend a factor of 2 as a conservative correction.

Commission Determination

55. The Commission approves the geomagnetic latitude scaling factor in the benchmark GMD event definition. In addition, the Commission directs NERC to conduct further research on geomagnetic latitude scaling factors as part of the GMD research work plan discussed below.

56. Based on the record, the Commission finds sufficient evidence to conclude that lower geomagnetic latitudes are, to some degree, less susceptible to the effects of GMD events. The issue identified in the NOPR and by some commenters focused on the specific scaling factors in Reliability Standard TPL–007–1 in light of some analyses and anecdotal evidence suggesting that lower geomagnetic latitudes may be impacted by GMDs to a larger degree than reflected in Reliability Standard TPL–007–1.

57. The geomagnetic latitude scaling factor in Reliability Standard TPL–007–1 is supported by some of the available research.[80] In addition, with the

---

[72] NOPR, 151 FERC ¶ 61,134 at P 37 (citing Ngwira, C.M., Pulkkinen, A., Kuznetsova, M.M., Glocer, A., "Modeling extreme 'Carrington-type' space weather events using three-dimensional global MHD simulations," 119 Journal of Geophysical Research: Space Physics 4472 (2014) (finding that in Carrington-type events "the region of large induced ground electric fields is displaced further equatorward . . . [and] thereby may affect power grids . . . such as [those in] southern states of [the] continental U.S."); Gaunt, C.T., Coetzee, G., "Transformer Failures in Regions Incorrectly Considered to have Low GIC-Risk," 2007 IEEE Lausanne 807 (July 2007) (stating that twelve transformers were damaged and taken out of service in South Africa (at −40 degrees latitude) during the October 2003 Halloween Storm GMD event)). *See also* Liu, C., Li, Y., Pirjola, R., "Observations and modeling of GIC in the Chinese large-scale high-voltage power networks," Journal Space Weather Space Climate 4 at A03–p6 (2014) (Liu Paper), *http://www.swsc-journal.org/articles/swsc/pdf/2014/01/swsc130009.pdf* (finding that GICs of about 25A/phase had been measured in a transformer at a nuclear power plant at 22.6 degrees north latitude (significantly further away from the magnetic pole than Florida)).

[73] NERC Comments at 9 (citing Ngwira, C., Pulkkinen, A., Wilder, F., Crowley, G., "Extended Study of Extreme Geoelectric Field Event Scenarios for Geomagnetically Induced Current Applications," 11 Space Weather 121 (2013) (Ngwira 2013 Paper)).

[74] Trade Associations Comments at 18–19.

[75] Joint ISOs/RTOs Comments at 5.

[76] *See, e.g.*, Gaunt Comments at 6; JINSA Comments at 2; Emprimus Comments at 2–3; Roodman Comments at 9; Resilient Societies Comments at 31–31; Kappenman Comments at 41–42.

[77] EIS Comments at 5 (citing Ngwira 2013 Paper).

[78] Los Alamos Paper at 12.

[79] *Id.*

[80] *See* NERC Comments at 9 (citing Ngwira 2013 Paper). We disagree with the contention made by EIS that NERC's proposed geomagnetic latitude scaling factors are inconsistent with the Ngwira 2013 Paper. EIS maintains that the Ngwira 2013 Paper supports the conclusion that the benchmark GMD event should be centered at 50 degrees geomagnetic latitude instead of the 60 degree geomagnetic latitude figure in Reliability Standard TPL–007–1. The Ngwira 2013 Paper contains no such conclusion. Instead, the Ngwira 2013 Paper found that the latitude threshold boundary is a transition region having a definite lower bound of 50 degrees geomagnetic latitude but with an upper range as high as 55 degrees geomagnetic latitude. Ngwira 2013 Paper at 127, 130. The Ngwira 2013 Paper also stated that its findings were "in agreement with earlier observations by [Thomson et al., 2011] and more recently by [Pulkkinen et al.,

Continued

exception of the Los Alamos Paper, commenters did not provide new information on the proposed scaling factor nor did commenters suggest alternative scaling factors. However, the Commission finds that there are enough questions regarding the effects of GMDs at lower geomagnetic latitudes to warrant directing NERC to study this issue further as part of the GMD research work plan. The Los Alamos Paper and the sources cited in the NOPR are suggestive that a 1-in-100 year GMD event could have a greater impact on lower geomagnetic latitudes than NERC's proposed scaling factor assumes. But, as the Los Alamos Paper recognizes, the current absence of historical data on large GMD events precludes a definitive conclusion based on an empirical analysis of historical observations. Moreover, in prepared comments for the March 1, 2016 Technical Conference, Dr. Backhaus, one of the authors of the Los Alamos Paper, recommended that "the current NERC analysis should be adopted and further analysis performed with additional observational data and severe disturbance modeling efforts with the intent of refining the geomagnetic latitude scaling law in future revisions."[81] The Commission directs NERC to reexamine the geomagnetic latitude scaling factors in Reliability Standard TPL–007–1 as part of the GMD research work plan, including using existing models and developing new models to extrapolate from historical data on small to moderate GMD events the impacts of a large, 1-in-100 year GMD event on lower geomagnetic latitudes.

B. Thermal Impact Assessments

NERC Petition

58. Reliability Standard TPL–007–1, Requirement R6 requires owners of transformers that are subject to the Reliability Standard to conduct thermal analyses to determine if the transformers would be able to withstand the thermal effects associated with a benchmark GMD event. NERC states that transformers are exempt from the thermal impact assessment requirement if the maximum effective GIC in the transformer is less than 75 A/phase during the benchmark GMD event as determined by an analysis of the system. NERC explains that "based on available power transformer measurement data, transformers with an effective GIC of less than 75 A/phase during the Benchmark GMD Event are unlikely to exceed known temperature limits established by technical organizations."[82]

59. As provided in Requirements R5 and R6, "the maximum GIC value for the worst case geoelectric field orientation for the benchmark GMD event described in Attachment 1" determines whether a transformer satisfies the 75 A/phase threshold. If the 75 A/phase threshold is satisfied, Requirement R6 states, in relevant part, that a thermal impact assessment should be conducted on the qualifying transformer based on the effective GIC flow information provided in Requirement R5.

60. In its June 28, 2016 filing, NERC states that it identified an error in Figure 1 (Upper Bound of Peak Metallic Hot Spot Temperatures Calculated Using the Benchmark GMD Event) of the White Paper on Screening Criterion for Transformer Thermal Impact Assessment that resulted in incorrect plotting of simulated power transformer peak hot-spot heating from the benchmark GMD event. NERC revised Figure 1 in the White Paper on Screening Criterion for Transformer Thermal Impact Assessment and made corresponding revisions to related text, figures and tables throughout the technical white papers supporting the proposed standard. NERC maintains that even with the revision to Figure 1, "the standard drafting team determined that the 75 A per phase threshold for transformer thermal impact assessment remains a valid criterion . . . [and] it is not necessary to revise any Requirements of the proposed Reliability Standard."[83]

NOPR

61. The NOPR proposed to approve the transformer thermal impact assessments in Requirement R6. In addition, as with the benchmark GMD event definition, the NOPR proposed to direct NERC to revise Requirement R6 to require registered entities to apply spatially averaged and non-spatially averaged peak geoelectric field values, or some equally efficient and effective alternative, when conducting thermal impact assessments. The NOPR also noted that Requirement R6 does not use the maximum GIC-producing orientation to conduct the thermal assessment for qualifying transformers; instead, the requirement uses the effective GIC time series described in Requirement R5.2 to conduct the thermal assessment on qualifying transformers. The NOPR sought comment from NERC as to why qualifying transformers are not assessed for thermal impacts using the maximum GIC-producing orientation and directed NERC to address whether, by not using the maximum GIC-producing orientation, the required thermal impact assessments could underestimate the impact of a benchmark GMD event on a qualifying transformer.

Comments

62. NERC opposes modifying the thermal impact assessments in Requirement R6 so that the assessments do not rely only on spatially-averaged data. NERC claims that the benchmark GMD event definition will "result in GIC calculations that are appropriately scaled for system-wide assessments."[84] NERC also contends that the "analysis performed by the standard drafting team of the impact of localized enhanced geoelectric fields on the GIC levels in transformers indicates that relatively few transformers in the system are affected."[85] In response to the question in the NOPR of why qualifying transformers are not assessed for thermal impacts using the maximum GIC producing orientation, NERC states that "the orientation of the geomagnetic field varies widely and continuously during a GMD event . . . [and] would be aligned with the maximum GIC-producing orientation for only a few minutes."[86] NERC concludes that "[i]n the context of transformer hot spot heating with time constants in the order of tens of minutes, alignment with any particular orientation for a few minutes at a particular point in time is not a driving concern."[87] NERC further states that the wave shape used in Reliability Standard TPL–007–1 provides "generally conservative results when performing thermal analysis of power transformers."[88]

63. The Trade Associations and CEA do not support the proposed NOPR directive because, they state, it focuses too heavily on individual transformers. The Trade Associations maintain that Reliability Standard TPL–007–1 "was never intended to address specific localized areas that might experience peak conditions and affect what we understand to be a very small number of assets that are unlikely to initiate a cascading outage."[89]

2012], which estimated the location to be within 50 [degrees]–62 [degrees]." *Id.* at 124.

[81] Statement of Scott Backhaus, March 1, 2016 Technical Conference at 2.

[82] NERC Petition at 30.

[83] NERC June 28, 2016 Filing at 1.

[84] NERC Comments at 17.

[85] *Id.*

[86] *Id.* at 19.

[87] *Id.*

[88] *Id.*

[89] Trade Associations Comments at 21.

64. Certain non-industry commenters contend that the 75 A/phase qualifying threshold for thermal impact assessments is not technically justified. Emprimus contends that "many transformers have GIC ratings less than 75 amps per phase," but Emprimus claims that an Idaho National Lab study showed that "GIC introduced at 10 amps per phase on high voltage transformers exceed harmonic levels allowed under IEEE 519." [90] Emprimus also maintains that a 2013 IEEE paper "suggest[s] that there can be generator rotor damage at GIC levels which exceed 50 amps per phase." [91] Gaunt contends, based on his analysis of historical events, that "degradation is initiated in transformers by currents that are significantly below the 75 amps per phase." [92] Gaunt states that "[u]ntil better records are kept of transformer [dissolved gas in oil analysis] and transformer failure, the proposed level of 75 [A/phase] of GIC needed to initiate assessment of transformer response must be considered excessively high." [93] Gaunt recommends a qualifying threshold of 15 amps per phase. Resilient Societies states that the 75 A/phase threshold is based on a mathematical model for one type of transformer and that several tests referenced in the standard drafting team's White Paper on Transformer Thermal Impact Assessment were carried out under no load or minimal load conditions. In addition, Resilient Societies contends that applying the 75 A/phase threshold and NERC's proposed benchmark GMD event (i.e., using the spatially-averaged reference peak geoelectric field amplitude) results in only "two out of approximately 560 extra high voltage transformers" requiring thermal impact assessments in the PJM region; only one 345 kV transformer requiring thermal impact assessment in Maine; and zero transformers requiring thermal impact assessments in ATC's network.[94] Kappenman contends that the 75 A/phase threshold does not consider transformers with tertiary windings or autotransformers which may be impacted at lower GIC levels than 75 A/phase.[95]

Commission Determination

65. Consistent with our determination above regarding the reference peak geoelectric field amplitude value, the Commission directs NERC to revise Requirement R6 to require registered entities to apply spatially averaged and non-spatially averaged peak geoelectric field values, or some equally efficient and effective alternative, when conducting thermal impact assessments.

66. In the NOPR, the Commission requested comment from NERC regarding why Requirement R6 does not use the maximum GIC-producing orientation to conduct the thermal assessment for qualifying transformers. After considering NERC's response, we continue to have concerns with not using the maximum GIC-producing orientation for the thermal assessment of transformers. However, at this time we do not direct NERC to modify Reliability Standard TPL–007–1. Instead, as part of the GMD research work plan discussed below, NERC is directed to study this issue to determine how the geoelectric field time series can be applied to a particular transformer so that the orientation of the time series, over time, will maximize GIC flow in the transformer, and to include the results in a filing with the Commission.

67. We are not persuaded by the comments opposed to Requirement R6's application of a 75 A/phase qualifying threshold. The standard drafting team's White Paper on Thermal Screening Criterion, as revised by NERC in the June 28, 2016 Filing, provides an adequate technical basis to approve NERC's proposal. As noted in the revised White Paper on Thermal Screening Criterion, the calculated metallic hot spot temperature corresponding to an effective GIC of 75 A/phase is 172 degrees Celsius; that figure is higher than the original figure of 150 degrees Celsius calculated by the standard drafting team but is still below the 200 degree Celsius limit specified in IEEE Std C57.91–2011.[96] The comments, particularly those of Gaunt, attempt to correlate historical transformer failures to past GMD events (*e.g.*, 2003 Halloween Storm), while arguing that the transformers damaged in those events did not experience GICs of 75 A/phase. The evidence adduced by Gaunt and others is inconclusive.[97] We therefore direct NERC to include further analysis of the thermal impact assessment qualifying threshold in the GMD research work plan.

68. In NOPR comments and in comments to the standard drafting team, Kappenman stated that delta winding heating due to harmonics has not been adequately considered by the standard drafting team and that, thermally, this is a bigger concern than metallic hot spot heating.[98] The standard drafting team responded that the vulnerability described for tertiary winding harmonic heating is based on the assumption that delta winding currents can be calculated using the turns ratio between primary and tertiary winding, which is incorrect when a transformer is under saturation.[99] The standard drafting team concluded that Kappenman's concerns regarding delta windings being a problem from a thermal standpoint are unwarranted and that the criteria developed by the standard drafting team use state-of-the-art analysis methods and measurement-supported transformer models. The Commission believes that the heating effects of harmonics on transformers, as discussed at the March 1, 2016 Technical Conference, are of concern and require further research.[100] Accordingly, we direct NERC to address the effects of harmonics, including tertiary winding harmonic heating and any other effects on transformers, as part of the GMD research work plan.[101]

---

[90] Emprimus Comments at 4.

[91] *Id.*

[92] Gaunt Comments at 13.

[93] *Id.* at 14.

[94] Resilient Societies Comments at 5–14. Resilient Societies states that modeling performed by Central Maine Power Co. and Emprimus for the Maine Public Utilities Commission indicates that eight 345 kV transformers (53 percent according to Resilient Societies) would require thermal impact assessments in Maine if the reference peak geoelectric field amplitude were set at 20 V/km. *Id.* at 10. Resilient Societies also contends that this result is consistent with the Oak Ridge Meta-R–319 Study's finding that eight transformers would be "at risk" in Maine under a "'30 Amp At-Risk Threshold scenario.'" *Id.* Central Maine Power Co. calculated that the scaled NERC benchmark GMD event for the northernmost point in Maine would be 4.53 V/km. Resilient Societies' calculations regarding ATC estimate that the scaled benchmark GMD event for Wisconsin would be 2 V/km. *Id.* at 14.

[95] The Commission received two comments following NERC's June 28, 2016 Filing. However, the supplemental comments did not specifically address the revisions submitted in NERC's June 28, 2016 filing.

[96] NERC June 28, 2016 Filing, Revised White Paper on Screening Criterion for Transformer Thermal Impact Assessment at 3.

[97] *See, e.g.,* Gaunt Comments at 13 ("Although it has not been possible to assemble an exact model of the power system during the period 29–31 October 2003, and data on the ground conductivity in Southern Africa is not known with great certainty, we are confident that the several calculations of GIC that been carried out are not grossly inaccurate.").

[98] Kappenman Comments at 45.

[99] Consideration of Comments Project 2013–03 Geomagnetic Disturbance Mitigation at 39 (December 5, 2014), *http://www.nerc.com/pa/Stand/Project201303GeomagneticDisturbanceMitigation/Comment%20Report%20_2013–03_GMD_12052014.pdf.*

[100] At the March 1, 2016 Technical Conference, Dr. Horton, a member of the standard drafting team, discussed the potential negative impacts of harmonics generated by GMDs on protection systems, reactive power resources and generators. Slide Presentation of Randy Horton, March 1, 2016 Technical Conference at 2–6.

[101] NERC indicated in its comments that it is already studying the issue of harmonics. NERC

Continued

C. GMD Research Work Plan

NOPR

69. The NOPR proposed to address the need for more data and certainty regarding GMD events and their potential effect on the Bulk-Power System by directing NERC to submit informational filings that address GMD-related research areas. The NOPR proposed to direct NERC to submit in the first filing a GMD research work plan indicating how NERC plans to: (1) Further analyze the area over which spatial averaging should be calculated for stability studies, including performing sensitivity analyses on squares less than 500 km per side (e.g., 100 km, 200 km); (2) further analyze earth conductivity models by, for example, using metered GIC and magnetometer readings to calculate earth conductivity and using 3–D readings; (3) determine whether new analyses and observations support modifying the use of single station readings around the earth to adjust the spatially averaged benchmark for latitude; and (4) assess how to make GMD data (e.g., GIC monitoring and magnetometer data) available to researchers for study.

70. With respect to GIC monitoring and magnetometer readings, the NOPR sought comment on the barriers, if any, to public dissemination of such readings, including if their dissemination poses a security risk and if any such data should be treated as Critical Energy Infrastructure Information or otherwise restricted to authorized users. The NOPR proposed that NERC submit the GMD research work plan within six months of the effective date of a final rule in this proceeding. The NOPR also proposed that the GMD research work plan submitted by NERC should include a schedule for submitting one or more informational filings that apprise the Commission of the results of the four additional study areas, as well as any other relevant developments in GMD research, and should assess whether Reliability Standard TPL–007–1 remains valid in light of new information or whether revisions are appropriate.

Comments

71. NERC states that continued GMD research is necessary and that the potential impacts of GMDs on reliability are evolving. NERC, however, prefers that the NERC GMD Task Force continue its research without the GMD research work plan proposed in the NOPR. NERC contends that allowing the NERC GMD Task Force to continue its work would "accomplish NERC's and the Commission's shared goals in advancing GMD understanding and knowledge, while providing the flexibility necessary for NERC to work effectively with its international research partners to address risks to the reliability of the North American Bulk-Power System."[102] NERC also claims that, in addition to being unnecessary given the work of the NERC GMD Task Force, the NOPR proposal "poses practical challenges . . . [because it would] bind[] NERC to a specific and inflexible research plan and report schedule to be determined six months (or even a year) following the effective date of a final rule in this proceeding."[103]

72. The Trade Associations and CEA do not support the GMD research work plan. Instead, they contend that NERC should be allowed to pursue GMD research independently.

73. Several commenters, while not addressing the NOPR proposal specifically, state that additional research is necessary to validate or improve elements of the benchmark GMD event definition.[104]

74. The Trade Associations state that monitoring data should be available for academic research purposes. Resilient Societies contends that monitoring data should be publicly disseminated on a regular basis and that there is no security risk in releasing such data because they relate to naturally occurring phenomena. Emprimus states that it supports making GIC and magnetometer monitoring data available to the public. Bardin supports making GIC and GMD-related information to the public or at least to "legitimate researchers."

75. Hydro One and CEA do not support mandatory data sharing without the use of non-disclosure agreements.

Commission Determination

76. The Commission recognizes, as do commenters both supporting and opposing proposed Reliability Standard TPL–007–1, that our collective understanding of the threats posed by GMD is evolving as additional research and analysis are conducted. These ongoing efforts are critical to the nation's long-term efforts to protect the grid against a major GMD event. While we approve NERC's proposed Reliability Standard TPL–007–1 and direct certain modifications, as described above, the Commission also concludes that facilitating additional research and analysis is necessary to adequately address these threats. As discussed in the next two sections of this final rule, the Commission directs a three-prong approach to further those efforts by directing NERC to: (1) Develop, submit, and implement a GMD research work plan; (2) develop revisions to Reliability Standard TPL–007–1 to require responsible entities to collect GIC monitoring and magnetometer data; and (3) collect GIC monitoring and magnetometer data from registered entities for the period beginning May 2013, including both data existing as of the date of this order and new data going forward, and to make that information available.

77. First, the Commission adopts the NOPR proposal and directs NERC to submit a GMD research work plan and, subsequently, informational filings that address the GMD-related research areas identified in the NOPR, additional research tasks identified in this Final Rule (i.e., the research tasks identified in the thermal impact assessment discussion above) and, in NERC's discretion, any GMD-related research areas generally that may impact the development of new or modified GMD Reliability Standards.[105] The GMD research work plan should be submitted within six months of the effective date of this final rule. The research required by this directive should be informed by ongoing GMD-related research efforts of entities such as USGS, National Atmospheric and Oceanic Administration (NOAA), National Aeronautics and Space Administration, Department of Energy, academia and other publicly available contributors, including work performed for the National Space Weather Action Plan.[106]

78. As part of the second research area identified in the NOPR (i.e., further analyze earth conductivity models by, for example, using metered GIC and

---

Comments at 14 ("NERC is collaborating with researchers to examine more complex GMD vulnerability issues, such as harmonics and mitigation assessment techniques, to enhance the modeling capabilities of the industry").

[102] NERC Comments at 13.

[103] *Id.* at 16.

[104] *See, e.g.,* USGS Comments at 1 (addressing earth conductivity models), Bardin Comments at 2 (addressing earth conductivity models); Roodman Comments at 3 (addressing reference peak geoelectric field amplitude); Gaunt Comments at 7 (addressing spatial averaging).

[105] The GMD research work plan need not address the fourth research area identified in the NOPR (i.e., assess how to make GIC monitoring and magnetometer data available to researchers for study) given the Commission's directive and discussion below regarding the collection and dissemination of necessary GIC monitoring and magnetometer data.

[106] National Science and Technology Council, National Space Weather Action Plan (October 2015), *https://www.whitehouse.gov/sites/default/files/microsites/ostp/final_nationalspaceweatheractionplan_20151028.pdf.*

magnetometer readings to calculate earth conductivity and using 3–D readings), the GMD research work plan should specifically investigate "coastal effects" on ground conductivity models.

79. In addition, the large variances described by USGS in actual 3–D ground conductivity data raise the question of whether one time series geomagnetic field is sufficient for vulnerability assessments. The characteristics, including frequencies, of the time series interact with the ground conductivity to produce the geoelectric field that drives the GIC. Therefore, the research should address whether additional realistic time series should be selected to perform assessments in order to capture the time series that produces the most vulnerability for an area.

80. The comments largely agree that additional GMD research should be pursued, particularly with respect to the elements of the benchmark GMD event definition (i.e., the reference peak geoelectric field amplitude value, geomagnetic latitude scaling factor, and earth conductivity scaling factor). There is ample evidence in the record to support the need for additional GMD-related research.[107] For example, USGS submitted comments indicating that USGS's one dimensional ground electrical conductivity models used by the standard drafting team have a "significant limitation" in that they assume that a "[one dimensional] conductivity-with-depth profile can adequately represent a large geographic region," which USGS describes as a "gross simplification."[108] USGS observes that while the "proposed standard attempted to incorporate the best scientific research available . . . it must be noted that the supporting science is quickly evolving."[109] USGS recommends that "the proposed standard should establish a process for updates and improvements that acknowledges and addresses the quickly evolving nature of relevant science and associated data."[110]

81. Opposition to the proposal centers on the contention that the proposed directive is unnecessary and potentially counterproductive given the continuing work of the NERC GMD Task Force. We do not find these comments persuasive. Our directive requires NERC to submit a work plan for the study of GMD-related issues that are already being examined or that NERC agrees should be studied.[111] Nothing in our directive precludes NERC from continuing to use the NERC GMD Task Force as a vehicle for conducting the directed research or other research. Indeed, we encourage NERC to continue to use the GMD Task Force as a forum for engagement with interested stakeholders. In addition, we do not set specific deadlines for completion of the research; we only require NERC to submit the GMD research work plan within six months of the effective date of a final rule. The GMD research work plan, in turn, should include target dates for the completion of research topics and the reporting of findings to the Commission. The Commission intends to notice and invite comment on the GMD research work plan. An extension of time to submit the GMD research work plan may be available if six months proves to be insufficient. In addition, given the uncertainties commonly associated with complex research projects, the Commission will be flexible regarding changes to the tasks and target dates established in the GMD research work plan.

D. Monitoring Data

NERC Petition

82. Reliability Standard TPL–007–1, Requirement R2 requires responsible entities to "maintain System models and GIC System models of the responsible entity's planning area for performing the study or studies needed to complete GMD Vulnerability Assessment(s)." NERC states that Reliability Standard TPL–007–1 contains "requirements to develop the models, studies, and assessments necessary to build a picture of overall GMD vulnerability and identify where mitigation measures may be necessary."[112] NERC explains that mitigating strategies "may include installation of hardware (e.g., GIC blocking or monitoring devices), equipment upgrades, training, or enhanced Operating Procedures."[113]

NOPR

83. The NOPR proposed to direct NERC to revise Reliability Standard TPL–007–1 to require the installation of monitoring equipment (i.e., GIC monitors and magnetometers) to the extent there are any gaps in existing GIC monitoring and magnetometer networks. Alternatively, the NOPR sought comment on whether NERC should be responsible for installation of any additional, necessary magnetometers while affected entities would be responsible for installation of additional, necessary GIC monitors. The NOPR also proposed that, as part of NERC's work plan, NERC identify the number and location of current GIC monitors and magnetometers in the United States to assess whether there are any gaps. The NOPR sought comment on whether the Commission should adopt a policy specifically allowing recovery of costs associated with or incurred to comply with Reliability Standard TPL–007–1, including for the purchase and installation of monitoring devices.

Comments

84. NERC does not support the NOPR proposal regarding the installation of GIC monitoring devices and magnetometers. NERC contends that the proposed requirement is not necessary because Reliability Standard TPL–007–1 "supports effective GMD monitoring programs, and additional efforts are planned or underway to ensure adequate data for reliability purposes."[114] NERC also maintains that the proposed directive "poses implementation challenges . . . [because] GMD monitoring capabilities and technical information have not yet reached a level of maturity to support application in a Reliability Standard, and not all applicable entities have developed the comprehensive

---

[107] *See, e.g.*, NERC October 22, 2015 Supplemental Comments at 7–8 (expressing support for additional research regarding geomagnetic latitude scaling factors and earth conductivity models).

[108] USGS Comments at 1.

[109] *Id.*

[110] *Id.* We note that Reliability Standard TPL–007–1, Att. 1 (Calculating Geoelectric Fields for the Benchmark GMD Event) already provides that a "planner can also use specific earth model(s) with documented justification . . ." Accordingly, Reliability Standard TPL–007–1 includes a mechanism for incorporating improvements in earth conductivity models when calculating the benchmark GMD event.

[111] *See, e.g.*, NERC Comments at 8 ("NERC agrees that [spatial averaging] research would provide additional modeling insights and supports further collaborative efforts between space weather researchers and electric utilities through the NERC GMD Task Force"), at 10 ("NERC agrees that additional [geomagnetic latitude scaling] research is necessary, and supports the significant research that is occurring throughout the space weather community to develop and validate models and simulation techniques"), at 13 ("Working with EPRI, researchers at USGS, and industry, NERC will work to improve the earth conductivity models that are a vital component to understanding the risks of GMD events in each geographic region"), and at 23 ("efforts are already underway to expand GMD monitoring capabilities . . . [and] [t]hrough these efforts, NERC and industry should effectively address the concerns noted by the Commission in the NOPR, including ensuring a more complete set of data for operational and planning needs and supporting analytical validation and situational awareness").

[112] NERC Petition at 13.

[113] *Id.* at 32.

[114] NERC Comments at 21. NERC cites as examples the 40 GIC monitoring nodes operated by EPRI's SUNBURST network; the use of GIC monitoring devices by some registered entities (e.g., PJM); and the magnetometer networks operated by USGS and EPRI. *Id.* at 23–25.

understanding of system vulnerabilities that would be needed to deploy GMD monitoring devices for the greatest reliability benefit."[115] NERC also notes that a requirement mandating the installation of monitoring devices for situational awareness purposes would be outside the scope of a planning Reliability Standard.

85. The Trade Associations, CEA, ITC, Hydro One and Tri-State, while agreeing that more data are useful to analytical validation and situational awareness, do not support the NOPR proposal. CEA does not support the proposal because Reliability Standard TPL–007–1 is a planning standard; a one-size-fits-all monitoring approach will not work; the responsibility for monitoring, which in Canada is done by the Canadian government, should not fall to industry or NERC; and the proposal is too costly. Likewise, ITC contends that it would not be prudent or cost effective for entities to have to install monitoring equipment. Hydro One does not support a Reliability Standard that prescribes the number and location of monitoring devices that must be installed. The Trade Associations and ITC, instead, support directing NERC to develop a plan to address this issue. The Trade Associations state that such a plan should involve a partnership between government and industry. Tri-State maintains that NERC, working with USGS and NOAA, should be responsible for determining the need for and installation of any needed magnetometers. If the Commission requires applicable entities to install monitoring devices, the Trade Associations, Tri-State and Exelon agree that there should be cost recovery.

86. BPA supports the NOPR proposal for increased monitoring because BPA believes it will improve situational awareness. As a model, BPA states that the "Canadian government in collaboration with Canadian transmission owners" have developed a "technique that shows real promise of increasing visibility of GIC flows and localized impacts for a regional transmission grid."[116] AEP encourages the Commission to expand the "number and scope of the permanent geomagnetic observatories and install permanent geoelectric observatories in the United States."[117]

87. Resilient Societies supports requiring the installation of GIC monitoring devices and magnetometers, noting that GIC monitors are commercially available and cost as little as $10,000 to $15,000 each. Emprimus supports developing criteria that inform the need for and location of monitoring devices.

Commission Determination

88. We conclude that additional collection and disclosure of GIC monitoring and magnetometer data is necessary to improve our collective understanding of the threats posed by GMD events. The Commission therefore adopts the NOPR proposal in relevant part and directs NERC to develop revisions to Reliability Standard TPL–007–1 to require responsible entities to collect GIC monitoring and magnetometer data as necessary to enable model validation and situational awareness, including from any devices that must be added to meet this need. The NERC standard drafting team should address the criteria for collecting GIC monitoring and magnetometer data discussed below and provide registered entities with sufficient guidance in terms of defining the data that must be collected, and NERC should propose in the GMD research work plan how it will determine and report on the degree to which industry is following that guidance.

89. In addition, the Commission directs NERC, pursuant to Section 1600 of the NERC Rules of Procedure, to collect GIC monitoring and magnetometer data from registered entities for the period beginning May 2013, including both data existing as of the date of this order and new data going forward, and to make that information available.[118] We also provide guidance that, as a general matter, the Commission does not believe that GIC monitoring and magnetometer data should be treated as Confidential Information pursuant to the NERC Rules of Procedure.

Collection of GIC and Magnetometer Data

90. In developing a requirement regarding the collection of magnetometer data, NERC should consider the following criteria discussed at the March 1, 2016 Technical Conference: (1) The data is sampled at a cadence of at least 10-seconds or faster; (2) the data comes from magnetometers that are physically close to GIC monitors; (3) the data comes from magnetometers that are not near sources of magnetic interference (e.g., roads and local distribution networks); and (4) data is collected from magnetometers spread across wide latitudes and longitudes and from diverse physiographic regions.[119]

91. Each responsible entity that is a transmission owner should be required to collect necessary GIC monitoring data. However, a transmission owner should be able to apply for an exemption from the GIC monitoring data collection requirement if it demonstrates that no or little value would be added to planning and operations. In developing a requirement regarding the collection of GIC monitoring data, NERC should consider the following criteria discussed at the March 1, 2016 Technical Conference: (1) The GIC data is from areas found to have high GIC based on system studies; (2) the GIC data comes from sensitive installations and key parts of the transmission grid; and (3) the data comes from GIC monitors that are not situated near transportation systems using direct current (e.g., subways or light rail).[120] GIC monitoring and magnetometer locations should also be revisited after GIC system models are run with improved ground conductivity models. NERC may also propose to incorporate the GIC monitoring and magnetometer data collection requirements in a different Reliability Standard (e.g., real-time reliability monitoring and analysis capabilities as part of the TOP Reliability Standards).

92. Our determination differs from the NOPR proposal in that the NOPR proposed to require the installation of GIC monitors and magnetometers. The comments raised legitimate concerns about incorporating such a requirement in Reliability Standard TPL–007–1 because of the complexities of siting and operating monitoring devices to achieve the maximum benefits for model validation and situational awareness. In particular, responsible entities may not have the technical capacity to properly install and operate magnetometers, given complicating issues such as man-made interference, calibration, and data interpretation. Accordingly, the Commission determines that requiring responsible entities to collect necessary GIC monitoring and magnetometer data, rather than install GIC monitors and magnetometers, affords greater flexibility while obtaining significant benefits. For example, responsible entities could collaborate with universities and government entities that operate magnetometers to collect necessary magnetometer data, or

---

[115] *Id.*

[116] BPA Comments at 4.

[117] AEP March 29, 2016 Supplemental Comments at 1.

[118] The Commission's directives to collect and make available GIC monitoring and magnetometer data do not apply to non-U.S. responsible entities or Alaska and Hawaii.

[119] Slide Presentation of Luis Marti (Third Panel), March 1, 2016 Technical Conference at 3, 9.

[120] *Id.* at 8.

responsible entities could choose to install GIC monitors or magnetometers to comply with the data collection requirement. While the Commission's primary concern is the quality of the data collected, we do not establish a requirement for either approach or promote a particular device for collecting the required data. We also find that cost recovery for prudent costs associated with or incurred to comply with Reliability Standard TPL–007–1 and future revisions to the Reliability Standard, including for the purchase and installation of monitoring devices, will be available to registered entities.[121]

Data Availability

93. We also direct NERC, pursuant to Sections 1500 and 1600 of the NERC Rules of Procedure, to collect and make GIC monitoring and magnetometer data available.[122] We determine that the dissemination of GIC monitoring and magnetometer data will facilitate a greater understanding of GMD events that, over time, will improve Reliability Standard TPL–007–1. The record in this proceeding supports the conclusion that access to GIC monitoring and magnetometer data will help facilitate GMD research, for example, by helping to validate GMD models.[123] To facilitate the prompt dissemination of GIC monitoring and magnetometer data, we address whether GIC monitoring or magnetometer data should qualify as Confidential Information under the NERC Rules of Procedure.[124]

94. Based on the record in this proceeding, we believe that GIC and magnetometer data typically should not be designated as Confidential Information under the NERC Rules of Procedure. We are not persuaded that the dissemination of GIC monitoring or magnetometer data poses a security risk or that the data otherwise qualify as Confidential Information. CEA and Hydro One have objected, without elaboration, to making data available without the use of non-disclosure agreements.[125] At the March 1, 2016 Technical Conference, panelists were questioned on the topic yet could not identify a security-based or other credible reason for not making such information available to requesters. In comments submitted after the March 1, 2016 Technical Conference, the Trade Associations explained that "GIC measurements, while not as sensitive as transmission planning studies, should also be protected . . . [because a] potentially malicious actor could conceivably combine GIC information with information from other sources to deduce the configuration and operating conditions of the grid or some portion of it." [126] The Trade Associations' comments, however, do not substantiate the assertion that the release of GIC monitoring (or magnetometer data) alone poses any risk to the Bulk-Power System. The Trade Associations' comment is also vague by not identifying what "information from other sources" could be combined with GIC monitoring "to deduce the configuration and operating conditions of the grid or some portion of it."

95. In conclusion, given both the lack of substantiated concerns regarding the disclosure of GIC and magnetometer data, and the compelling demonstration that access to these data will support ongoing research and analysis of GMD threats, the Commission expects NERC to make GIC and magnetometer data available. Notwithstanding our findings here, to the extent any entity seeks confidential treatment of the data it provides to NERC, the burden rests on that entity to justify the confidential treatment.[127] Exceptions are possible if the providing entity obtains from NERC, at the time it submits data to NERC, a determination that GIC or magnetometer data qualify as Confidential Information.[128] Entities denied access to GIC and magnetometer data by NERC or providers denied Confidential Information treatment of GIC and magnetometer data may appeal NERC's decision to the Commission.

E. Corrective Action Plan Deadlines

NERC Petition

96. Reliability Standard TPL–007–1, Requirement R7 provides that:

> Each responsible entity, as determined in Requirement R1, that concludes, through the GMD Vulnerability Assessment conducted in Requirement R4, that their System does not meet the performance requirements of Table 1 shall develop a Corrective Action Plan addressing how the performance requirements will be met . . . .

NERC explains that the NERC Glossary defines corrective action plan to mean, "A list of actions and an associated timetable for implementation to remedy a specific problem." [129] Requirement R7.3 states that the corrective action plan shall be provided within "90 calendar days of completion to the responsible entity's Reliability Coordinator, adjacent Planning Coordinator(s), adjacent Transmission Planner(s), functional entities referenced in the Corrective Action Plan, and any functional entity that submits a written request and has a reliability-related need."

NOPR

97. The NOPR proposed to direct NERC to modify Reliability Standard TPL–007–1 to require corrective action plans to be developed within one year of the completion of the GMD Vulnerability Assessment. The NOPR also proposed to direct NERC to modify Reliability Standard TPL–007–1 to require a deadline for non-equipment mitigation measures that is two years following development of the corrective action plan and a deadline for mitigation measures involving equipment installation that is four years following development of the corrective action plan. Recognizing that there is little experience with installing equipment for GMD mitigation, the NOPR stated that the Commission is open to proposals that may differ from its proposal, particularly from any entities with experience in this area. The NOPR also sought comment on appropriate alternative deadlines and whether there should be a mechanism that would allow NERC to consider, on

---

[121] NOPR, 151 FERC ¶ 61,134 at P 49 n.60.

[122] If GIC monitoring and magnetometer data is already publicly available (e.g., from a government entity or university), NERC need not duplicate those efforts.

[123] *See, e.g.,* March 1, 2016 Technical Conference Tr. 58:22–59:13 (Love); 128:5–129:2 (Overbye); ATC Comments at 6–7 ("as more measuring devices (including magnetometers and GIC monitors) continue to propagate, the body of field data on magnetic fields and the resultant GICs will continue to increase the understanding of this phenomena and result in better models that more closely match real world conditions . . . [a]bsent this field data, it is difficult to build accurate models that can be used to plan and operate the transmission system").

[124] Providers of GIC and magnetometer data may request that NERC treat their GIC monitoring and magnetometer data as "Confidential Information," as that term is defined in Section 1500 of the NERC Rules of Procedure. Under the NERC Rules of Procedure, disclosure of Confidential Information by NERC to a requester requires a formal request, notice and opportunity for comment, and an executed non-disclosure agreement for requesters not seeking public disclosure of the information. NERC Rules of Procedure, Section 1503 (Requests for Information) (effective Nov. 4, 2015).

[125] CEA Comments at 15; Hydro One Comments at 2.

[126] Trade Associations March 7, 2016 Supplemental Comments at 5.

[127] *See* NERC Rules of Procedure, Section 1502.1. To address any substantiated concerns regarding the need for confidentiality of an entity's GIC or magnetometer data, NERC could develop a policy for disseminating such data only after an appropriate time interval (e.g., six months).

[128] We understand that NERC typically does not determine whether information submitted to it under a claim of confidentiality is Confidential Information when receiving such information. *See North American Electric Reliability Corp.,* 119 FERC ¶ 61,060, at PP 195–196 (2007). We expect that, when a submitter seeks a determination by NERC of a claim that GIC or magnetometer data qualify as Confidential Information, NERC will decide promptly.

[129] NERC Petition at 31.

a case-by-case basis, requests for extensions of required deadlines.

Comments

98. NERC states that it does not oppose a one-year deadline for completing the development of corrective action plans.[130] However, NERC contends that imposing deadlines on the completion of mitigation actions would be problematic because of the uncertainties regarding the amount of time needed to install necessary equipment. NERC maintains that deadlines that are too short may cause entities to take mitigation steps that, while quicker, would not be as effective as mitigations that take more time to complete. NERC supports allowing extensions if the Commission adopts the NOPR proposal.

99. AEP states that, even if possible, a one-year deadline for developing corrective action plans is too aggressive and would encourage narrow thinking (i.e., registered entities would address GMD mitigation rather than pursue system improvements generally that would also address GMD mitigation). AEP, instead, proposes a two-year deadline. AEP does not support a Commission-imposed deadline for completing mitigation actions, although it supports requiring a time-table in the corrective action plan. AEP notes that the Commission did not impose a specific deadline for completion of corrective actions in Reliability Standard TPL–001–4 (Transmission System Planning Performance). CEA does not support a deadline for the development of corrective action plans because it is already part of the GMD Vulnerability Assessment process. Like AEP, CEA does not support specific deadlines for the completion of mitigation actions and instead supports including time-tables in the corrective action plan. CEA also contends that an extension process would be impracticable.

100. Trade Associations, BPA and Tri-State support the imposition of corrective action plan deadlines as long as entities can request extensions. Gaunt supports the corrective action plan deadlines proposed in the NOPR. Emprimus supports the imposition of deadlines but contends that non-equipment mitigation actions should be completed in 6 months and that there should be a rolling four-year period for equipment mitigation (i.e., after each year, 25 percent of the total mitigation actions should be completed).

Commission Determination

101. The Commission directs NERC to modify Reliability Standard TPL–007–1 to include a deadline of one year from the completion of the GMD Vulnerability Assessments to complete the development of corrective action plans. NERC's statement that it "expects" corrective action plans to be completed at the same time as GMD Vulnerability Assessments concedes the point made in the NOPR that Reliability Standard TPL–007–1 currently lacks a clear deadline for the development of corrective action plans.

102. The Commission also directs NERC to modify Reliability Standard TPL–007–1 to include a two-year deadline after the development of the corrective action plan to complete the implementation of non-hardware mitigation and four-year deadline to complete hardware mitigation. The comments provide contrasting views on the practicality of imposing mitigation deadlines, with NERC and some industry commenters arguing that such deadlines are not warranted while the Trade Associations and other industry commenters support their imposition. Most of these comments, however, support an extension process if the Commission determines that deadlines are necessary. The Commission agrees that NERC should consider extensions of time on a case-by-case basis. The Commission directs NERC to submit these revisions within 18 months of the effective date of this Final Rule.

103. Following adoption of the mitigation deadlines required in this final rule, Reliability Standard TPL–007–1 will establish a recurring five-year schedule for the identification and mitigation of potential GMD risks on the grid, as follows: (1) The development of corrective action plans must be completed within one year of a GMD Vulnerability Assessment; (2) non-hardware mitigation must be completed within two years following development of corrective action plans; and (3) hardware mitigation must be completed within four years following development of corrective action plans.

104. As discussed elsewhere in this final rule, the Commission recognizes and expects that our collective understanding of the science regarding GMD threats will improve over time as additional research and analysis is conducted. We believe that the recurring five-year cycle will provide, on a going-forward basis, the opportunity to update Reliability Standard TPL–007–1 to reflect new or improved scientific understanding of GMD events.

F. Minimization of Load Loss and Curtailment

NERC Petition

105. Reliability Standard TPL–007–1, Requirement R4 states that each responsible entity "shall complete a GMD Vulnerability Assessment of the Near-Term Transmission Planning Horizon once every 60 calendar months." Requirement R4.2 further states that the "study or studies shall be conducted based on the benchmark GMD event described in Attachment 1 to determine whether the System meets the performance requirements in Table 1."

106. NERC maintains that Table 1 sets forth requirements for system steady state performance. NERC explains that Requirement R4 and Table 1 "address assessments of the effects of GICs on other Bulk-Power System equipment, system operations, and system stability, including the loss of devices due to GIC impacts."[131] Table 1 provides, in relevant part, that load loss and/or curtailment are permissible elements of the steady state:

> Load loss as a result of manual or automatic Load shedding (*e.g.* UVLS) and/or curtailment of Firm Transmission Service may be used to meet BES performance requirements during studied GMD conditions. The likelihood and magnitude of Load loss or curtailment of Firm Transmission Service should be minimized.

NOPR

107. The NOPR sought comment on the provision in Table 1 that "Load loss or curtailment of Firm Transmission Service should be minimized." The NOPR stated that because the term "minimized" does not represent an objective value, the provision is potentially subject to interpretation and assertions that the term is vague and may not be enforceable. The NOPR also explained that the modifier "should" might indicate that minimization of load loss or curtailment is only an expectation or a guideline rather than a requirement. The NOPR sought comment on how the provision in Table 1 regarding load loss and curtailment will be enforced, including: (1) Whether, by using the term "should," Table 1 requires minimization of load loss or curtailment; or both and (2) what constitutes "minimization" and how it will be assessed.

---

[130] NERC contends that a deadline is unnecessary because "NERC expects that applicable entities would determine necessary corrective actions as part of their GMD Vulnerability Assessments for the initial assessment [due 60 months after a final rule in this proceeding goes into effect] as well as subsequent assessments [due every 60 months thereafter]." NERC Comments at 28.

[131] NERC Petition at 39.

Comments

108. NERC states the language in Table 1 is modeled on Reliability Standard TPL–001–4, which provides in part that "an objective of the planning process should be to minimize the likelihood and magnitude of interruption of Firm transmission Service following Contingency events." NERC explains that Reliability Standard TPL–007–1 "does not include additional load loss performance criteria used in normal contingency planning because such criteria may not be applicable to GMD Vulnerability Assessment of the impact from a 1-in-100 year GMD event." [132] However, NERC points out that the enforcement of Requirement R4 "would include an evaluation of whether the system meets the Steady State performance requirements of Table 1 which are aimed at protecting against instability, controlled separation, and Cascading." [133] NERC further states that "minimized" in the context of Reliability Standard TPL–007–1 means that "planned Load loss or curtailments are not to exceed amounts necessary to prevent voltage collapse." [134]

109. The Trade Associations agree with the NOPR that the lack of objective criteria could create compliance and enforcement challenges and could limit an operator's actions in real-time. The Trade Associations state that the Commission "should consider whether such language in mandatory requirements invites the unintended consequences of raising reliability risks, especially during real-time emergency conditions . . . [but] [i]n the interim, the Trade Associations envision that NERC will consider further discussions with stakeholders on the issue prior to TPL–007 implementation." [135]

Commission Determination

110. The Commission accepts the explanation in NERC's comments of what is meant by the term "minimized" in Table 1.

G. Violation Risk Factors and Violation Severity Levels

111. Each requirement of Reliability Standard TPL–007–1 includes one violation risk factor and has an associated set of at least one violation severity level. NERC states that the ranges of penalties for violations will be based on the sanctions table and supporting penalty determination process described in the Commission approved NERC Sanction Guidelines. The NOPR proposed to approve the violation risk factors and violation severity levels submitted by NERC, for the requirements in Reliability Standard TPL–007–1, consistent with the Commission's established guidelines.[136] The Commission did not receive any comments regarding this aspect of the NOPR. Accordingly, the Commission approves the violation risk factors and violation severity levels for the requirements in Reliability Standard TPL–007–1.

H. Implementation Plan and Effective Dates

NERC Petition

112. NERC proposes a phased, five-year implementation period.[137] NERC maintains that the proposed implementation period is necessary: (1) To allow time for entities to develop the required models; (2) for proper sequencing of assessments because thermal impact assessments are dependent on GIC flow calculations that are determined by the responsible planning entity; and (3) to give time for development of viable corrective action plans, which may require applicable entities to "develop, perform, and/or validate new or modified studies, assessments, procedures . . . [and because] [s]ome mitigation measures may have significant budget, siting, or construction planning requirements." [138]

113. The proposed implementation plan states that Requirement R1 shall become effective on the first day of the first calendar quarter that is six months after Commission approval. For Requirement R2, NERC proposes that the requirement shall become effective on the first day of the first calendar quarter that is 18 months after Commission approval. NERC proposes that Requirement R5 shall become effective on the first day of the first calendar quarter that is 24 months after Commission approval. NERC proposes that Requirement R6 shall become effective on the first day of the first calendar quarter that is 48 months after Commission approval. And for Requirement R3, Requirement R4, and Requirement R7, NERC proposes that the requirements shall become effective on the first day of the first calendar quarter that is 60 months after Commission approval.

NOPR

114. The NOPR proposed to approve the implementation plan and effective dates submitted by NERC. However, given the serial nature of the requirements in Reliability Standard TPL–007–1, the Commission expressed concern about the duration of the timeline associated with any mitigation stemming from a corrective action plan and sought comment from NERC and other interested entities as to whether the length of the implementation plan, particularly with respect to Requirements R4, R5, R6, and R7, could be reasonably shortened.

Comments

115. NERC does not support shortening the implementation period. NERC maintains that the proposed implementation period is "appropriate and commensurate with the requirements of the proposed standard" and is based on "industry . . . projections on the time required for obtaining validated tools, models and data necessary for conducting GMD Vulnerability Assessments through the standard development process." [139] NERC notes that the standard drafting team initially proposed a four-year implementation plan, but received substantial comments expressing concern with only having four years.

116. The Trade Associations, BPA, CEA, Joint ISOs/RTOs and Tri-State support the proposed implementation plan for largely the same reasons as NERC.

117. Gaunt proposes a shorter implementation period wherein the initial GMD Vulnerability Assessment would be performed 48 months following the effective date of a final rule in this proceeding, as opposed to the proposed implementation plan's 60 months. Subsequent GMD Vulnerability Assessments would be performed every 48 months thereafter. Briggs states that a "3 or 4 year timeline would likely provide industry with enough time to implement corrective measures and should be considered." [140]

Commission Determination

118. The Commission approves the implementation plan submitted by NERC. When registered entities begin complying with Reliability Standard TPL–007–1, it will likely be the first time that many registered entities will have planned for a GMD event, beyond developing the GMD operational procedures required by Reliability Standard EOP–010–1. Registered

---

[132] NERC Comments at 29.

[133] *Id.*

[134] *Id.*

[135] Trade Associations Comments at 28.

[136] *North American Electric Reliability Corp.*, 135 FERC ¶ 61,166 (2011).

[137] NERC Petition, Ex. B (Implementation Plan for TPL–007–1).

[138] *Id.* at 2.

[139] NERC Comments at 30.

[140] Briggs Comments at 7.

entities will gain the capacity to conduct GMD Vulnerability Assessments over the course of the five-year implementation plan by complying with, at phased intervals, the foundational requirements in Reliability Standard TPL–007–1 (*i.e.*, establishing responsibilities for planning and developing models and performance criteria). In addition, as discussed above, NERC's implementation plan affords sufficient time for NERC to submit and for the Commission to consider the directed revisions to Reliability Standard TPL–007–1 before the completion of the first GMD Vulnerability Assessment. As such, the five-year implementation plan will allow for the incorporation of the revised Reliability Standard in the first round of GMD Vulnerability Assessments.

I. Other Issues

119. Several commenters indicated that the Commission should address the threats posed by EMPs or otherwise raised the issue of EMPs.[141] For example, Briggs states that the Commission should "initiate a process to improve the resilience of the U.S. electric grid to the threat of high altitude electromagnetic pulse (HEMP) attacks, which can be more severe than solar superstorms."[142] However, as the Commission stated in Order No. 779 in directing the development of GMD Reliability Standards and in Order No. 797 in approving the First Stage GMD Reliability Standards, EMPs are not within the scope of the GMD rulemaking proceedings.[143]

120. Holdeman contends that the Commission "should modify the current preemption of States preventing them from having more stringent reliability standards for Commission regulated entities than Commission standards."[144] As the Commission indicated in response to similar comments in Order No. 797, section 215(i)(3) of the FPA provides in relevant part that section 215 does not "preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State, as long as such action is not inconsistent with any reliability standard."[145] Moreover, Reliability Standard TPL–007–1 does not preclude users, owners, and operators of the Bulk-Power System from taking additional steps that are designed to mitigate the effects of GMD events, provided those additional steps are not inconsistent with the Commission-approved Reliability Standards.

121. Certain commenters opposed to Reliability Standard TPL–007–1 contend that its approval could absolve industry of any legal liability should a GMD event cause a disruption to the Bulk-Power System. For example, Resilient Societies "ask[s] the Commission to clarify its expectation that the FERC jurisdictional entities will be held to account, and be subject to liability in the event of gross negligence or willful misconduct in planning for and mitigating solar geomagnetic storms."[146] Resilient Societies also contends that the Commission does not have the legal authority "to grant immunity from liability by setting reliability standards."[147]

122. The Commission has never stated in the GMD Reliability Standard rulemakings that compliance with Commission-approved Reliability Standards absolves registered entities from legal liability generally, to the extent legal liability exists, should a disruption occur on the Bulk-Power System due to a GMD event. Resilient Societies' comment appears to misconstrue language in Order No. 779 in which the Commission stated, when directing the development of the Second Stage GMD Reliability Standards, that the "Second Stage GMD Reliability Standard should not impose 'strict liability' on responsible entities for failure to ensure the reliability operation of the Bulk-Power System in the face of a GMD event of unforeseen severity."[148] The Commission's statement merely recognized that the Second Stage GMD Reliability Standard should require registered entities to plan against a defined benchmark GMD event, for the purpose of complying with the proposed Reliability Standard, rather than any GMD event generally (i.e., a GMD event that exceeded the severity of the benchmark GMD event). The Commission did not suggest, nor could it suggest, that compliance with a Reliability Standard would absolve registered entities from general legal liability, if any, arising from a disruption to the Bulk-Power System. The only liability the Commission was referring to in Order No. 779 was the potential for penalties or remediation under section 215 of the FPA for failure to comply with a Commission-approved Reliability Standard.

123. Kappenman, Resilient Societies and Bardin filed comments that addressed the NERC "Level 2" Appeal Panel decision.[149] As a threshold issue, we agree with the Appeal Panel that the issues raised by the appellants in that proceeding are not procedural; instead they address the substantive provisions of Reliability Standard TPL–007–1. Section 8 (Process for Appealing an Action or Inaction) of the NERC Standards Process Manual states:

> Any entity that has directly and materially affected interests and that has been or will be adversely affected by any procedural action or inaction related to the development, approval, revision, reaffirmation, retirement or withdrawal of a Reliability Standard, definition, Variance, associated implementation plan, or Interpretation shall have the right to appeal. This appeals process applies only to the NERC Reliability Standards processes as defined in this manual, not to the technical content of the Reliability Standards action.

The appellants, who have the burden of proof under the NERC Rules of Procedure, have not shown that NERC or the standard drafting team failed to comply with any procedural requirements set forth in the NERC Rules of Procedure.[150] Instead, it would appear that the appeal constitutes a collateral attack on the substantive provisions of Reliability Standard TPL–007–1. As the appellants' substantive concerns with Reliability Standard TPL–007–1 have been addressed in this Final Rule, issues surrounding the NERC "Level 2" Appeal Panel decision are, in any case, moot.

III. Information Collection Statement

124. The collection of information contained in this final rule is subject to review by the Office of Management and Budget (OMB) regulations under section 3507(d) of the Paperwork Reduction Act of 1995 (PRA).[151] OMB's regulations require approval of certain informational collection requirements imposed by agency rules.[152]

---

[141] *See* Briggs Comments at 7; EIS Comments at 3; JINSA Comments at 2.

[142] Briggs Comments at 7.

[143] Order No. 797, 147 FERC ¶ 61,209 at P 42 (citing Order No. 779, 143 FERC ¶ 61,147 at P 14 n.20).

[144] Holdeman Comments at 2.

[145] Order No. 797, 147 FERC ¶ 61,209 at P 44 (citing 16 U.S.C. 824o(i)(3)).

[146] Resilient Societies Comments at 62; *see also* CSP Comments at 1 ("It would be far better for FERC to remand Standard TPL–007–1 in its entirety than to approve a reliability standard that would grant liability protection to utilities while blocking the electric grid protection for the public that a 21st century society requires.").

[147] Resilient Societies Comments at 62.

[148] Order No. 779, 143 FERC ¶ 61,147 at P 84.

[149] NERC August 17, 2015 Filing at Appendix 1 (Decision of Level 2 Appeal Panel SPM Section 8 Appeal the Foundation For Resilient Societies, Inc. TPL–007–1).

[150] NERC Rules of Procedure, Appendix 3A (Standard Processes Manual), Section 8 (Process for Appealing an Action or Inaction) (effective June 26, 2013).

[151] 44 U.S.C. 3507(d).

[152] 5 CFR 1320.11.

125. Upon approval of a collection(s) of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of a rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number.

126. The Commission solicited comments on the need for this information, whether the information will have practical utility, the accuracy of the burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected or retained, and any suggested methods for minimizing respondents' burden, including the use of automated information techniques. The Commission asked that any revised burden or cost estimates submitted by commenters be supported by sufficient detail to understand how the estimates are generated. The Commission received comments on specific requirements in Reliability Standard TPL–007–1, which we address in this Final Rule. However, the Commission did not receive any comments on our reporting burden estimates or on the need for and the purpose of the information collection requirements.[153]

Public Reporting Burden: The Commission approves Reliability Standard TPL–007–1 and the associated implementation plan, violation severity levels, and violation risk factors, as discussed above. Reliability Standard TPL–007–1 will impose new requirements for transmission planners, planning coordinators, transmission owners, and generator owners. Reliability Standard TPL–007–1, Requirement R1 requires planning coordinators, in conjunction with the applicable transmission planner, to identify the responsibilities of the planning coordinator and transmission planner in the planning coordinator's planning area for maintaining models and performing the study or studies needed to complete GMD Vulnerability Assessments. Requirements R2, R3, R4, R5, and R7 refer to the "responsible entity, as determined by Requirement R1," when identifying which applicable planning coordinators or transmission planners are responsible for maintaining models and performing the necessary study or studies. Requirement R2 requires that the responsible entities maintain models for performing the studies needed to complete GMD Vulnerability Assessments, as required in Requirement R4. Requirement R3 requires responsible entities to have criteria for acceptable system steady state voltage performance during a benchmark GMD event. Requirement R4 requires responsible entities to complete a GMD Vulnerability Assessment of the near-term transmission planning horizon once every 60 calendar months. Requirement R5 requires responsible entities to provide GIC flow information to transmission owners and generator owners that own an applicable bulk electric system power transformer in the planning area. This information is necessary for applicable transmission owners and generator owners to conduct the thermal impact assessments required by proposed Requirement R6. Requirement R6 requires applicable transmission owners and generator owners to conduct thermal impact assessments where the maximum effective GIC value provided in proposed Requirement R5, Part 5.1 is 75 A/phase or greater. Requirement R7 requires responsible entities to develop a corrective action plan when its GMD Vulnerability Assessment indicates that its system does not meet the performance requirements of Table 1—Steady State Planning Events. The corrective action plan must address how the performance requirements will be met, must list the specific deficiencies and associated actions that are necessary to achieve performance, and must set forth a timetable for completion. The Commission estimates the annual reporting burden and cost as follows:

FERC–725N, AS MODIFIED BY THE FINAL RULE IN DOCKET NO. RM15–11–000

[TPL–007–1 Reliability Standard for Transmission System Planned Performance for Geomagnetic Disturbance Events] [154]

	Number of respondents (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden hours & cost per response [155] (4)	Total annual burden hours & total annual cost (3) * (4) = (5)	Cost per respondent ($) (5) ÷ (1)
(One-time) Requirement 1.	121 (PC & TP)	1	121	Eng. 5 hrs. ($331.75); RK 4 hrs. ($149.80).	1,089 hrs. (605 Eng., 484 RK); $58,267.55 ($40,141.75 Eng., $18,125.80 RK).	$481.55
(On-going) Requirement 1.	121 (PC & TP)	1	121	Eng. 3 hrs. ($199.05); RK 2 hrs. ($74.90).	605 hrs. (363 Eng., 242 RK); $33,147.95 ($24,085.05 Eng., $9,062.90 RK).	273.95
(One-time) Requirement 2.	121 (PC & TP)	1	121	Eng. 22 hrs. ($1,459.70); RK 18 hrs. ($674.10).	4840 hrs. (2,662 Eng., 2,178 RK); $258,189.80 ($176,623.70 Eng., $81,566.10 RK).	2,133.80
(On-going) Requirement 2.	121 (PC & TP)	1	121	Eng. 5 hrs. ($331.75); RK 3 hrs. ($112.35).	968 hrs. (605 Eng., 363 RK); $53,736.10 ($40,141.75 Eng., $13,594.35 RK).	444.10

---

[153] While noting the uncertainties surrounding the potential costs associated with implementation of Reliability Standard TPL–007–1 and the potential costs that could arise from a revised Reliability Standard, the Trade Associations stated that they "have no specific comments regarding the OMB cost estimate in the NOPR." Trade Associations Comments at 9.

FERC–725N, as Modified by the Final Rule in Docket No. RM15–11–000—Continued

[TPL–007–1 Reliability Standard for Transmission System Planned Performance for Geomagnetic Disturbance Events][154]

	Number of respondents (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden hours & cost per response[155] (4)	Total annual burden hours & total annual cost (3) * (4) = (5)	Cost per respondent ($) (5) ÷ (1)
(One-time) Requirement 3.	121 (PC & TP)	1	121	Eng. 5 hrs. ($331.75); RK 3 hrs. ($112.35).	968 hrs. (605 Eng., 363 RK); $53,736.10 ($40,141.75 Eng., $13,594.35 RK).	444.10
(On-going) Requirement 3.	121 (PC & TP)	1	121	Eng. 1 hrs. ($66.35);RK 1 hrs. ($37.45).	242 hrs. (121 Eng., 121 RK); $12,559.80 ($8,028.35 Eng., $4,531.45 RK).	103.80
(On-going) Requirement 4.	121 (PC & TP)	1	121	Eng. 27 hrs. ($1,791.45); RK 21 hrs. ($786.45).	5,808 hrs. (3,267 Eng., 2,541 RK); $311,919.85 ($216,765.45 Eng., $95,154.40 RK).	2,277.85
(On-going) Requirement 5.	121 (PC & TP)	1	121	Eng. 9 hrs. ($597.15); RK 7 hrs. ($262.15).	1936 hrs. (1,089 Eng., 847 RK); $103,975.30 ($72,255.15 Eng., $31,720.15 RK).	859.30
(One-time) Requirement 6.	881 (TO & GO)	1	881	Eng. 22 hrs. ($1,459.70); RK 18 hrs. ($674.19).	35,240 hrs. (19,382 Eng., 15,858 RK); $1,879,957.09 ($1,285,995.70 Eng., $593,961.39 RK).	2,133.89
(On-going) Requirement 6.	881 (TO & GO)	1	881	Eng. 2 hrs. ($132.70); RK 2 hrs. ($74.90).	3,524 hrs. (1,762 Eng., 1762 RK); $182,895.60 ($116,908.70 Eng., $65,986.90 RK).	207.60
(On-going) Requirement 7.	121 (PC & TP)	1	121	Eng. 11 hrs. ($729.85); RK 9 hrs. ($337.05).	2,420 hrs. (1,331 Eng., 1,089 RK); $129,094.90 ($88,311.85 Eng., $40,783.05 RK).	1,066.90
Total			2851		57,640[156] hrs. (31,792 Eng., 25,848 RK); $3,077,480.04 ($2,109,399.20 Eng., $968,080.84 RK).	

Title: FERC–725N, Mandatory Reliability Standards: TPL Reliability Standards.

Action: Approved Additional Requirements.

OMB Control No: 1902–0264.

Respondents: Business or other for-profit and not-for-profit institutions.

Frequency of Responses: One time and on-going.

Necessity of the Information: The Commission has reviewed the requirements of Reliability Standard TPL–007–1 and has made a determination that the requirements of this Reliability Standard are necessary to implement section 215 of the FPA. Specifically, these requirements address the threat posed by GMD events to the Bulk-Power System and conform to the Commission's directives regarding development of the Second Stage GMD Reliability Standards, as set forth in Order No. 779.

Internal review: The Commission has assured itself, by means of its internal review, that there is specific, objective support for the burden estimates associated with the information requirements.

127. Interested persons may obtain information on the reporting requirements by contacting the Federal Energy Regulatory Commission, Office of the Executive Director, 888 First Street NE., Washington, DC 20426 [Attention: Ellen Brown, e-mail:

---

[154] Eng.=engineer; RK =recordkeeping (record clerk); PC=planning coordinator; TP=transmission planner; TO=transmission owner; and GO=generator owner.

[155] The estimates for cost per response are derived using the following formula: Burden Hours per Response * $/hour = Cost per Response. The $66.35/hour figure for an engineer and the $37.45/hour figure for a record clerk are based on data on the average salary plus benefits from the Bureau of Labor Statistics obtainable at *http://www.bls.gov/oes/current/naics3_221000.htm* and *http://www.bls.gov/news.release/ecec.nr0.htm.*

[156] Of the 57,640 total burden hours, 42,137 hours are one-time burden hours, and 15,503 hours are on-going annual burden hours.

DataClearance@ferc.gov, phone: (202) 502–8663, fax: (202) 273–0873].

128. Comments concerning the information collections in this final rule and the associated burden estimates, should be sent to the Commission in this docket and may also be sent to the Office of Management and Budget, Office of Information and Regulatory Affairs [Attention: Desk Officer for the Federal Energy Regulatory Commission]. For security reasons, comments should be sent by e-mail to OMB at the following e-mail address: *oira_submission@omb.eop.gov.* Please reference FERC–725N and OMB Control No. 1902–0264 in your submission.

IV. Environmental Analysis

129. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[157] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended.[158] The actions here fall within this categorical exclusion in the Commission's regulations.

V. Regulatory Flexibility Act

130. The Regulatory Flexibility Act of 1980 (RFA)[159] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.[160] The SBA revised its size standard for electric utilities (effective January 22, 2014) to a standard based on the number of employees, including affiliates (from a standard based on megawatt hours).[161] Under SBA's new size standards, planning coordinators, transmission planners, transmission owners, and generator owners are likely included in one of the following categories (with the associated size thresholds noted for each):[162]

- Hydroelectric power generation, at 500 employees
- Fossil fuel electric power generation, at 750 employees
- Nuclear electric power generation, at 750 employees
- Other electric power generation (e.g., solar, wind, geothermal, biomass, and other), at 250 employees
- Electric bulk power transmission and control,[163] at 500 employees

131. Based on these categories, the Commission will use a conservative threshold of 750 employees for all entities.[164] Applying this threshold, the Commission estimates that there are 440 small entities that function as planning coordinators, transmission planners, transmission owners, and/or generator owners. However, the Commission estimates that only a subset of such small entities will be subject to the approved Reliability Standard given the additional applicability criterion in the approved Reliability Standard (*i.e.,* to be subject to the requirements of the approved Reliability Standard, the applicable entity must own or must have a planning area that contains a large power transformer with a high side, wye-grounded winding with terminal voltage greater than 200 kV).

132. Reliability Standard TPL–007–1 enhances reliability by establishing requirements that require applicable entities to perform GMD Vulnerability Assessments and to mitigate identified vulnerabilities. The Commission estimates that each of the small entities to whom the approved Reliability Standard applies will incur one-time compliance costs of $5,193.34 and annual ongoing costs of $5,233.50.

133. The Commission does not consider the estimated cost per small entity to impose a significant economic impact on a substantial number of small entities. Accordingly, the Commission certifies that the approved Reliability Standard will not have a significant economic impact on a substantial number of small entities.

VI. Document Availability

134. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (*http://www.ferc.gov*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street NE., Room 2A, Washington, DC 20426.

135. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

136. User assistance is available for eLibrary and the FERC's website during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. E-mail the Public Reference Room at *public.referenceroom@ferc.gov.*

VII. Effective Date and Congressional Notification

137. These regulations are effective November 29, 2016. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a "major rule" as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

By the Commission.

Issued: September 22, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

Appendix

Commenters

INITIAL COMMENTS

Abbreviation	Commenter
AEP	American Electric Power Service Corporation.
APS	Arizona Public Service Company.
ATC	American Transmission Company.

---

[157] *Regulations Implementing the National Environmental Policy Act of 1969,* Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986–1990 ¶ 30,783 (1987).

[158] 18 CFR 380.4(a)(2)(ii).

[159] 5 U.S.C. 601–12.

[160] 13 CFR 121.101.

[161] SBA Final Rule on "Small Business Size Standards: Utilities," 78 FR 77,343 (Dec. 23, 2013).

[162] 13 CFR 121.201, Sector 22, Utilities.

[163] This category covers transmission planners and planning coordinators.

[164] By using the highest number threshold for all types of entities, our estimate conservatively treats more entities as "small entities."

INITIAL COMMENTS—Continued

Abbreviation	Commenter
Baker	Greta Baker.
Bardin	David J. Bardin.
BPA	Bonneville Power Administration.
Briggs	Kevin Briggs.
CEA	Canadian Electricity Association.
CSP	Center for Security Policy.
EIS	Electric Infrastructure Security Council.
Emprimus	Emprimus LLC.
Exelon	Exelon Corporation.
Gaunt	Charles T. Gaunt.
Holdeman	Eric Holdeman.
Hydro One	Hydro One Networks Inc.
ITC	International Transmission Company.
Lloyd's	Lloyd's America, Inc.
JINSA	Jewish Institute for National Security Affairs.
Joint ISOs/RTOs	ISO New England Inc., Midcontinent Independent Transmission System Operator, Inc., Independent Electricity System Operator, New York Independent System Operator, Inc., and PJM Interconnection, L.L.C.
Kappenman	John G. Kappenman and Curtis Birnbach.
Morris	Eric S. Morris.
NERC	North American Electric Reliability Corporation.
Resilient Societies	Foundation for Resilient Societies.
Roodman	David Roodman.
Trade Associations	American Public Power Association, Edison Electric Institute, Electricity Consumers Resource Council, Electric Power Supply Association, Large Public Power Council, National Rural Electric Cooperative Association.
Tri-State	Tri-State Generation and Transmission Association, Inc.
USGS	United States Geological Survey.

SUPPLEMENTAL COMMENTS

AEP	American Electric Power Service Corporation.
Bardin	David J. Bardin.
CSP	Center for Security Policy.
Gaunt	Charles T. Gaunt.
IEEE	IEEE Power and Energy Society Transformers Committee.
Kappenman	John G. Kappenman and Curtis Birnbach.
NERC	North American Electric Reliability Corporation.
Resilient Societies	Foundation for Resilient Societies.
Roodman	David Roodman.
Trade Associations	American Public Power Association, Edison Electric Institute, Electricity Consumers Resource Council, Electric Power Supply Association, Large Public Power Council, National Rural Electric Cooperative Association.
USGS	United States Geological Survey.

[FR Doc. 2016–23441 Filed 9–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR Part 12

[Docket No. USCBP–2016–0061; CBP Dec. 16–15]

RIN 1515–AE12

Notice of Arrival for Importations of Pesticides and Pesticidal Devices

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Interim regulations; solicitation of comments.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations pertaining to the importation of pesticides and pesticidal devices into the United States subject to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Specifically, CBP is amending the regulations to permit the option of filing an electronic alternative to the U.S. Environmental Protection Agency's (EPA) "Notice of Arrival of Pesticides and Devices" (NOA) paper form, with entry documentation, via any CBP-authorized electronic data interchange system. This change will support modernization

initiatives, including implementation of the International Trade Data System (ITDS). This document also makes non-substantive conforming and editorial changes to the CBP regulations.

DATES: This interim final rule is effective September 30, 2016. Comments must be submitted on or before October 31, 2016.

ADDRESSES: You may submit comments, identified by docket number USCBP–2016–0061, by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Trade and Commercial Regulations Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street NE., 10th Floor, Washington, DC 20229–1177.

Instructions: All submissions received must include the agency name and docket title for this rulemaking, and must reference docket number USCBP–2016–0061. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of the document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Submitted comments may also be inspected during business days between the hours of 9:00 a.m. and 4:30 p.m. at the Trade and Commercial Regulations Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street NE., 10th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: For questions related to the filing of EPA forms with CBP, contact William R. Scopa, Branch Chief, Partner Government Branch, Inter-Agency Collaboration Division, Office of Trade, U.S. Customs and Border Protection, at *william.r.scopa.cbp.dhs.gov.* For EPA-related questions, contact Ryne Yarger, Environmental Protection Specialist, Field and External Affairs Division, Office of Pesticide Programs, U.S. Environmental Protection Agency, at *yarger.ryne@epa.gov,* telephone (703) 605–1193.

SUPPLEMENTARY INFORMATION:

Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the interim rule. *See* **ADDRESSES** above for information on how to submit comments. U.S. Customs and Border Protection (CBP) also invites comments that relate to the economic, environmental, or federalism effects that might result from this interim rule. Comments that will provide the most assistance to CBP will reference a specific portion of the interim rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Background

I. The Federal Insecticide, Fungicide and Rodenticide Act

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended (7 U.S.C. 136 *et seq.*), provides for federal regulation of pesticide distribution, sale, and use in the United States. Section 3 of the FIFRA, 7 U.S.C. 136a, requires that, with limited exceptions, all pesticides distributed or sold in the United States must be registered (licensed) by the U.S. Environmental Protection Agency (EPA). Section 17(c)(1) of the FIFRA, 7 U.S.C. 136o(c)(1), provides for EPA review of pesticides and devices being imported into the United States and authorizes U.S. Customs and Border Protection (CBP), at the request of EPA, to delay or refuse admission of imports that appear, from examination, to be adulterated, or misbranded, or otherwise violate the provisions of the FIFRA or are injurious to human health or the environment. Section 17(e) of the FIFRA, 7 U.S.C. 136o(e), provides that CBP, in consultation with EPA, will prescribe regulations for the enforcement of section 17(c).

Under the FIFRA, EPA has authority to regulate the distribution or sale of registered and unregistered pesticides and pesticidal devices into the United States. In order to facilitate compliance with the FIFRA, the filing of EPA Form 3540–1 ("Notice of Arrival of Pesticides and Devices," hereinafter referred to in this document as "NOA") is required to notify EPA of the arrival of imported pesticides and devices and serves to assist EPA and CBP in fulfilling their statutory obligation under the FIFRA to regulate the importation, distribution, or sale of pesticides and devices in the United States. The NOA can be found in fillable .pdf format on EPA's "Compliance" Web site at *https://www.epa.gov/compliance/epa-form-3540-1-notice-arrival-pesticides-and-devices.*

II. Current Pesticide and Device Importation Procedures

The statutory provisions set forth in section 17(c) of the FIFRA, 7 U.S.C. 136o(c), are implemented in the CBP regulations at §§ 12.110 through 12.117 of title 19 of the Code of Federal Regulations (19 CFR 12.110–12.117) and prescribe the administration of CBP's pesticide and device import program.

Currently, when a pesticide or device is to be imported into the United States, the importer of record or its agent must submit, prior to arrival, a NOA to the EPA regional office with responsibility for the port of entry where the merchandise will be entered. EPA reviews and evaluates the information presented on the NOA and determines the disposition to be made of the shipment of the pesticides or devices upon their arrival in the United States. EPA may request additional information to make its determination on whether the pesticides or devices satisfy the requirements of the FIFRA. Upon review of the NOA, EPA will inform CBP of the action to be taken with respect to the shipment. The possible actions include release, detention, or refusal of entry of the shipment. The determination is indicated on the completed NOA form, which is signed by an EPA official and returned to the importer or its agent. The importer or the importer's agent must submit the completed NOA form to CBP along with the documentation required for the entry of merchandise. CBP will follow EPA's disposition instructions in the NOA and notify EPA when discrepancies exist between the NOA and the entry documents.

III. Explanation of Interim Amendments to CBP Regulations

CBP, in consultation with EPA, is amending the CBP regulations to permit the option of filing an electronic alternative to the NOA with the entry documentation, via any CBP-authorized electronic data interchange system. The NOA may still be filed in a paper format with the EPA prior to arrival of the shipment, and the completed NOA must be filed with CBP at the time of entry.

These changes liberalize filing procedures and implement modernization initiatives including the International Trade Data System (ITDS), as established by section 405 of the Security and Accountability for Every (SAFE) Port Act of 2006, Public Law 109–347, 120 Stat. 1884, by utilizing a single-window system for the collection and distribution of standard electronic import and export data required by participating Federal agencies. These amendments will allow electronic collection, processing, sharing, and review of requisite trade data and documents during the cargo import process.

A discussion of the amendments to 19 CFR 12.110–12.117, other than non-substantive editorial changes, is set forth below.

Section 12.111

Existing § 12.111 (19 CFR 12.111) provides that all imported pesticides are required to be registered under the provisions of section 3 of the FIFRA, and pursuant to 40 CFR 162.10, before being permitted entry into the United States. Devices, although not required to be registered, must not bear any statement, design, or graphic representation that is false or misleading in any particular.

CBP is amending this section to update an EPA regulatory citation and to conform to EPA regulations that allow certain pesticides to be imported without registration.

Section 12.112

Existing § 12.112(a) (19 CFR 12.112(a)) provides that prior to arrival of pesticides or devices into the United States, the importer must submit a NOA to the Administrator of the EPA. EPA will complete the NOA, indicating the disposition to be made of the shipment of pesticides or devices upon its arrival in the United States, and return it to the importer or its agent. Existing § 12.112(b) exempts importers of chemicals imported for use other than as pesticides from the requirement to submit a NOA.

This rule liberalizes the procedures set forth in 19 CFR 12.112(a) by permitting the option of filing an electronic alternative to the NOA, with the entry documentation, via any CBP-authorized electronic data interchange system. The NOA may still be filed in a paper format, however it must be submitted to the EPA prior to arrival of the shipment.

Section 12.113

Existing § 12.113 (19 CFR 12.113) prescribes the presentation of the NOA to CBP, and the ramifications of failure to do so. Specifically, paragraph (a) requires that upon arrival of a shipment of pesticides or devices into the United States, the importer or its agent must present the completed NOA to the CBP port director and the port director will notify EPA of any discrepancies between the entry documents for the shipment and the information contained in the NOA. Paragraph (b) provides that where a completed NOA is not presented to CBP upon arrival, the shipment will be detained by CBP at the importer's risk and expense until the completed NOA is presented or until other disposition is ordered by EPA. The detention may not exceed 30 days, unless extended by CBP for good cause for a period not to exceed an additional 30 days. The importer or his agent may also request CBP for an extension of the initial 30-day detention period. Paragraph (c) provides that a shipment that remains detained or undisposed of due to failure to present a completed NOA or non-receipt of the EPA shipment disposition order as to its disposition will be treated as a prohibited importation. CBP will cause the destruction of any such shipment not exported by the consignee within 90 days after the expiration of the detention period.

CBP is amending § 12.113 to clarify that CBP must be in receipt of the completed NOA at the time of entry, and not upon arrival, and that an electronic alternative to the NOA may be filed via any CBP-authorized electronic data interchange system with the filing of the entry documentation.

Section 12.115

Section 12.115 (19 CFR 12.115) prescribes the terms applicable to when a shipment of detained pesticides or devices may be released to the consignee under bond pending an examination by EPA as to whether the goods comply with the requirements of the FIFRA.

CBP is amending this section to conform to 19 CFR part 133 which permits the electronic filing of bonds.

Section 12.116

Section 12.116 (19 CFR 12.116) prescribes the manner by which CBP will deliver samples of the imported pesticides or devices, and any related information, to EPA.

CBP is amending this provision by removing the reference to "in writing" to reflect that CBP may notify the consignee electronically.

Inapplicability of Notice and Delayed Effective Date

The Administrative Procedure Act (APA) requirements in 5 U.S.C. 553 govern agency rulemaking procedures. Section 553(b) of the APA generally requires notice and public comment before issuance of a final rule. In addition, section 553(d) of the APA requires that a final rule have a 30-day delayed effective date. The APA, however, provides exceptions from the prior notice and public comment requirement and the delayed effective date requirements, when an agency for good cause finds that such procedures are impracticable, unnecessary, or contrary to the public interest.

Treasury and CBP find that prior notice and comment procedures are unnecessary and that good cause exists to issue these regulations effective upon publication. Prior procedures are unnecessary because the rule does not substantively alter the underlying rights or interests of importers or filers, but only expands the options available to filers in presenting required information to the agency.

Executive Orders 13563 and 12866

Executive Orders (E.O.) 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This interim rule is not a "significant regulatory action," under section 3(f) of E.O. 12866. Accordingly, OMB has not reviewed this regulation.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions) when the agency is required to publish a general notice of proposed rulemaking for a rule. Since a general notice of proposed rulemaking is not necessary for this rule, CBP is not required to prepare a regulatory flexibility analysis for this rule.

Paperwork Reduction Act (PRA)

The information collection activities associated with the existing requirements related to the submission of a paper NOA under 19 CFR 12.110–12.117, are currently approved by OMB under OMB control number 2070–0020 (EPA ICR No. 0152.10). This rule adds an electronic filing option to the existing paper filing option, in which the information collection activities for the electronic filing of a NOA have been approved under OMB control number 2070–0020 (EPA ICR No. 0152.11). There is no change in burden hours as a result of this rule.

Signing Authority

This document is being issued in accordance with § 0.1(a)(1) of the CBP regulations (19 CFR 0.1(a)(1)) pertaining to the authority of the Secretary of the Treasury (or his or her delegate) to approve regulations related to certain CBP revenue functions.

List of Subjects in 19 CFR Part 12

Customs duties and inspection, Entry of merchandise, Imports, Pesticides and devices, Reporting and recordkeeping requirements.

Amendments to Part 12 of the CBP Regulations

For the reasons set forth in the preamble, 19 CFR part 12 is amended as set forth below.

PART 12—SPECIAL CLASSES OF MERCHANDISE

■ 1. The general authority citation for part 12, and the specific authority citations for sections 12.110 through 12.117, continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624.

* * * * *

Sections 12.110 through 12.117 also issued under 19 U.S.C. 1484 and 7 U.S.C. 136 *et seq.*

* * * * *

§ 12.110 [Amended]

■ 2. Section 12.110 is amended:

■ a. In the first sentence, by removing the word "shall"; and

■ b. In the second sentence, by removing the words "shall mean" and adding in their place the word "means".

§ 12.111 [Amended]

■ 3. In § 12.111, the first sentence is amended by removing the word "All" and adding in its place the word "Certain", and by removing the number "162.10" and adding in its place the language "part 152".

■ 4. Section 12.112 is amended by revising paragraph (a) to read as follows:

§ 12.112 Notice of Arrival of pesticides and devices filed with the Administrator.

(a) *General.* An importer or the importer's agent desiring to import pesticides or devices into the United States must submit to the Administrator, prior to the arrival of the shipment in the United States, a Notice of Arrival of Pesticides and Devices (Notice of Arrival) on U.S. Environmental Protection Agency (EPA) Form 3540–1. The Administrator will complete the Notice of Arrival and provide notification to the importer or the importer's agent indicating the disposition to be made of a pesticide or device upon its entry into the United States. In the alternative, the importer or the importer's agent may file an electronic alternative to the Notice of Arrival, with the filing of the entry documentation, via any CBP-authorized electronic data interchange system.

* * * * *

■ 5. Section 12.113 is revised to read as follows:

§ 12.113 Arrival and entry of shipment of pesticides and devices.

(a) *Notice of Arrival form filed with CBP.* Upon entry of a shipment of pesticides or devices into the United States, and concurrent with the filing of the entry documentation, CBP must be in receipt of a completed Notice of Arrival of Pesticides and Devices (Notice of Arrival) on U.S. Environmental Protection Agency (EPA) Form 3540–1 or its electronic alternative submitted via any CBP-authorized electronic data interchange system. A completed Notice of Arrival must have been signed by the Administrator and indicate any action to be taken by CBP with respect to the shipment. CBP will compare entry information for the shipment of pesticides or devices with the information in the Notice of Arrival and notify the Administrator of any discrepancies.

(b) *EPA Notice of Arrival declaration form not presented.* When a shipment of pesticides or devices arrives and entry is attempted in the United States without a completed Notice of Arrival having been filed with CBP pursuant to paragraph (a) of this section, the shipment will be detained by CBP at the importer's risk and expense until the completed Notice of Arrival is presented to CBP or until other disposition is ordered by the Administrator. Such detention is not to exceed a period of 30-calendar days, or such additional extended 30-calendar day detention period as CBP may for good cause authorize. An importer or its agent may request an extension of the initial 30-calendar day detention period by filing a request with the director of the CBP port of entry.

(c) *Disposition of pesticides or devices remaining under detention.* A shipment of pesticides or devices that remains detained or undisposed of due to the failure to timely submit to CBP a completed Notice of Arrival will be treated as a prohibited importation. CBP will cause the destruction of any such shipment not exported by the consignee within 90-calendar days after the expiration of the detention period specified or authorized by paragraph (b) of this section.

■ 6. Section 12.114 is revised to read as follows:

§ 12.114 Release or refusal of delivery.

If the EPA directs the port director to release the shipment of pesticides or devices, the shipment will be released to the consignee. If the EPA directs the port director to refuse delivery of the shipment, the shipment will be refused delivery and treated as a prohibited importation. The port director will cause the destruction of any shipment refused delivery and not exported by the consignee within 90-calendar days after notice of such refusal of delivery.

■ 7. Section 12.115 is revised to read as follows:

§ 12.115 Release under bond of shipment detained for examination.

If the EPA so directs, a shipment of pesticides or devices will be detained at the importer's risk and expense by the port director pending an examination by the Administrator to determine whether the shipment complies with the requirements of the Act. However, a shipment detained for examination may be released to the consignee prior to a determination by the Administrator provided a bond is furnished on CBP Form 301, or its electronic equivalent, containing the bond conditions set forth in § 113.62 of this chapter, for the return of the merchandise to CBP custody, and upon entry of the merchandise and the satisfaction of all other applicable laws. The bond will be in an amount deemed appropriate by CBP. When a shipment of pesticides or devices is released to the consignee under bond, the pesticides or devices must not be used or otherwise disposed of until the determination on compliance with the requirements of the Act is made by the Administrator.

§ 12.116 [Amended]

■ 8. Section § 12.116 is amended: in the first and last sentences, by removing the word "shall" each place that it appears and adding in each place the word "will"; and, in the last sentence, by removing the phrase ", in writing,".

§ 12.117 [Amended]

■ 9. Section 12.117 is amended by removing the word "shall" each place that it appears and adding in each place the word "will".

R. Gil Kerlikowske,

Commissioner, U.S. Customs and Border Protection.

Approved: September 26, 2016.

Timothy E. Skud,

Deputy Assistant Secretary of the Treasury.

[FR Doc. 2016–23578 Filed 9–29–16; 8:45 am]

BILLING CODE 9111–14–P

INTERNATIONAL TRADE COMMISSION

19 CFR Part 220

Rules Relating to the Submission and Consideration of Petitions for Duty Suspensions and Reductions

AGENCY: United States International Trade Commission.

ACTION: Interim rule with request for comments.

SUMMARY: The United States International Trade Commission (Commission) is adopting interim rules that will amend the Commission's Rules of Practice and Procedure and establish a new part governing the submission and consideration of petitions for duty suspensions and reductions under the American Manufacturing Competitiveness Act of 2016.

DATES:

Effective date: September 30, 2016.

Deadline for filing written comments: November 29, 2016.

ADDRESSES: You may submit comments, identified by docket number MISC–046, rulemaking regarding petitions for duty suspensions and reductions, by any of the following methods:

—*Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.

—*Agency Web site: https://edis.usitc.gov.* Follow the instructions for submitting comments on the Web site.

—*Mail:* For paper submission. U.S. International Trade Commission, 500 E Street SW., Room 112A, Washington, DC 20436.

—*Hand Delivery/Courier:* U.S. International Trade Commission, 500 E Street SW., Room 112A, Washington, DC 20436. From the hours of 8:45 a.m. to 5:15 p.m.

Instructions: All submissions received must include the agency name and docket number (MISC–046, Rulemaking Regarding Petitions for Duty Suspensions/Reductions), along with a cover letter stating the nature of the commenter's interest in the proposed rulemaking. All comments received will be posted without change to *https://edis.usitc.gov* including any personal information provided. For paper copies, a signed original and 8 copies of each set of comments should be submitted to Lisa R. Barton, Secretary, U.S. International Trade Commission, 500 E Street SW., Room 112A, Washington, DC 20436.

For access to the docket to read background documents or comments received, go to *https://edis.usitc.gov* and/or the U.S. International Trade Commission, 500 E Street SW., Room 112A, Washington, DC 20436.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary, telephone (202) 205–2000 or William Gearhart, Esquire, Office of the General Counsel, United States International Trade Commission, telephone (202) 205–3091. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its Web site at *https://www.usitc.gov.*

SUPPLEMENTARY INFORMATION: The preamble below is designed to assist readers in understanding these amendments to the Commission's Rules of Practice and Procedure (the Rules). This preamble provides background information, a regulatory analysis of the amendments, a section-by-section explanation of the amendments, and a description of the amendments to the Rules. The Commission encourages members of the public to comment on whether the language of the amendments is sufficiently clear for users to understand, and to submit any other comments they wish to make on the amendments.

These amendments are being promulgated in accordance with the Administrative Procedure Act (5 U.S.C. 553) (APA), and will be codified in 19 CFR part 220.

Background

Section 335 of the Tariff Act of 1930 (19 U.S.C. 1335) authorizes the Commission to adopt such reasonable procedures, rules and regulations as it deems necessary to carry out its functions and duties. In addition, section 3(b)(5) of the American Manufacturing Competitiveness Act of 2016, Public Law 114–159, 130 Stat. 396 (19 U.S.C. 1332 note) (the Act) directs the Commission to prescribe and publish in the **Federal Register** and on a publicly available internet Web site of the Commission procedures to be complied with by members of the public submitting petitions for duty suspensions and reductions under section 3(b)(1)(A) of that Act.

The Commission is promulgating rules governing the submission and consideration of petitions for duty suspensions and reductions under the Act. Section 3 of the Act establishes a process for the submission and consideration of petitions for duty suspensions and reductions. More specifically, it directs the Commission to publish a notice by October 15, 2016, that requests members of the public to submit petitions to the Commission for duty suspensions and reductions, provided that they can demonstrate that they are likely beneficiaries of such duty suspensions or reductions. The Act also provides that the petitioners must submit disclosure forms with respect to such duty suspensions and reductions. The petitions and disclosure forms must be submitted during the 60-day period beginning on the date of publication of the Commission's notice. Section 3 of the Act also lists the types of information that must be included in a petition.

Section 3 of the Act requires that the Commission publish on its Web site all of the petitions that contain the required information and the related disclosure forms no later than 30 days after the close of the 60-day filing period. It also provides that members of the public will have 45 days from the date of the notice's publication to submit comments to the Commission regarding the petitions and disclosure forms. The Commission must make those comments available to the public on the Commission's Web site.

These amendments establish new Commission rules governing the submission of petitions and the issuance of the Commission's reports to the Congress under the Act. The new rules identify the types of entities that may file a petition, describe the information that must be included in a petition, provide procedures for public comment, and describe the schedule for filing petitions and public comments. The new rules also describe the content of the preliminary and final reports that the Commission must submit to the Congress, and the time for submitting those reports, and otherwise establish procedures relating to the Commission's review and processing of the petitions under the Act.

Procedure for Adopting the Interim Amendments

The Commission ordinarily promulgates amendments to the Code of Federal Regulations in accordance with the notice-and-comment rulemaking procedure in section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553). That procedure entails publication of notice of proposed rulemaking in the **Federal Register** that solicits public comment on the proposed amendments, consideration by the Commission of public comments on the content of the amendments, and publication of the final amendments at least 30 days prior to their effective date.

In this instance, however, the Commission is amending its rules in 19 CFR part 220 on an interim basis, effective upon publication of this notice in the **Federal Register**. The Commission's authority to adopt interim amendments without following all steps listed in section 553 of the APA is derived from section 335 of the Tariff Act of 1930 (19 U.S.C. 1335), section 3(b)(5) of the American Manufacturing Competitiveness Act of 2016 (19 U.S.C. 1332 note), and section 553 of the APA.

Section 553(b) of the APA allows an agency to dispense with publication of a notice of proposed rulemaking when the following circumstances exist: (1) The rules in question are interpretive rules, general statements of policy, or rules of agency organization, procedure or practice; or (2) the agency for good cause finds that notice and public comment on the rules are impracticable, unnecessary, or contrary to the public interest, and the agency incorporates that finding and the reasons therefor into the rules adopted by the agency. Section 553(d)(3) of the APA allows an agency to dispense with the publication of notice of final rules at least thirty days prior to their effective date if the agency finds that good cause exists for not meeting the advance publication requirement and the agency publishes that finding along with the rules. Additionally, section 3(b)(5) of the American Manufacturing Competitiveness Act of 2016 requires that the Commission prescribe and publish procedures for submitting petitions for duty suspensions and reductions under that Act, and section 335 of the Tariff Act authorizes the Commission to adopt such reasonable procedures, rules, and regulations as it deems necessary to carry out its functions and duties.

In this instance, the Commission has determined that the requisite circumstances exist for dispensing with the notice, comment, and advance publication procedure that ordinarily precedes the adoption of Commission rules. For purposes of invoking the section 553(b)(3)(A) exemption from publishing a notice of proposed rulemaking that solicits public comment, the Commission finds that the interim amendments to part 220 are "agency rules of procedure and practice." Moreover, the Commission finds under 553(b)(3)(B) that good cause exists to waive prior notice and opportunity for public comment. In particular, the American Manufacturing Competitiveness Act of 2016 took effect on May 20, 2016, and it requires that the Commission have a process in place to accept petitions not later than October 15, 2016, which makes the establishment of rules a matter of urgency. Hence, it would be impracticable for the Commission to comply with the usual notice of proposed rulemaking and public comment procedure, and therefore the Commission has determined that interim rules are needed under these circumstances.

For the purpose of invoking the section 553(d)(3) exemption from publishing advance notice of the interim amendments to part 220 at least thirty days prior to their effective date, the Commission finds the fact that the Act was signed by the President on May 20, 2016, but requires that the Commission have a complete process in place no later than October 15, 2016, makes such advance publication impracticable and constitutes good cause for not complying with that requirement.

The Commission recognizes that interim rule amendments should not respond to anything more than the exigencies created by the new legislation. Each interim amendment to part 220 concerns a new rule covering a matter addressed in the new legislation but not covered by a preexisting rule.

After taking into account all comments received and the experience acquired under the interim rules, the Commission will replace them with final rules promulgated in accordance with the notice, comment, and advance publication procedure prescribed in section 553 of the APA.

Regulatory Analysis of Proposed Amendments to the Commission's Rules

The Commission has determined that these interim rules do not meet the criteria described in section 3(f) of Executive Order 12866 (58 FR 51735, October 4, 1993) and thus do not constitute a "significant regulatory action" for purposes of the Executive Order.

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is inapplicable to this rulemaking because it is not one for which a notice of proposed rulemaking is required under 5 U.S.C. 553(b) or any other statute.

These interim rules do not contain federalism implications warranting the preparation of a federalism summary impact statement pursuant to Executive Order 13132 (64 FR 43255, August 4, 1999).

No actions are necessary under title II of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (2 U.S.C. 1531–1538) because the interim rules will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year (adjusted annually for inflation), and will not significantly or uniquely affect small governments.

These interim rules are not "major rules" as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801*et seq.*). Moreover, they are exempt from the reporting requirements of that Act because they contain rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.

The Commission has submitted an information collection request for its secure web portal for the Miscellaneous Tariff Bills Petition System to the Office of Management and Budget for Paperwork Reduction Act clearance. See 81 FR 58531 (Aug. 25, 2016). The Commission intends to process the information it collects consistent with these interim rules.

Section-by-Section Explanation of the Proposed Amendments

PART 220—PROCESS FOR CONSIDERATION OF PETITIONS FOR DUTY SUSPENSIONS AND REDUCTIONS

Section 220.1 of part 220 states this part of the rules applies to proceedings of the Commission under the American Manufacturing Competitiveness Act of 2016.

Section 220.2 defines key terms and acronyms used in part 220. The definitions are drawn largely from definitions in the Act itself. The definitions of the terms "like" and "directly competitive" are taken from definitions in the legislative history of the Trade Act of 1974 and have been traditionally applied in connection with several U.S. trade laws that use those terms. The definition of "imminent production" states that the term normally means production that is planned to begin within 3 years of the date the petition is filed, which is intended to conform to the Commission's practice with respect to miscellaneous tariff bills prior to the Act. The applicability of this definition of "imminent production" is limited to the Act.

Section 220.3 identifies the types of entities that may file a petition and specifies the format that must be followed in submitting a petition. Consistent with the statute, it states that a petition under this part may be filed by members of the public who can demonstrate that they are likely beneficiaries of duty suspensions or reductions. It also states that a member of the public for these purposes would generally be a firm, importer of record, a manufacturer that uses the imported article, or a U.S. Federal, state, or local government entity. Section 220.3 states that any petition must be filed via the Commission's secure web portal designated for this purpose, and it makes clear that the Commission will not accept petitions submitted in paper or in any other form.

Section 220.4 states that petitions for duty suspensions or reductions must be filed not later than 60 days after the Commission publishes a notice of opportunity to file in the **Federal Register**, and states that the Commission will publish such notice no later than October 15, 2016, for the first round of petitions. Section 220.4 states that a second round of petitions may be filed in October 2019, after publication of a similar notice.

Section 220.5 lists the types of information that must be set forth in a petition, including the name of the petitioner and contact information, a statement regarding whether the petitioner is seeking a duty suspension or a duty reduction, a description of the article concerned, a description of the industry, a certification that the petitioner is a likely beneficiary, certain U.S. Customs and Border Protection (CBP) documentation, the names of known importers, the names of likely beneficiaries, and a description of any domestic production of the article. It also requires that the petitioner certify that it has not filed identical or overlapping petitions with the Commission.

Section 220.6 further describes the information that should be included in the description of the article for which a duty suspension or reduction is being sought. It also identifies types of article descriptions that the Commission will not likely recommend for inclusion in a miscellaneous tariff bill, such as those that contain "actual use" or "chief use" criteria or trade-marked and other protected names, and those that might alter tariff treatment or classification of a product.

Section 220.7 states that a petition will not be considered to be "properly filed" unless it contains all the information required by §§ 220.3 through 220.5 of the rules. It also states that, when a petitioner files petitions that are identical or overlapping in article coverage and does not withdraw the earlier petition(s), the Commission will consider the earliest filed pending petition to be the petition of record.

Section 220.8 states that, in the case of petitions for identical or overlapping articles received from multiple petitioners, the Commission may consolidate those petitions and publish a single recommendation.

Section 220.9 states that a petitioner may withdraw a petition at any time prior to the time the Commission transmits its final report to the House Committee on Ways and Means and the Senate Committee on Finance (Committees). It also states that a petitioner who withdraws a petition may file a new petition, but only during the 60-day window allowed for filing petitions. The rule further states that a petitioner may not amend a petition, but instead must withdraw the petition and file a new one within the 60-day filing period.

Section 220.10 states that the Commission will publish on its Web site, no later than 30 days after expiration of the 60-day period for filing petitions, the petitions for duty suspensions and reductions that are timely filed and that contain the required information. The rule also states that at that time the Commission will publish a notice in the **Federal Register** inviting members of the public to submit comments on the petitions received. It states that those comments must be filed through the Commission's secure web portal no later than 45 days after publication of the notice.

Section 220.11 states that the Commission will submit its preliminary report to the Committees no later than 150 days after it publishes the petitions submitted. The rule describes the types of information that will be included in the preliminary report, including the Commission's determination of whether or not domestic production of the article exists, any technical changes to the article description that are needed to make the description administrable, an estimate of the amount of revenue loss, and a determination of whether or not the duty suspension is available to any person who imports the article. The rule states that the Commission will also include in the preliminary report a list of the petitions that meet certain statutory criteria.

Section 220.12 states that the Commission will submit its final report to the Committees no later than 60 days after it submits its preliminary report. It states that the final report will include the information required to be included in the preliminary report as updated after taking into consideration certain information from the Committees, and that the report also will include determinations regarding whether the duty suspension or reduction can likely be administered by CBP, whether the estimated loss in revenue from the duty suspension or reduction does not exceed $500,000, and whether the duty suspension or reduction is available to any person importing the articles.

Section 220.13 states that the Commission will not release information that the Commission considers to be confidential business information within the meaning of 19 CFR 201.6(a) unless the party submitting the information had notice at the time of submission that such information would be released, or such party subsequently consents to release. The rule notifies parties of two possible instances in which confidential business information might be released: (1) The Commission may base its revenue loss estimates on the estimated values of imports submitted by petitioners in their petitions, and (2) the Commission may disclose some or all of the confidential business information provided in petitions and public comments to the U.S. Department of Commerce, the U.S. Department of Agriculture, and CBP for use in preparing the report that Commerce provides to the Commission and the Committees.

Section 220.14 states that Commission rules that apply to the initiation and conduct of investigations, with the exception of certain rules that apply to methods employed in obtaining information, the computation of time, and to attorneys and agents, will not apply to Commission proceeding under part 220.

List of Subjects in 19 CFR Part 220

Administrative practice and procedure, Miscellaneous tariff bills.

■ For the reasons stated in the preamble, the United States International Trade Commission amends 19 CFR chapter II by adding part 220 to subchapter D to read as follows:

PART 220—PROCESS FOR CONSIDERATION OF PETITIONS FOR DUTY SUSPENSIONS AND REDUCTIONS

Sec.

220.1 Applicability of part.
220.2 Definitions applicable to this part.
220.3 Who may file a petition, format for filing.
220.4 Time for filing.
220.5 Contents of petition.
220.6 Article description.
220.7 Properly filed petition.
220.8 Consolidation of petitions.
220.9 Withdrawal of petitions, amendments to petitions.
220.10 Commission review of petitions and disclosure forms.
220.11 Commission preliminary report.
220.12 Commission final report.
220.13 Confidential business information.
220.14 Application of other Commission rules.

Authority: 19 U.S.C. 1335; Public Law 114–159, 130 Stat. 396 (19 U.S.C. 1332 note).

§ 220.1 Applicability of part.

This part applies to proceedings of the Commission under the American Manufacturing Competitiveness Act of 2016, Public Law 114–159, 130 Stat. 396 (19 U.S.C. 1332 note).

§ 220.2 Definitions applicable to this part.

For the purposes of this part, the following terms have the meanings hereby assigned to them:

(a) *Act* means the American Manufacturing Competitiveness Act of 2016.

(b) *HTS* means Harmonized Tariff Schedule of the United States.

(c) *Committees* means the House Committee on Ways and Means and Senate Committee on Finance.

(d) *Commission disclosure form* means the information submitted to the Commission by a petitioner as part of a petition for a duty suspension or reduction that contains the following:

(1) The contact information for any known importers of the article to which the proposed duty suspension or reduction would apply.

(2) A certification by the petitioner that the proposed duty suspension or reduction is available to any person importing the article to which the proposed duty suspension or reduction would apply.

(3) A certification that the petitioner is a likely beneficiary of the proposed duty suspension or reduction.

(e) *Duty suspension or reduction* refers to an amendment to the HTS for a period not to exceed 3 years that—

(1) Extends an existing temporary duty suspension or reduction on an article under chapter 99 of the HTS; or

(2) Provides for a new temporary duty suspension or reduction on an article under that chapter.

(f) *Likely beneficiary* means an individual or entity likely to utilize, or benefit directly from the utilization of, an article that is the subject of a petition for a duty suspension or reduction.

(g) *Domestic producer* means a person that demonstrates production, or imminent production, in the United States of an article that is identical to, or like or directly competitive with, an article to which a petition for a duty suspension or reduction would apply.

(h) *Domestic production* means the production of an article that is identical to, or like or directly competitive with, an article to which a petition for a duty suspension or reduction would apply, for which a domestic producer has demonstrated production, or imminent production, in the United States.

(1) "Identical" article means a domestic article that has the same inherent or intrinsic characteristics and is classified in the same HTS rate line as the article that is the subject of a petition for duty suspension or reduction;

(2) "Like" article means a domestic article that is substantially identical in inherent or intrinsic characteristics (*i.e.*, materials from which made, appearance, quality, texture, etc.) as the article that is the subject of a petition for duty suspension or reduction; and

(3) "Directly competitive" article means a domestic article which, although not substantially identical in its inherent or intrinsic characteristics, is substantially equivalent for commercial purposes, that is, adapted to the same uses and essentially interchangeable therefor as the article that is the subject of a petition for duty suspension or reduction.

(i) *Imminent production* normally means production planned to begin within 3 years of the date on which the petition is filed.

§ 220.3 Who may file a petition, format for filing.

(a) *Who may file.* A petition under this part may be filed by members of the public who can demonstrate that they are likely beneficiaries of duty suspensions or reductions. A member of the public for these purposes would generally be a firm, importer of record, a manufacturer that uses the imported article, or a government entity at the U.S. Federal, state, or local level.

(b) *Format for filing.* Each such petition shall be submitted via the secure Commission web portal designated by the Commission and in the format designated by the Commission. The Commission will not accept petitions submitted in paper or in any other form or format. Petitions, including any attachments thereto, shall otherwise comply with the Commission's Handbook on MTB Filing Procedures as posted on the Commission's Web site.

§ 220.4 Time for filing.

Petitions for duty suspensions and reductions and Commission disclosure forms must be filed not later than 60 days after the Commission publishes in the **Federal Register** and on its Web site a notice requesting members of the public to submit this information. The Commission will publish notice requesting such petitions and disclosure forms not later than October 15, 2016, and October 15, 2019.

§ 220.5 Contents of petition.

The petition shall include the following information:

(a) The name, telephone number, and postal and email address of the petitioner, and if appropriate, its representative in the matter;

(b) A statement as to whether the petitioner is requesting an extension of an existing duty suspension or reduction or a new duty suspension or reduction; and if a duty reduction, the amount of the reduction;

(c) A certification that the petitioner is a likely beneficiary of the proposed duty suspension or reduction;

(d) An article description that meets the requirements of § 220.6 for the proposed duty suspension or reduction and identifies the permanent classification of the article in chapters 1–97 of the HTS and the Chemical Abstracts Service registry number (if applicable);

(e) To the extent available—

(1) A classification ruling of U.S. Customs and Border Protection (CBP) with respect to the article; and

(2) A copy of CBP documentation indicating where the article is classified in the HTS.

(f) A brief and general description of the article and its uses, and the names of the principal countries from which it is imported.

(g) A brief description of the industry in the United States that uses the article.

(h) For each HTS number included in the article description, an estimate of the total value (in United States dollars) of imports of the article for the calendar year preceding the year in which the petition is filed, for the calendar year in which the petition is filed, and for each of the 5 calendar years after the calendar year in which the petition is filed, including an estimate of the total value of such imports for each HTS article, by the person who submits the petition and by any other importers, if available.

(i) The name of each person that imports the article, if available.

(j) A description of any domestic production of the article, if available.

(k) A Commission disclosure form as defined in § 220.2(d).

(l) The names of any likely beneficiaries, and their contact information.

(m) A certification that the petitioner has not separately filed, and has not withdrawn, a petition for duty suspension or reduction during the current filing cycle:

(1) For an article that is identical to that in the current petition;

(2) For an article whose article description includes the article covered by the current petition; or

(3) For an article that is included in the scope of the current petition.

(n) Such other information as the Commission may require.

§ 220.6 Article description.

(a) *In general.* The article description in the petition shall be provided in a format appropriate to be included in the amendment to chapter 99 of the HTS and shall include language that:

(1) Describes a specific class or kind of imported merchandise and provides any other information needed to distinguish the covered products from other goods;

(2) Is suitable for incorporation in the HTS in the column entitled "Article Description" for each tariff heading in HTS chapter 99 that affords a temporary duty suspension or reduction;

(3) Describes covered products in their condition as imported, based primarily upon the goods' discernible physical characteristics at the time of importation;

(4) Is sufficiently clear as to be administrable by CBP; and

(5) Is otherwise required by this part or accomplishes the purposes of the Act.

(b) *Article descriptions that are not recommended.* The Commission will generally consider proposed article descriptions containing the following kinds of information or criteria as preventing the relevant petition from being recommended for inclusion in a miscellaneous tariff bill, unless input received from the U.S. Department of Commerce (Commerce) or CBP provides a basis for the Commission's analysis under the Act:

(1) "Actual use" or "chief use" criteria;

(2) Trade-marked or similarly protected terms or names, brand names, proprietary names, part numbers, or other company-specific names;

(3) Language—

(i) Describing goods that are illegal to import, where the petitioner is not a government entity;

(ii) Describing goods that are covered by tariff-rate quota provisions; or

(iii) Seeking to alter the tariff treatment provided in subchapter III or IV of chapter 99 of the HTS; or

(4) An HTS subheading number(s) that would alter or attempt to alter the classification of the product in chapters 1 through 97 of the HTS.

§ 220.7 Properly filed petition.

(a) *In general.* A petition will not be considered to be properly filed unless the petition and the Commission disclosure form are filed in accordance with and contain the information required by §§ 220.3 through 220.5

(b) *Identical and overlapping petitions.* (1) A petition will not be considered to be properly filed if the petitioner has previously filed, and has not withdrawn, a petition for duty suspension or reduction during the current filing cycle:

(i) For an article that is identical to that in the current petition;

(ii) For an article whose article description includes the article covered by the current petition; or

(iii) For an article that is included in the scope of the current petition.

(2) Should the Commission find that a petitioner has filed one or more identical or overlapping petitions and that such earlier filed petitions have not been withdrawn, the Commission will generally consider the earliest filed pending petition to be the petition of the petitioner.

§ 220.8 Consolidation of petitions.

Should the Commission receive petitions for duty suspensions or reductions from multiple petitioners for identical or overlapping articles classified in the same HTS subheading or subheadings, the Commission may consolidate the petitions and publish a single recommendation so that a single proposed HTS chapter 99 provision for the articles is presented in the Commission's preliminary and final reports.

§ 220.9 Withdrawal of petitions, amendments to petitions.

(a) *Withdrawal of petitions.* A petitioner may withdraw a petition for duty suspension or reduction filed under this part at any time prior to the date on which the Commission submits its final report. It shall do so by notifying the Commission through the Commission's designated secure web portal of its withdrawal and the notification shall include the name of the petitioner, the Commission identification number for the petition, and the HTS number for the article concerned.

(b) *Submission of new petition.* A petitioner who withdraws a petition for duty suspension or reduction that was timely filed under § 220.4 may submit a new petition, but only during the 60-day period described in § 220.4.

(c) *Amendments to petitions.* A petitioner may not amend or otherwise change a petition once it is submitted. If a petitioner wishes to amend or otherwise change a petition, such as to correct an error, the petitioner must withdraw the petition and file a new petition containing the changes in accordance with paragraphs (a) and (b) of this section.

§ 220.10 Commission review of petitions and disclosure forms.

(a) *Commission publication and public availability.* Not later than 30 days after expiration of the 60-day period for filing petitions for duty suspensions and reductions, the Commission will publish on its Web site the petitions for duty suspensions and reductions submitted under § 220.3 that were timely filed and contain the information required under § 220.5. When circumstances allow, the Commission may post such petitions on its Web site earlier than 30 days after expiration of the 60-day period for filing petitions.

(b) *Public comment.* Not later than 30 days after expiration of the 60-day period for filing petitions, the Commission will also publish in the **Federal Register** and on its Web site a notice requesting members of the public to submit comments on the petitions for duty suspensions and reductions. To be considered, such comments must be filed through the Commission's secure web portal during the 45-day period following publication of the Commission's notice requesting comments from members of the public. Comments, including any attachments thereto, must otherwise comply with the Commission's Handbook on MTB Filing Procedures as posted on the Commission's Web site. For purposes of this section, all petitions posted by the Commission on its Web site, whether or not posted early, shall be deemed to be officially published by the Commission on its Web site on the date of publication of the notice seeking written comments from members of the public on the petitions.

§ 220.11 Commission preliminary report.

(a) Not later than 150 days after the Commission publishes the petitions and Commission disclosure forms submitted, the Commission will submit a preliminary report on the petitions filed to the Committees. The report will include the following information for each petition filed—

(1) The HTS heading or subheading in which each article that is the subject of

a petition is classified, as identified by documentation supplied to the Commission and any supporting information obtained by the Commission.

(2) A determination of whether or not domestic production of the article that is the subject of the petition exists, taking into account the report of the Secretary of Commerce under section 3(c)(1) of the Act, and, if such production exists, whether or not a domestic producer of the article objects to the duty suspension or reduction.

(3) Any technical changes to the description of the article that is the subject of the petition for the duty suspension or reduction that are necessary for purposes of administration when the article is presented for importation, taking into account the report of the Secretary of Commerce under section 3(c)(2) of the Act.

(4) An estimate of the amount of loss in revenue to the United States that would no longer be collected if the duty suspension or reduction takes effect.

(5) A determination of whether or not the duty suspension or reduction is available to any person that imports the article that is the subject of the duty suspension or reduction.

(6) The likely beneficiaries of each duty suspension or reduction, including whether the petitioner is a likely beneficiary.

(b) The preliminary report will also include the following information:

(1) A list of petitions for duty suspensions and reductions that meet the requirements of the Act without modifications.

(2) A list of petitions for duty suspensions and reductions for which the Commission recommends technical corrections (*i.e.*, corrections to the article description that do not otherwise substantially alter the scope or HTS classification of the articles covered by the petition) in order to meet the requirements of the Act, with the correction specified.

(3) A list of petitions for duty suspensions and reductions for which the Commission recommends modifications to the amount of the duty suspension or reduction that is the subject of the petition to comply with the requirements of the Act, with the modification specified.

(4) A list of petitions for duty suspensions and reductions for which the Commission recommends modifications to the scope of the articles that are the subject of the petitions in order to address objections by domestic producers to such petitions, with the modifications specified.

(5) A list of the following:

(i) Petitions for duty suspensions and reductions that the Commission has determined do not contain the information required under section 3(b)(2) of the Act.

(ii) Petitions for duty suspensions and reductions with respect to which the Commission has determined the petitioner is not a likely beneficiary.

(6) A list of petitions for duty suspensions and reductions that the Commission does not recommend for inclusion in a miscellaneous tariff bill, other than petitions specified in section 3(b)(3)(C)(ii)(V) of the Act.

(c) The Commission will forward to the Committees any additional information submitted to the Commission by the Secretary of Commerce after the Commission transmits its preliminary report.

§ 220.12 Commission final report.

(a) The Commission will submit its final report on each petition for a duty suspension or reduction specified in the preliminary report to the Committees not later than 60 days after the Commission submits its preliminary report. The final report will contain the following information—

(1) The information required to be included in a preliminary report under section 3(b)(3)(C)(i)–(ii) of the Act and updated as appropriate after considering any information submitted by the Committees under section 3(b)(3)(D) of the Act.

(2) A determination of the Commission whether—

(i) The duty suspension or reduction can likely be administered by U.S. Customs and Border Protection;

(ii) The estimated loss in revenue to the United States from the duty suspension or reduction does not exceed $500,000 in a calendar year during which the duty suspension or reduction would be in effect; and

(iii) The duty suspension or reduction is available to any person importing the articles that is the subject of the duty suspension or reduction.

(b) [Reserved]

§ 220.13 Confidential business information.

(a) *In general.* The Commission will not release information which the Commission considers to be confidential business information within the meaning of § 201.6(a) of this chapter unless the party submitting the confidential business information had notice, at the time of submission, that such information would be released by the Commission, or such party subsequently consents to the release of the information.

(b) *Exceptions.* (1) In calculating the estimated revenue loss required under the Act, the Commission may base its estimates in whole or in part on the estimated values of imports submitted by petitioners in their petitions.

(2) The Commission may disclose some or all of the confidential business information provided to the Commission in petitions and public comments to the U.S. Department of Commerce for use in preparing its report to the Commission and the Committees, and to the U.S. Department of Agriculture and CBP for use in providing information for Commerce's report.

§ 220.14 Application of other Commission rules.

Commission rules applicable to the initiation and conduct of investigations, including rules set out in subpart B of part 201 of this chapter (except § 201.9 (methods employed in obtaining information), § 201.14(a) (computation of time), and § 201.15 (attorneys or agents)), shall not apply to Commission proceedings under this part.

By order of the Commission.

Issued: September 21, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–23229 Filed 9–29–16; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 510, 520, 522, 524, 529, and 558

[Docket No. FDA–2016–N–0002]

New Animal Drugs; Approval of New Animal Drug Applications; Change of Sponsor's Address

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; technical amendment.

SUMMARY: The Food and Drug Administration (FDA, we) is amending the animal drug regulations to reflect application-related actions for new animal drug applications (NADAs) and abbreviated new animal drug applications (ANADAs) during July and August 2016. FDA is also informing the public of the availability of summaries of the basis of approval and of environmental review documents, where applicable. The animal drug regulations are also being amended to reflect a change of a sponsor's address.

DATES: This rule is effective September 30, 2016.

FOR FURTHER INFORMATION CONTACT: George K. Haibel, Center for Veterinary Medicine (HFV–6), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–402–5689, *george.haibel@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Approval Actions

FDA is amending the animal drug regulations to reflect approval actions for NADAs and ANADAs during July and August 2016, as listed in table 1. In addition, FDA is informing the public of the availability, where applicable, of documentation of environmental review required under the National Environmental Policy Act (NEPA) and, for actions requiring review of safety or effectiveness data, summaries of the basis of approval (FOI Summaries) under the Freedom of Information Act (FOIA). These public documents may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday. Persons with access to the Internet may obtain these documents at the CVM FOIA Electronic Reading Room: *http://www.fda.gov/AboutFDA/CentersOffices/OfficeofFoods/CVM/CVMFOIAElectronicReadingRoom/default.htm.* Marketing exclusivity and patent information may be accessed in FDA's publication, Approved Animal Drug Products Online (Green Book) at: *http://www.fda.gov/AnimalVeterinary/Products/ApprovedAnimalDrugProducts/default.htm.*

TABLE 1—ORIGINAL AND SUPPLEMENTAL NADAS AND ANADAS APPROVED DURING JULY AND AUGUST 2016

Approval date	File No.	Sponsor	Product name	Species	Effect of the action/ indications for use	Public documents
July 24, 2016	141–458	Merial, Inc., 3239 Satellite Blvd., bldg. 500, Duluth, GA 30096–4640.	EQUIOXX (firocoxib) Tablets.	Horses	Original approval for the control of pain and inflammation associated with osteoarthritis in horses.	FOI Summary.
July 20, 2016	141–459	Intervet, Inc., 2 Giralda Farms, Madison, NJ 07940.	BRAVECTO (fluralaner topical solution) for Dogs. BRAVECTO (fluralaner topical solution) for Cats.	Dogs, cats	Original approval for killing adult fleas, for the treatment and prevention of flea infestations, and for the treatment and control of tick infestations in dogs and cats.	FOI Summary.
August 12, 2016	141–461	Aratana Therapeutics, Inc., 11400 Tomahawk Creek Pkwy., Leawood, KS 66211.	NOCITA (bupivacaine liposome injectable suspension).	Dogs	Original approval to provide local postoperative analgesia for cranial cruciate ligament surgery in dogs.	FOI Summary.
July 1, 2016	200–501	Cross Vetpharm Group Ltd. Broomhill Rd., Tallaght, Dublin 24, Ireland.	Praziquantel (praziquantel) Injection.	Dogs	Original approval of a generic copy of NADA 111–607.	FOI Summary.
August 5, 2016	200–508	Cross Vetpharm Group Ltd. Broomhill Rd., Tallaght, Dublin 24, Ireland.	BILOVET (tylosin) Injection.	Cattle, swine	Original approval of a generic copy of NADA 012–965.	FOI Summary.

II. Change of Sponsor's Address

Nexcyon Pharmaceuticals, Inc., 644 West Washington Ave., Madison, WI 53719 has informed FDA that it has changed its address to P.O. Box 259158, Madison, WI 53725. Accordingly, the regulations at 21 CFR 510.600(c) will be amended to reflect this sponsor's change of address.

III. Technical Amendments

FDA has noticed that drug labeler codes (DLCs) in several sections of part 558 (21 CFR part 558) do not accurately reflect the sponsorship of a new animal drug application. At this time, we are amending part 558 to remove these DLCs. Also, FDA is amending the regulations to revise a human food safety warning for tulathromycin injectable solution in 21 CFR 522.2630 and to correct a cross-reference for combination medicated feeds in § 558.128 (21 CFR 558.128). These actions are being taken to improve the accuracy of the regulations.

The restrictions for veterinary feed directive (VFD) drugs in part 558 are being revised to reflect a uniform text. In addition, we are revising § 558.59 to reflect a current format. These actions are being taken to improve the clarity of the regulations.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects

21 CFR Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

21 CFR Parts 520, 522, 524, and 529

Animal drugs.

21 CFR Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 510, 520, 522, 524, 529, and 558 are amended as follows:

PART 510—NEW ANIMAL DRUGS

■ 1. The authority citation for part 510 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 379e.

§ 510.600 [Amended]

■ 2. Revise § 510.600 as follows:

■ a. In the table in paragraph (c)(1):

■ i. In the entries for "Cronus Pharma LLC", "HQ Specialty Pharma Corp.", "OXIS International, Inc.", "Pharmgate LLC ", "Putney, Inc.", "SmartVet USA, Inc.", and "Wildlife Laboratories, Inc.", remove "Suite" and in its place add "suite";

■ ii. In the entry for "Merial, Inc.", remove "Bldg." and in its place add "bldg.";

■ iii. In the entry for "Nexcyon Pharmaceuticals, Inc.", remove "644 West Washington Ave., Madison, WI 53719" and in its place add "P.O. Box 259158, Madison, WI 53725";

■ b. In the table in paragraph (c)(2):

■ i. In the entries for "024991", "026637", "042791", "053923", "069043", "069254", and "086001", remove "Suite" and in its place add "suite";

■ ii. In the entry for "050604", remove "Bldg." and in its place add "bldg."; and

■ iii. In the entry for "050929", remove "644 West Washington Ave., Madison, WI 53719" and in its place add "P.O. Box 259158, Madison, WI 53725".

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

■ 3. The authority citation for part 520 continues to read as follows:

Authority: 21 U.S.C. 360b

■ 4. In § 520.928, revise paragraph (c) to read as follows:

§ 520.928 Firocoxib tablets.

* * * * *

(c) *Conditions of use*—(1) *Dogs*—(i) *Amount.* 5 mg/kg (2.27 mg/lb) body weight. Administer once daily for osteoarthritis. Administer approximately 2 hours before soft tissue or orthopedic surgery.

(ii) *Indications for use.* For the control of pain and inflammation associated with osteoarthritis; and for the control of postoperative pain and inflammation associated with soft-tissue and orthopedic surgery.

(iii) *Limitations.* Federal law restricts this drug to use by or on the order of a licensed veterinarian.

(2) *Horses*—(i) *Amount.* Administer one 57-mg tablet to horses weighing 800 to 1,300 lb once daily for up to 14 days.

(ii) *Indications for use.* For the control of pain and inflammation associated with osteoarthritis.

(iii) *Limitations.* Do not use in horses intended for human consumption. Federal law restricts this drug to use by or on the order of a licensed veterinarian.

§ 520.2345c [Amended]

■ 5. In § 520.2345c, remove paragraph (d)(1)(iii).

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

■ 6. The authority citation for part 522 continues to read as follows:

Authority: 21 U.S.C. 360b.

■ 7. Add § 522.224 to read as follows:

§ 522.224 Bupivacaine.

(a) *Specifications.* Each milliliter (mL) of liposomal suspension contains 13.3 milligrams (mg) bupivacaine.

(b) *Sponsor.* See No. 086026 in § 510.600(c) of this chapter.

(c) *Conditions of use in dogs*—(1) *Amount.* Administer 5.3 mg/kg (0.4 mL/kg) by infiltration injection into the tissue layers at the time of incisional closure.

(2) *Indications for use.* For single-dose infiltration into the surgical site to provide local postoperative analgesia for cranial cruciate ligament surgery in dogs.

(3) *Limitations.* Federal law restricts this drug to use by or on the order of a licensed veterinarian.

■ 8. In § 522.1870, revise paragraphs (a), (c)(1)(i) and (iii), and (c)(2)(i) and (iii) to read as follows:

§ 522.1870 Praziquantel.

(a) *Specifications.* Each milliliter (mL) of solution contains 56.8 milligrams of praziquantel.

* * * * *

(c) * * *

(1) * * *

(i) *Amount.* Administer by subcutaneous or intramuscular injection for dogs and puppies 5 pounds (lb) and under, 0.3 mL; for 6 to 10 lb, 0.5 mL; for 11 to 25 lb, 1.0 mL; if over 25 lb, 0.2 mL/5 lb body weight to a maximum of 3 mL.

* * * * *

(iii) *Limitations.* Federal law restricts the drug to use by or on the order of a licensed veterinarian.

(2) * * *

(i) *Amount.* Administer by subcutaneous or intramuscular injection for cats and kittens under 5 lb, 0.2 mL; 5 to 10 lb, 0.4 mL; 11 lb and over, 0.6 mL maximum.

* * * * *

(iii) *Limitations.* Federal law restricts the drug to use by or on the order of a licensed veterinarian.

■ 9. In § 522.2630, revise paragraph (d)(1)(iii)(A) to read as follows:

§ 522.2630 Tulathromycin.

* * * * *

(d) * * *

(1) * * *

(iii) * * *

(A) Cattle intended for human consumption must not be slaughtered within 18 days from the last treatment. This drug is not approved for use in female dairy cattle 20 months of age or older, including dry dairy cows. Use in these cattle may cause drug residues in milk and/or in calves born to these cows. Federal law restricts this drug to use by or on the order of a licensed veterinarian.

* * * * *

■ 10. Revise § 522.2640 to read as follows:

§ 522.2640 Tylosin.

(a) *Specifications.* Each milliliter (mL) of solution contains 50 or 200 milligrams (mg) of tylosin activity (as tylosin base).

(b) *Sponsors.* See sponsors in § 510.600(c) of this chapter as follows:

(1) No. 000986 for use of 50- or 200-mg/mL solutions as in paragraph (e) of this section.

(2) Nos. 000010 and 061623 for use of a 200-mg/mL solution as in paragraphs (e)(1) and (2) of this section.

(c) *Related tolerances.* See § 556.740 of this chapter.

(d) *Special considerations.* Labeling must bear the warning statements: "Do not administer to horses or other equines. Injection of tylosin in equines has been fatal."

(e) *Conditions of use*—(1) *Beef cattle and nonlactating dairy cattle*—(i) *Amount.* Administer 8 mg per pound (mg/lb) of body weight by intramuscular injection once daily for not more than 5 consecutive days. Continue treatment 24 hours after symptoms disappear.

(ii) *Indications for use.* Treatment of bovine respiratory complex (shipping fever, pneumonia) usually associated with *Pasteurella multocida* and *Arcanobacterium pyogenes;* foot rot (necrotic pododermatitis) and calf diphtheria caused by *Fusobacterium necrophorum* and metritis caused by *A. pyogenes.*

(iii) *Limitations.* Do not inject more than 10 mL per site. Use a 50-mg/mL solution for calves weighing less than 200 pounds. Cattle intended for human consumption must not be slaughtered within 21 days of the last use of this drug product. This drug product is not approved for use in female dairy cattle 20 months of age or older, including dry dairy cows. Use in these cattle may cause drug residues in milk and/or in calves born to these cows. This product is not approved for use in calves intended to be processed for veal. A withdrawal period has not been established in preruminating calves.

(2) *Swine*—(i) *Amount.* Administer 4 mg/lb of body weight by intramuscular injection twice daily for not more than 3 consecutive days. Continue treatment 24 hours after symptoms disappear. If tylosin medicated drinking water is used as a followup treatment for swine dysentery, the animal should thereafter receive feed containing 40 to 100 grams of tylosin per ton for 2 weeks to assure depletion of tissue residues.

(ii) *Indications for use.* Treatment of swine arthritis caused by *Mycoplasma hyosynoviae;* swine pneumonia caused by *Pasteurella* spp.; swine erysipelas caused by *Erysipelothrix rhusiopathiae;* swine dysentery associated with *Treponema hyodysenteriae* when followed by appropriate medication in the drinking water and/or feed.

(iii) *Limitations.* Do not inject more than 5 mL per site. Adverse reactions, including shock and death may result from overdosage in baby pigs. It is recommended that tylosin 50-mg/mL injection be used in pigs weighing less than 25 lbs. Swine intended for human consumption must not be slaughtered within 14 days of the last use of this drug product.

(3) *Dogs and cats*—(i) *Amount.* Administer 3 to 5 mg/lb of body weight by intramuscular injection at 12- to 24-hour intervals.

(ii) *Indications for use*—(A) *Dogs.* Treatment of upper respiratory infections such as bronchitis, tracheobronchitis, tracheitis, laryngitis, tonsillitis, and pneumonia caused by *Staphylococci* spp., hemolytic *Streptococci* spp., and *Pasteurella multocida.*

(B) *Cats.* Treatment of upper respiratory infections when caused by *Staphylococci* spp. and hemolytic *Streptococci* spp. and for feline pneumonitis when caused by tylosin-susceptible organisms.

(iii) *Limitations.* Federal law restricts this drug to use by or on the order of a licensed veterinarian.

PART 524—OPHTHALMIC AND TOPICAL DOSAGE FORM NEW ANIMAL DRUGS

■ 11. The authority citation for part 524 continues to read as follows:

Authority: 21 U.S.C. 360b.

■ 12. Add § 524.998 to read as follows:

§ 524.998 Fluralaner.

(a) *Specifications.* Each milliliter of solution contains 280 milligrams (mg) fluralaner.

(b) *Sponsor.* See No. 000061 in § 510.600(c) of this chapter.

(c) *Conditions of use*—(1) *Dogs*—(i) *Amount.* Administer topically as a single dose every 12 weeks according to the label dosage schedule to provide a minimum dose of 11.4 mg/lb (25 mg/kg) body weight. May be administered every 8 weeks in case of potential exposure to *Amblyomma americanum* ticks.

(ii) *Indications for use.* Kills adult fleas; for the treatment and prevention of flea infestations (*Ctenocephalides felis*) and the treatment and control of tick infestations (*Ixodes scapularis* (black-legged tick), *Dermacentor variabilis* (American dog tick), and *Rhipicephalus sanguineus* (brown dog tick)) for 12 weeks in dogs and puppies 6 months of age and older, and weighing 4.4 lb or greater; for the treatment and control of *A. americanum* (lone star tick) infestations for 8 weeks in dogs and puppies 6 months of age and older, and weighing 4.4 lb or greater.

(iii) *Limitations.* Federal law restricts this drug to use by or on the order of a licensed veterinarian.

(2) [Reserved]

PART 529—CERTAIN OTHER DOSAGE FORM NEW ANIMAL DRUGS

■ 13. The authority citation for part 529 continues to read as follows:

Authority: 21 U.S.C. 360b.

§ 529.400 [Amended]

■ 14. In § 529.400, in paragraph (a), remove footnote 1.

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

■ 15. The authority citation for part 558 continues to read as follows:

Authority: 21 U.S.C. 354, 360b, 360ccc, 360ccc–1, 371.

§ 558.58 [Amended]

■ 16. In § 558.58, in paragraph (e)(6), remove "3.6" and in its place add "36.6".

■ 17. Revise § 558.59 to read as follows:

§ 558.59 Apramycin.

(a) *Specifications.* Each pound of Type A article contains 75 grams apramycin (as apramycin sulfate).

(b) *Sponsor.* See No. 058198 in § 510.600(c) of this chapter.

(c) [Reserved]

(d) *Related tolerances.* See § 556.52 of this chapter.

(e) *Conditions of use in swine*—(1) *Amount.* Feed at 150 grams apramycin per ton of Type C medicated feed as the sole ration for 14 consecutive days.

(2) *Indications for use.* For control of porcine colibacillosis (weanling pig scours) caused by susceptible strains of *Escherichia coli.*

(3) *Limitations.* Withdraw 28 days before slaughter.

§ 558.68 [Amended]

■ 18. In § 558.68, redesignate paragraphs (c) and (d) as paragraphs (d) and (c); and in paragraphs (e)(1)(i) and (e)(2)(i), remove "000986" and in its place add "058198".

§ 558.128 [Amended]

■ 19. In § 558.128, in paragraph (e)(7)(xi), remove "§ 558.600" and in its place add "§ 558.612".

§ 558.195 [Amended]

■ 20. In § 558.195, in paragraph (e)(1)(vi), remove "000009" and in its place add "054771"; and in paragraphs (e)(2)(iii) and (v), remove "000986" wherever it appears and in its place add "058198".

§ 558.261 [Amended]

■ 21. In § 558.261, redesignate paragraphs (c) and (d) as paragraphs (d) and (c).

§ 558.295 [Amended]

■ 22. In § 558.295, remove and reserve paragraph (b).

■ 23. In § 558.325, revise paragraph (d)(3) to read as follows:

§ 558.325 Lincomycin.

* * * * *

(d) * * *

(3) Labeling of Type A medicated articles and single-ingredient Type B and Type C medicated feeds containing lincomycin intended for use in swine shall bear the following caution statement: "The effects of lincomycin on swine reproductive performance, pregnancy, and lactation have not been determined. Not for use in swine intended for breeding when lincomycin is fed at 20 grams per ton of complete feed."

* * * * *

§ 558.342 [Amended]

■ 24. In § 558.342, in paragraphs (e)(1)(iv),(ix), (x), and (xi), remove

"000986" wherever it appears and in its place add "058198".

§ 558.366 [Amended]

■ 25. In § 558.366, in paragraph (d), in the entry for "113.5 (0.0125 pct)", remove "000986" and in its place add "058198".

§ 558.618 [Amended]

■ 26. In § 558.618, redesignate paragraphs (c) and (d) as paragraphs (d) and (c).

■ 27. In § 558.633, revise paragraph (d)(1) to read as follows:

§ 558.633 Tylvalocin.

* * * * *

(d) * * *

(1) Federal law restricts medicated feed containing this veterinary feed directive (VFD) drug to use by or on the order of a licensed veterinarian. See § 558.6 for additional requirements.

* * * * *

Dated: September 21, 2016.

Tracey Forfa,

Deputy Director, Center for Veterinary Medicine.

[FR Doc. 2016–23230 Filed 9–29–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 573

[Docket No. FDA–2014–F–0988]

Food Additives Permitted in Feed and Drinking Water of Animals; Feed Grade Sodium Formate

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA, we, the Agency) is amending the regulations for food additives permitted in feed and drinking water of animals to provide for the safe use of feed grade sodium formate as a feed acidifying agent in complete swine feeds. This action is in response to a food additive petition filed by BASF Corp.

DATES: This rule is effective September 30, 2016. Submit either electronic or written objections and requests for a hearing by October 31, 2016. See section V of this document for further information on the filing of objections.

ADDRESSES: You may submit objections and requests for a hearing as follows:

Electronic Submissions

Submit electronic objections in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Objections submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your objection will be made public, you are solely responsible for ensuring that your objection does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your objection, that information will be posted on *http://www.regulations.gov.*
- If you want to submit an objection with confidential information that you do not wish to be made available to the public, submit the objection as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper objections submitted to the Division of Dockets Management, FDA will post your objection, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA–2014–F–0988 for "Food Additives Permitted in Feed and Drinking Water of Animals; Feed Grade Sodium Formate." Received objections will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- *Confidential Submissions*—To submit an objection with confidential information that you do not wish to be made publicly available, submit your objections only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your objections and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper objections received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Chelsea Trull, Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–402–6729, *chelsea.trull@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In a document published in the **Federal Register** of July 25, 2014 (79 FR 43325), FDA announced that we had filed a food additive petition (animal use) (FAP 2286) submitted by BASF Corp., 100 Park Ave., Florham Park, NJ 07932. The petition proposed that the regulations for food additives permitted in feed and drinking water of animals be amended to provide for the safe use of feed grade sodium formate as a feed acidifying agent in complete swine feeds. The notice of petition provided for a 30-day comment period on the petitioner's request for categorical exclusion from preparing an environmental assessment or environmental impact statement.

In addition, the petition proposed that the animal food additive regulations for formic acid and ammonium formate be amended to limit formic acid and formate salts from all added sources to 1.2 percent of complete feeds. This element of the petition was not described in the July 2014 notice of petition.

Elsewhere in this issue of the **Federal Register**, FDA is providing notice of BASF Corp.'s proposal that FDA amend the food additive regulations for formic acid and ammonium formate to limit formic acid and formate salts from all added sources to 1.2 percent of complete feed when multiple sources of formic acid and its salts are used in combination.

II. Conclusion

FDA concludes that the data establish the safety and utility of feed grade sodium formate for use as a feed acidifying agent in complete swine feeds and that the food additive regulations should be amended as set forth in this document.

III. Public Disclosure

In accordance with § 571.1(h) (21 CFR 571.1(h)), the petition and documents we considered and relied upon in reaching our decision to approve the petition will be made available for public disclosure (see **FOR FURTHER INFORMATION CONTACT**). As provided in § 571.1(h), we will delete from the documents any materials that are not available for public disclosure.

IV. Analysis of Environmental Impact

The Agency has determined under 21 CFR 25.32(r) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment, nor an environmental impact statement is required.

V. Objections and Hearing Requests

Any person who will be adversely affected by this regulation may file with the Division of Dockets Management (see **ADDRESSES**) either electronic or written objections. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provision of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection.

Any objections received in response to the regulation may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov*.

List of Subjects in 21 CFR Part 573

Animal feeds, Food additives.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 573 is amended as follows:

PART 573—FOOD ADDITIVES PERMITTED IN FEED AND DRINKING WATER OF ANIMALS

■ 1. The authority citation for part 573 continues to read as follows:

Authority: 21 U.S.C. 321, 342, 348.

■ 2. Add § 573.696 to read as follows:

§ 573.696 Feed grade sodium formate.

The food additive, feed grade sodium formate, may be safely used in the manufacture of complete swine feeds in accordance with the following prescribed conditions:

(a) The additive is manufactured by the reaction of 99 percent formic acid and 50 percent sodium hydroxide in water to produce a solution made up of at least 20.5 percent sodium salt of formic acid and not more than 61 percent formic acid.

(b) The additive is used or intended for use as a feed acidifying agent, to lower the pH, in complete swine feeds at levels not to exceed 1.2 percent of the complete feed.

(c) To assure safe use of the additive, formic acid and formate salts from all added sources cannot exceed 1.2 percent of complete feed when multiple sources of formic acid and its salts are used in combination.

(d) To assure safe use of the additive, in addition to the other information required by the Federal Food, Drug, and Cosmetic Act, the label and labeling shall contain:

(1) The name of the additive.

(2) Adequate directions for use, including a statement that feed grade sodium formate must be uniformly applied and thoroughly mixed into complete feeds and that the complete feeds so treated shall be labeled as containing feed grade sodium formate.

(3) Cautions for use including this statement: Caution: Follow label directions. Formic acid and formate salts from all added sources cannot exceed 1.2 percent of complete feed when multiple sources of formic acid and its salts are used in combination.

(e) To assure safe use of the additive, in addition to the other information required by the act and paragraph (d) of this section, the label and labeling shall contain:

(1) Appropriate warnings and safety precautions concerning feed grade sodium formate.

(2) Statements identifying feed grade sodium formate as a corrosive and possible severe irritant.

(3) Information about emergency aid in case of accidental exposure as follows:

(i) Statements reflecting requirements of applicable sections of the Superfund Amendments and Reauthorization Act (SARA), and the Occupational Safety and Health Administration (OSHA) human safety guidance regulations.

(ii) Contact address and telephone number for reporting adverse reactions or to request a copy of the Material Safety Data Sheet (MSDS).

Dated: September 26, 2016.

Tracey H. Forfa,

Deputy Director, Center for Veterinary Medicine.

[FR Doc. 2016–23671 Filed 9–29–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 882

[Docket No. FDA 2016–N–2677]

Medical Devices; Neurological Devices; Classification of the Evoked Photon Image Capture Device

AGENCY: Food and Drug Administration, HHS.

ACTION: Final order.

SUMMARY: The Food and Drug Administration (FDA) is classifying the Evoked Photon Image Capture Device into class I (general controls). The Agency is classifying the device into class I (general controls) in order to provide a reasonable assurance of safety and effectiveness of the device.

DATES: This order is effective September 30, 2016. The classification was applicable on July 15, 2016.

FOR FURTHER INFORMATION CONTACT: Kristen Bowsher, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 2646, Silver Spring, MD 20993–0002, 301–796–6448, *kristen.bowsher@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with section 513(f)(1) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360c(f)(1)), devices that were not in commercial distribution before May 28, 1976 (the date of enactment of the Medical Device Amendments of 1976), generally referred to as postamendments devices, are classified automatically by statute into class III without any FDA rulemaking process. These devices remain in class III and require premarket approval, unless and until the device is classified or reclassified into class I or II, or FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i), to a predicate device that does not require premarket approval. The Agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and part 807 (21 CFR part 807) of the regulations.

Section 513(f)(2) of the FD&C Act (21 U.S.C. 360c(f)(2)), as amended by section 607 of the Food and Drug Administration Safety and Innovation Act (Pub. L. 112–144), provides two procedures by which a person may request FDA to classify a device under the criteria set forth in section 513(a)(1). Under the first procedure, the person submits a premarket notification under section 510(k) of the FD&C Act for a device that has not previously been classified and, within 30 days of receiving an order classifying the device into class III under section 513(f)(1), the person requests a classification under section 513(f)(2). Under the second procedure, rather than first submitting a premarket notification under section 510(k) and then a request for classification under the first procedure, the person determines that there is no legally marketed device upon which to base a determination of substantial equivalence and requests a classification under section 513(f)(2) of the FD&C Act. If the person submits a request to classify the device under this second procedure, FDA may decline to undertake the classification request if FDA identifies a legally marketed device that could provide a reasonable basis for review of substantial equivalence with the device or if FDA determines that the device submitted is not of "low-moderate risk" or that general controls would be inadequate to control the risks and special controls to mitigate the risks cannot be developed.

In response to a request to classify a device under either procedure provided by section 513(f)(2) of the FD&C Act, FDA shall classify the device by written order within 120 days. This classification will be the initial classification of the device. On January 12, 2015, EPIC Research & Diagnostics, Inc. submitted a request for classification of the EPIC ClearView™ System under section 513(f)(2) of the FD&C Act.

In accordance with section 513(f)(2) of the FD&C Act, FDA reviewed the request in order to classify the device under the criteria for classification set forth in section 513(a)(1). FDA classifies devices into class I if general controls by themselves are sufficient to provide reasonable assurance of safety and effectiveness of the device for its intended use. After review of the information submitted in the de novo request, FDA determined that the device can be classified into class I. FDA believes general controls will provide reasonable assurance of the safety and effectiveness of the device.

Therefore, on July 15, 2016, FDA issued an order to the requestor classifying the device into class I. FDA is codifying the classification of the device by adding 21 CFR 882.1561.

The device is assigned the generic name evoked photon image capture device, and it is identified as a prescription, electrically-powered device intended for use as a non-invasive measurement tool that applies electricity to detect electrophysiological signals emanating from the skin, which are reported numerically and as images without clinical interpretation. The device is not intended for diagnostic purposes.

FDA has identified the following risks to health associated specifically with this type of device: Adverse tissue reaction, electromagnetic incompatibility, and electromagnetic malfunction (*e.g.,* shock).

Evoked photon image capture devices are not safe for use except under the supervision of a practitioner licensed by law to direct the use of the device. As such, the device is a prescription device and must satisfy prescription labeling requirements (see 21 CFR 801.109 *Prescription devices*).

II. Analysis of Environmental Impact

The Agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

III. Paperwork Reduction Act of 1995

This final order refers to previously approved collections of information found in other FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in part 807, subpart E, regarding premarket notification submissions have been approved under OMB control number 0910–0120, and the collections of information in 21 CFR part 801, regarding labeling have been approved under OMB control number 0910–0485.

List of Subjects in 21 CFR Part 882

Medical devices, Neurological devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 882 is amended as follows:

PART 882—NEUROLOGICAL DEVICES

■ 1. The authority citation for part 882 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 371.

■ 2. Add § 882.1561 to subpart B to read as follows:

§ 882.1561 Evoked photon image capture device.

(a) *Identification.* An evoked photon image capture device is a prescription, electrically powered device intended for use as a noninvasive measurement tool that applies electricity to detect electrophysiological signals emanating from the skin, which are reported numerically and as images without clinical interpretation. The device is not intended for diagnostic purposes.

(b) *Classification.* Class I (general controls). The device is exempt from the premarket notification procedures in subpart E of part 807 of this chapter, subject to the limitations in § 882.9.

Dated: September 26, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–23633 Filed 9–29–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF STATE

22 CFR Part 51

[Public Notice: 9680]

RIN 1400–AE01

Passports: Service Passports

AGENCY: Department of State.

ACTION: Interim final rule.

SUMMARY: This rule amends a regulation that establishes the different types of passports issued by the Department of State. A definition for special issuance passports is added. Amendments establish a new service passport, which may be approved for certain non-personal services contractors who travel abroad in support of and pursuant to a contract with the U.S. government, and make corresponding changes regarding official and diplomatic passports. The service passport will demonstrate a contractual relationship between the bearer's employer and the U.S. government as the reason for travel, thereby continuing to demonstrate the individual's support function on behalf of the U.S. government, but nevertheless signaling a more attenuated relationship with the U.S. government than that enjoyed by direct hire employees. The U.S. government incurs significant additional cost annually in delays and fees because foreign governments do not recognize contractors as doing work for the U.S. government. By more clearly demonstrating the attenuated relationship, the Department will eliminate such waste. The regulation is amended to establish the validity of the new service passport and clarify the grounds for invalidity of a special issuance passport.

DATES: This rule is effective on September 30, 2016. The Department of State will accept comments on this interim final rule until November 29, 2016.

ADDRESSES: You may make comments by any of the following methods, and you must include the RIN in the subject line of your message.

- *Mail (paper, disk, or CD–ROM submissions):* ATTN: RIN 1400–AE01, U.S. Department of State, Office of Passport Services, Bureau of Consular Affairs (CA/PPT), Attn: CA/PPT/L, 44132 Mercure Circle, P.O. Box 1227, Sterling, Virginia 20166–1227.
- *Email: PassportRules@state.gov.*
- Persons with access to the Internet may view this rule and submit comments by going to *www.regulations.gov,* and searching for docket number DOS–2016–0065.

FOR FURTHER INFORMATION CONTACT: Michael Yohannan, Attorney Advisor, *PassportRules@state.gov,* (202) 485–6507.

SUPPLEMENTARY INFORMATION: U.S. government activities overseas are often supported by non-personal services contracts, defined in 48 CFR 37.101 as contracts "under which the personnel rendering services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the U.S. government and its employees." U.S. citizens employed under these contracts, sometimes referred to as non-personal services contractors, carry out critical security, maintenance and other functions on behalf of the U.S. government, often under difficult or dangerous circumstances. As a general rule these individuals conduct the travel associated with their contractual duties in support of the U.S. government with a regular passport. However, the Department is aware that there are limited circumstances in which non-personal services contractors traveling on regular passports experience difficulties when the purpose of their travel involves work conducted in support of the U.S. government. These difficulties annually cause significant cost to the U.S. government resulting from program delays and fees assessed to the Department. Contractors working on building projects who must travel intermittently out of country to renew visas are particularly affected by such difficulties because the U.S. government must bear the round-trip air travel costs, the hotel costs, and the per diem costs in addition to wage costs during often lengthy waits for a new visa. Foreign governments also charge large visa fees which then increase the costs of programs and building projects. In these instances, it is advantageous to the U.S. government to provide a passport that conveys that the traveler is abroad to conduct work in support of the U.S. government while simultaneously indicating that the traveler has a more attenuated relationship with the U.S. government that does not justify a diplomatic or official passport.

The Department of State is creating a new type of passport, the "service passport," to fulfill this function. The Department is further clarifying the limited circumstances under which a non-personal or personal services contractor may receive an official or diplomatic passport when in receipt of such request from a federal agency. The Department estimates that this rulemaking will affect approximately 1,000 non-personal services contractors per year.

Under 22 U.S.C. 211a *et seq.,* the Secretary of State has the authority to make rules for the granting and issuance of passports. To add clarity to the types of passports issued by the Department, § 51.1 of 22 CFR is being modified to add a definition of "special issuance passport." The Department is modifying § 51.3 to authorize issuance of service passports and to clarify the eligibility criteria for official and diplomatic passports. The Department is further modifying § 51.4 to clarify the validity of special issuance passports, including the new service passport, and clarify the grounds for invalidity of a special issuance passport.

Regulatory Findings

The Department is publishing this rule as a final rule, effective on the date of publication, pursuant to the "good cause" exemption of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(3)(B). The Department finds that delaying the effect of this rule until after notice and comment would be impractical, unnecessary, and contrary to public interest. The Department finds that providing these individuals with travel documents that indicate that their travel is in support of the U.S. government while also signaling a more attenuated relationship with the U.S. government than that enjoyed by direct hire employees provides a compelling justification for an immediate effective date of this rule.

In addition, this rulemaking is exempt from notice and comment pursuant to 5 U.S.C. 553(a)(1), because it involves a foreign affairs function of the United States. As noted above, contractors working on building projects often must travel intermittently out of country to renew visas, and foreign governments charge large visa fees whenever that occurs. The U.S. government must provide a passport that conveys that the traveler is abroad to conduct work in support of the U.S. government while simultaneously indicating that the traveler has a more attenuated relationship with the U.S. government that does not justify a diplomatic or official passport.

Because this rule is exempt from 5 U.S.C. 553, it is effective on the date of publication. *See* 5 U.S.C. 553(d). However, the Department solicits—and welcomes—comments on this rulemaking, and will address relevant comments in a final rule.

Regulatory Flexibility Act

The Department, in accordance with the Regulatory Flexibility Act, 5 U.S.C.

605(b), has reviewed this rule and, by approving it, certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities as defined in 5 U.S.C. 601(6).

Unfunded Mandates Act of 1995

This rule will not result in the expenditure by state, local, tribal, or territorial governments, in the aggregate, or by the private sector, of $100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996, since it will not result in an annual effect on the economy of $100 million or more. *See* 5 U.S.C. 804(2).

Executive Order 12866 and 13563

The Department has reviewed the regulation to ensure its consistency with the regulatory philosophy and principles set forth in the Executive Orders and finds that the benefits of this rule outweigh any costs. This rule is not economically significant under Executive Order 12866, section 3(f)(1), because it will not have an annual effect on the economy of $100 million or more. The Department expects the rule's impact on the public to be minimal; therefore, the Department finds that the benefits of this rulemaking outweigh any costs. This rule has been designated as "non-significant" by the Office of Information and Regulatory Affairs.

Executive Order 13132

This rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the Department has determined that this rule does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement.

Executive Order 13175—Effect on Tribes

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, Executive Order 13175 does not apply to this rulemaking.

Paperwork Reduction Act

This rule does not impose or alter any reporting or record-keeping requirements under the Paperwork Reduction Act. The individuals who will be applying for the new service passports are those who would have applied for regular or official passports; therefore, the total burden on existing information collections is expected to remain constant. The OMB Control Numbers are 1405–0004 and 1405–0020.

List of Subjects in 22 CFR Part 51

Administrative practice and procedure, Drug traffic control, Passports and visas, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, 22 CFR part 51 is amended as follows:

PART 51—PASSPORTS

■ 1. The authority citation for Part 51 continues to read as follows:

Authority: 8 U.S.C. 1504; 18 U.S.C. 1621; 22 U.S.C. 211a, 212, 213, 213n (Pub. L. 106–113 Div. B, Sec. 1000(a)(7) [Div. A, Title II, Sec. 236], 113 Stat. 1536, 1501A–430); 214, 214a, 217a, 218, 2651a, 2671(d)(3), 2705, 2714, 2721, & 3926; 26 U.S.C. 6039E; 31 U.S.C. 9701; 42 U.S.C. 652(k) [Div. B, Title V of Pub. L. 103–317, 108 Stat. 1760]; E.O. 11295, Aug. 6, 1966, FR 10603, 3 CFR, 1966–1970 Comp., p. 570; Sec. 1 of Pub. L. 109–210, 120 Stat. 319; Sec. 2 of Pub. L. 109–167, 119 Stat. 3578; Sec. 5 of Pub. L. 109–472, 120 Stat. 3554; Pub. L. 108–447, Div. B, Title IV, Dec. 8, 2004, 118 Stat. 2809; Pub. L. 108–458, 118 Stat. 3638, 3823 (Dec. 17, 2004).

■ 2. Amend § 51.1 by removing the alphabetical paragraph designations and adding the definitions for *non-personal services contractor, personal services contractor,* and *special issuance passport* in alphabetical order to read as follows:

§ 51.1 Definitions.

* * * * *

Non-personal services contractor, for purposes of this part, is an individual working under a non-personal services contract as defined in 48 CFR 37.101.

* * * * *

Personal services contractor, for purposes of this part, means a contractor who is working under a personal services contract as described in 48 CFR 37.104.

* * * * *

Special issuance passport means a regular passport for which no passport fee is collected pursuant to § 51.52, and a service, official or diplomatic passport as defined in § 51.3.

* * * * *

■ 3. Revise § 51.3 to read as follows:

§ 51.3 Types of passports.

(a) *Regular passport.* A regular passport is issued to a national of the United States.

(b) *Service passport.* When authorized by the Department, a service passport may be issued to a non-personal services contractor traveling abroad to carry out duties in support of and pursuant to a contract with the U.S. government, when exceptional circumstances make a service passport necessary to enable the individual to carry out his or her contractual duties.

(c) *Official passport.* When authorized by the Department, an official passport may be issued to:

(1) An officer or employee of the U.S. government traveling abroad to carry out official duties, and family members of such persons;

(2) A U.S. government personal services contractor traveling abroad to carry out official duties on behalf of the U.S. government;

(3) A non-personal services contractor traveling abroad to carry out duties in support of and pursuant to a contract with the U.S. government when the contractor is unable to carry out such duties using a regular or service passport; or

(4) An official or employee of a state, local, tribal, or territorial government traveling abroad to carry out official duties in support of the U.S. government.

(d) *Diplomatic passport.* A diplomatic passport is issued to a Foreign Service Officer or to a person having diplomatic status or comparable status because he or she is traveling abroad to carry out diplomatic duties on behalf of the U.S. government. When authorized by the Department, spouses and family members of such persons may be issued diplomatic passports. When authorized by the Department, a diplomatic passport may be issued to a U.S. government contractor if the contractor meets the eligibility requirements for a diplomatic passport and the diplomatic passport is necessary to complete his or her contractual duties in support of the U.S. government.

(e) *Passport card.* A passport card is issued to a national of the United States on the same basis as a regular passport. It is valid only for departure from and entry to the United States through land and sea ports of entry between the United States and Mexico, Canada, the Caribbean and Bermuda. It is not a globally interoperable international travel document.

■ 4. Revise § 51.4 to read as follows:

§ 51.4 Validity of passports.

(a) *Signature of bearer.* A passport book is valid only when signed by the bearer in the space designated for signature, or, if the bearer is unable to sign, signed by a person with legal authority to sign on his or her behalf. A passport card is valid without the signature of the bearer.

(b) *Period of validity of a regular passport and a passport card.* (1) A regular passport or passport card issued to an applicant 16 years of age or older is valid for ten years from date of issue unless the Department limits the validity period to a shorter period.

(2) A regular passport or passport card issued to an applicant under 16 years of age is valid for five years from date of issue unless the Department limits the validity period to a shorter period.

(3) A regular passport for which payment of the fee has been excused is valid for a period of five years from the date issued unless limited by the Department to a shorter period.

(c) *Period of validity of a service passport.* The period of validity of a service passport, unless limited by the Department to a shorter period, is five years from the date of issue, or so long as the bearer maintains the status pursuant to which the service passport is issued, whichever is shorter. A service passport which has not expired must be returned to the Department upon the termination of the bearer's status or at such other time as the Department may determine.

(d) *Period of validity of an official passport.* The period of validity of an official passport, unless limited by the Department to a shorter period, is five years from the date of issue, or so long as the bearer maintains his or her official status, whichever is shorter. An official passport which has not expired must be returned to the Department upon the termination of the bearer's official status or at such other time as the Department may determine.

(e) *Period of validity of a diplomatic passport.* The period of validity of a diplomatic passport, unless limited by the Department to a shorter period, is five years from the date of issue, or so long as the bearer maintains his or her diplomatic status, whichever is shorter. A diplomatic passport which has not expired must be returned to the Department upon the termination of the bearer's diplomatic status or at such other time as the Department may determine.

(f) *Limitation of validity.* The validity period of any passport may be limited by the Department to less than the normal validity period. The bearer of a limited passport may apply for a new passport, using the proper application and submitting the limited passport, applicable fees, photographs, and additional documentation, if required, to support the issuance of a new passport.

(g) *Invalidity.* A United States passport is invalid as soon as:

(1) The Department has sent or personally delivered a written notice to the bearer stating that the passport has been revoked; or

(2) The passport has been reported as lost or stolen to the Department, a U.S. passport agency or a diplomatic or consular post abroad and the Department has recorded the reported loss or theft; or

(3) The passport is cancelled by the Department (physically, electronically, or otherwise) upon issuance of a new passport of the same type to the bearer; or

(4) The Department has sent a written notice to the bearer that the passport has been invalidated because the Department has not received the applicable fees; or

(5) The passport has been materially changed in physical appearance or composition, or contains a damaged, defective or otherwise nonfunctioning chip, or includes unauthorized changes, obliterations, entries or photographs, or has observable wear or tear that renders it unfit for use as a travel document, and the Department either takes possession of the passport or sends a written notice to the bearer); or

(6) The bearer of a special issuance passport no longer maintains the status pursuant to which the passport was issued; or

(7) The Department has sent a written notice to the bearer, directly or through the bearer's employing agency, stating that a special issuance passport has been cancelled by the Department.

Dated: September 23, 2016.

David T. Donahue,

Acting Assistant Secretary, Bureau of Consular Affairs, Department of State.

[FR Doc. 2016–23568 Filed 9–29–16; 8:45 am]

BILLING CODE 4710–13–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Federal Highway Administration

23 CFR Parts 1270 and 1275

[Docket No. NHTSA–2016–0099]

RIN 2127–AL45

Regulatory Update of Transfer and Sanction Programs

AGENCY: National Highway Traffic Safety Administration (NHTSA) and Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Interim final rule; request for comments.

SUMMARY: This action revises the Federal implementing regulations for the Section 154 (Open Container) and Section 164 (Repeat Intoxicated Driver) programs as a result of enactment of the Fixing America's Surface Transportation (FAST) Act. It incorporates the new compliance criteria for the Section 164 program and updates the regulations to reflect current practice. This document is being issued as an interim final rule to ensure that States receive instructions that are important to upcoming compliance determinations to be made on October 1, 2016. The agencies request comments on this rule. The agencies will publish a document responding to any comments received and, if appropriate, will amend provisions of the regulations.

DATES: This interim final rule is effective on October 1, 2016. Comments concerning this interim final rule are due on November 30, 2016.

ADDRESSES: You may submit comments using the number identified in the heading of this document by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, M–30, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Regardless of how you submit your comments, please mention the docket number of this document.

You may also call the Docket at 202–366–9324.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Privacy Act: Please see the Privacy Act heading under Regulatory Analyses and Notices.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Docket Management Facility, M–30, U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC. The Docket Management Facility is open between 9 a.m. and 5 p.m., Eastern Time, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

NHTSA: For program issues: Barbara Sauers, Director, Office of Grants Management and Operations, Telephone number: (202) 366–0144, Email: *Barbara.Sauers@dot.gov.* For legal issues: Russell Krupen, Attorney Advisor, Office of Chief Counsel, Telephone number: (202) 366–1834, Email: *Russell.Krupen@dot.gov;* Facsimile: (202) 366–3820.

FHWA: For program issues: Erin Kenley, Team Leader, Safety Programs Implementation and Evaluation Team, Office of Safety, Telephone number: (202) 366–8556, Email: *Erin.Kenley@dot.gov.* For legal issues: William Winne, Attorney Advisor, Office of Chief Counsel, Telephone number: (202) 366–1397, Email: *William.Winne@dot.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Section 154: Open Container Laws
III. Section 164: Repeat Intoxicated Driver Laws
IV. Non-Compliance Penalties and Procedures
V. Notice and Comment, Effective Date, and Request for Comments
VI. Regulatory Analyses and Notices
VII. Public Participation

I. Introduction

On December 4, 2015, the President signed into law the Fixing America's Surface Transportation Act (FAST Act), Public Law 114–94, the first authorization enacted in over ten years that provides long-term funding certainty for surface transportation. The FAST Act amended 23 U.S.C. 154 (Section 154) and 23 U.S.C. 164 (Section 164), which address the serious national problems of impaired driving by encouraging States to meet minimum standards for their open container laws and repeat intoxicated driver laws. The FAST Act built on prior amendments to those sections in the Moving Ahead for Progress in the 21st Century Act (MAP–21), Public Law 112–141, signed into law on July 6, 2012.

The National Highway Traffic Safety Administration (NHTSA) and the Federal Highway Administration (FHWA) (collectively, "the agencies") are issuing this interim final rule (IFR), with immediate effectiveness, to ensure that States receive instructions that are important to upcoming compliance determinations to be made on October 1, 2016, as the changes in the FAST Act are effective on that date. This IFR amends the Federal implementing regulations for Section 154 (23 CFR part 1270) and Section 164 (23 CFR part 1275) to reflect the changed requirements from the recent Federal legislation. At the same time, the agencies are taking this opportunity to update the regulations to improve clarity, codify longstanding interpretation of the statutes and current regulations, and streamline procedures for States.

This preamble will first address the history of and modifications to the minimum compliance requirements of Section 154 and Section 164, respectively. It will then address the elements common to both programs, including the penalties for noncompliance, the limitations on use of funds associated with noncompliance, and the responsibilities of compliant and non-compliant States.

II. Section 154: Open Container Laws

A. Background

The Transportation Equity Act for the 21st Century (TEA–21), Public Law 105–178, was signed into law on June 9, 1998. On July 22, 1998, the TEA–21 Restoration Act, Public Law 105–206 (a technical corrections bill), was enacted to restore provisions that were agreed to by the conferees to TEA–21, but were not included in the conference report. Section 1405 of the TEA–21 Restoration Act amended chapter 1 of title 23, United States Code (U.S.C.), by adding Section 154, which established a transfer program under which a percentage of a State's Federal-aid highway construction funds would be transferred to the State's apportionment under 23 U.S.C. 402 (Section 402) if the State failed to enact and enforce a conforming "open container" law. These funds could be used for alcohol-impaired driving countermeasures or the enforcement of driving while intoxicated laws, or States could elect to use all or a portion of the funds for hazard elimination activities under 23 U.S.C. 152.

Under Section 154, to avoid the transfer of funds, a State must enact and enforce an open container law "that prohibits the possession of any open alcoholic beverage container, or the consumption of any alcoholic beverage, in the passenger area of any motor vehicle (including possession or consumption by the driver of the vehicle) located on a public highway, or the right-of-way of a public highway, in the State." 23 U.S.C. 154(b)(1). All 50 States, the District of Columbia, and Puerto Rico are considered to be States for the purposes of this program.

On October 6, 1998, the agencies published an interim final rule implementing the Section 154 program, 63 FR 53580 (Oct. 6, 1998), followed by a final rule published on August 24, 2000. 65 FR 51532 (Aug. 24, 2000). Since that time, the minimum requirements that a State's open container law must meet to comply with Section 154 have not changed. However, subsequent legislation amended the penalty provisions that apply to non-compliant States. Under current law, noncompliance results in the reservation of funds rather than an immediate transfer to Section 402; funds are reserved from different Federal-aid highway programs and in a different amount (based on a percentage defined in law); the transfer to Section 402 is dependent upon a State's election to use funds for alcohol impaired driving countermeasures; and funds may be used for highway safety improvement program activities eligible under 23 U.S.C. 148 rather than hazard elimination activities. The Federal implementing regulations were never updated to reflect these statutory changes governing procedures.

This IFR updates the Federal implementing regulations to reflect these procedural changes. In addition, it makes changes to improve clarity, codify longstanding interpretations of the Federal statute and regulations, streamline procedures for States, and eliminate regulatory provisions that were not effectuated in practice for reasons discussed below. These changes are intended to ensure a uniform understanding among the States of the minimum requirements their open container laws must meet. Revisions to the procedures for demonstrating compliance, the penalties for noncompliance, and the responsibilities of compliant and non-compliant States are discussed later in the preamble as those aspects are common to the Section 154 program and the Section 164 program.

B. Compliance Criteria for State Open Container Laws

NHTSA is delegated the authority by the Secretary of Transportation to determine State compliance under Section 154 (49 CFR 1.95(f)). While Congress has not changed the minimum requirements that a State's open container law must meet to comply with Section 154 since the inception of the program, NHTSA's experience implementing the compliance criteria since the regulations were finalized in 2000 suggests the need to provide additional clarity to the States on particular aspects of the requirements. States are responsible for ensuring and maintaining their own compliance with these requirements. The agencies believe that the discussion in this preamble and the revisions to the regulations will allow States to better understand the program and attain and maintain compliance. These revisions are not intended to substantively amend the compliance requirements of the Section 154 program.

1. Definitions (23 CFR 1270.3)

The agencies are adding definitions for the terms "FHWA," "NHTSA," and "open container law" and eliminating the definition for "enact and enforce." The added definitions are for terms used in the regulation, while the elimination of the definition of "enact and enforce" is simply because the term is plain and does not need a definition. The regulations continue to require a State to "enact and enforce" a compliant law.

The agencies are amending the definition of "open alcoholic beverage container" to add the parenthetical phrase "(regardless of whether it has been closed or resealed.)" 23 CFR 1270.3(e).[1] This is intended to make clear that "cork and carry" or "resealed wine container" laws exempting a recorked or resealed alcoholic beverage container from the State's open container laws are not allowed under the Federal law. Recorking or resealing does not negate the fact that the contents in the bottle have been partially removed, a direct concern under the Federal statute. Due to the preponderance of these laws in States, the agencies determined that this clarification is necessary. Recorked or resealed alcoholic beverages containers must be stored outside of the passenger area, such as in the trunk of a motor vehicle.

2. Compliance Criteria (23 CFR 1270.4(a)–(c))

Congress has made no changes to the substantive compliance criteria of Section 154 since the inception of the program. Therefore, the agencies are not making any substantive changes to these sections of the regulations. The six compliance criteria are discussed extensively in the interim final rule (63 FR 53580 [Oct. 6, 1998]) and final rule (65 FR 51532 [Aug. 24, 2000]) that first implemented the program. Those discussions provide background and explanations regarding the Federal minimum requirements.

3. Exceptions (23 CFR 1270.4(d))

The Federal implementing regulations require a State's open container law to apply to "the passenger area of any motor vehicle," with passenger area meaning "the area designed to seat the driver and passengers while the motor vehicle is in operation and any area that is readily accessible to the driver or a passenger while in their seating positions, including the glove compartment." 23 CFR 1270.3(g), 1270.4(b)(2). However, certain exceptions to this rule are permitted provided they comply with the requirements in 23 CFR 1270.4(d)(1).

The Federal regulations have long permitted possession of an open alcoholic beverage container in a locked glove compartment. NHTSA has accepted as compliant a State provision permitting storage of an open container in a locked center console because a locked center console is functionally equivalent to a locked glove compartment. This IFR logically extends that exception to allow possession of an open alcoholic beverage container in any locked container (including a locked fixed console or a locked glove compartment). The agencies emphasize that this exception does not permit the possession in the passenger area of an open alcoholic beverage container in tamper-evident packaging. (See the earlier discussion about "cork and carry" and "resealed wine container" provisions.) While tamper-evident packaging may assist law enforcement officers in identifying whether consumption of the alcoholic beverage has occurred, it does not restrict access to the alcoholic beverage, which is the purpose of open container laws.

This IFR also moves the location of the phrase "in a motor vehicle that is not equipped with a trunk" to remove any ambiguity that this is a prerequisite for allowing placement of an open alcoholic beverage container behind the last upright seat or in an area not normally occupied by the driver or a passenger. No substantive change is intended—the agencies have always interpreted and applied this provision in this manner.

The Federal implementing regulations require a State's open container law to apply to all occupants of a motor vehicle. However, the Federal statute and implementing regulations permit exceptions allowing a passenger, but never a driver, to possess an open alcoholic beverage container or consume an alcoholic beverage in the passenger area of "a motor vehicle designed, maintained, or used primarily for the transportation of persons for compensation, or in the living quarters of a house coach or house trailer." 23 CFR 1270.4(d)(2). The agencies are making technical corrections to this provision that do not change its application.

III. Section 164: Repeat Intoxicated Driver Laws

A. Background

Section 1406 of the TEA–21 Restoration Act amended chapter 1 of title 23, U.S.C., by adding Section 164, which established a transfer program under which a percentage of a State's Federal-aid highway construction funds would be transferred to the State's apportionment under Section 402 if the State failed to enact and enforce a conforming "repeat intoxicated driver" law. As with Section 154, transfer funds could be used for alcohol-impaired driving countermeasures or the enforcement of driving while intoxicated laws, or States could elect to use all or a portion of the funds for hazard elimination activities under 23 U.S.C. 152.

Under Section 164, to avoid the transfer of funds, a State must enact and enforce a repeat intoxicated driver law that establishes, at minimum, certain specified penalties for second and subsequent convictions of driving while intoxicated or driving under the influence. As originally enacted, Section 164 required that States impose the following minimum penalties: A one-year driver's license suspension; the impoundment or immobilization of, or the installation of an ignition interlock system on, the repeat intoxicated driver's motor vehicles; an assessment of the repeat intoxicated driver's degree of alcohol abuse, and treatment as appropriate; and the sentencing of the repeat intoxicated driver to a minimum number of days of imprisonment or community service. All 50 States, the District of Columbia, and Puerto Rico are considered to be States for the purposes of this program.

---

[1] Throughout this preamble, citations to the Section 154 and Section 164 implementing regulations refer to the version as amended by the IFR.

On October 19, 1998, the agencies published an interim final rule that implemented the Section 164 program, 63 FR 55796 (Oct. 19, 1998), followed by a final rule published on October 4, 2000. 65 FR 59112 (Oct. 4, 2000). The SAFETEA–LU Technical Corrections Act of 2008, Public Law 110–244 (enacted June 6, 2008), amended some of the minimum penalties States must impose on repeat offenders, and both MAP–21 and the FAST Act further amended these minimum penalties. These Acts also updated, in the same ways as Section 154, the penalty provisions that apply to States that are not compliant with the program. Despite these significant statutory changes over the past eight years, the Federal implementing regulations have not been updated since 2000.

This IFR updates the minimum compliance criteria based on these legislative changes, as well as to improve clarity, codify longstanding interpretations, streamline procedures for States, and eliminate regulatory provisions that were not effectuated in practice for reasons discussed below. As with Section 154, these changes are intended to ensure a uniform understanding among the States of the minimum requirements their repeat intoxicated driver laws must meet. Revisions to the procedures for demonstrating compliance, the penalties for noncompliance, and the responsibilities of compliant and non-compliant States are discussed later in the preamble as those apply also to the Section 154 program.

B. Minimum Repeat Intoxicated Driver Law Requirements

Unlike the Section 154 program, Congress has made substantive amendments to the requirements that a State's repeat intoxicated driver law must meet to comply with Section 164. Many of the revisions described in this section codify those substantive statutory changes, as the regulations have not been updated since 2000. In other cases, the agencies are simply improving the clarity of the regulations to reflect longstanding application of the Federal statute since 2000.

1. Definitions (23 CFR 1275.3)

The agencies are adding definitions for "FHWA" and "NHTSA" and eliminating the definition for "enact and enforce," consistent with the approach for 23 CFR 1270.3. The agencies are eliminating the definitions for "driver's motor vehicle" and "impoundment or immobilization," as the compliance criterion to which these applied was repealed by the FAST Act. The agencies are eliminating the definition for "license suspension," as the compliance criterion to which it applied has been reworded, rendering the definition superfluous. The agencies are adding a definition for "24–7 sobriety program" due to FAST Act revisions to the general compliance criteria. Because the definition of the term in the FAST Act cross-references 23 U.S.C. 405(d)(7)(A), the agencies have similarly tied the definition here to the meaning given to it in NHTSA's Section 405 implementing regulations (*see* 23 CFR 1300.23(b)). 23 CFR 1270.3(a). This necessitates adding a reference to a "combination of laws or programs" to the definition of "repeat intoxicated driver law" to accommodate these 24–7 sobriety programs. Finally, the agencies are adding a definition for "mandatory sentence." As used in combination with "imprisonment," the definition is intended to ensure that repeat offenders are in fact detained for the minimum periods specified.

Although the IFR makes no change to the definition of "repeat intoxicated driver," the agencies emphasize that a State may not expunge an offender's prior conviction in order to exclude it from the five-year lookback period. Any mechanism (including expungement) that causes a State to exclude from consideration prior convictions of driving while intoxicated or driving under the influence, when such convictions occurred within the prior five years, generally does not comply with Section 164.

2. Compliance Criteria (23 CFR 1275.4(a))

The substantive compliance criteria of Section 164 have been significantly amended since their inception. This IFR updates the compliance criteria to reflect the current law, as most recently amended by the FAST Act. In addition, the agencies are providing clarifications as appropriate.

a. License Sanction (23 CFR 1275.4(a)(1))

Section 164, as created by the TEA–21 Restoration Act, required all repeat offenders to receive a minimum one-year hard license suspension or revocation. Under the Federal implementing regulations, during the one-year term, the offender could not be eligible for any driving privileges, such as a restricted or hardship license. Because the Federal implementing regulations have not been updated since 2000, this language remained in the Code of Federal Regulations. The SAFETEA–LU Technical Corrections Act of 2008 and MAP–21 made further changes that were effectuated by the agencies, but that were never written into the regulations.

The FAST Act completely rewrote the license sanction criterion in 23 U.S.C. 164(a)(5)(A) to loosen the requirements and provide for additional compliance options for States. This IFR codifies the revised criterion. Under today's IFR, all repeat offenders must receive one or a combination of three license sanctions for a period of not less than one year (365 days). States may therefore "mix-and-match" these sanctions, provided that, in combination, they last for the full one year period.

The first license sanction is a suspension of all driving privileges. During that period, the repeat offender is not permitted to operate any motor vehicle under any circumstances. The second license sanction is a restriction on driving privileges that limits the individual to operating only motor vehicles with an ignition interlock device installed. Section 164 and the implementing regulations permit certain limited exceptions to this license sanction, discussed later in this preamble. The third license sanction is that the repeat offender may only operate a motor vehicle provided the individual is participating in, and complying with, a 24–7 sobriety program. For a State's law or 24–7 sobriety program to comply with this requirement, it must make clear that any participant who is kicked out of the program must be subject to either a hard license suspension or an ignition interlock restriction, as provided under the other two license sanctions, for the remainder of the one year sanction period.

b. Vehicle Sanction (Repealed)

The TEA–21 Restoration Act required all repeat offenders to "be subject to the impoundment or immobilization of each of the individual's motor vehicles or the installation of an ignition interlock system on each of the motor vehicles." The Federal implementing regulations further required impoundment or immobilization to occur during the one-year license suspension, while installation of an ignition interlock device was required to occur at the conclusion of the one-year license suspension. The FAST Act repealed this vehicle sanction. With the vast majority of States moving to ignition interlocks as a license sanction, the vehicle sanction requirement was largely redundant. This IFR removes these requirements from 23 CFR 1275.4.

c. Assessment and Treatment (23 CFR 1275.4(a)(2))

Under Section 164, the State law must require that all repeat intoxicated drivers undergo an assessment of their degree of alcohol abuse, and it must authorize the imposition of treatment as appropriate. An assessment is required of all repeat offenders because it allows for a determination not only of whether an offender should undergo treatment, but also of what type and level of treatment is appropriate for that offender. While treatment is not required for all repeat offenders, the State must authorize the imposition of treatment as appropriate. Congress has not changed this criterion since its inception, and the agencies are making no changes in this IFR.

d. Minimum Sentence (23 CFR 1275.4(a)(3))

Since the beginning of the program, Section 164 has required that each State have a law that imposes a mandatory minimum sentence on all repeat intoxicated drivers. For a second offense, the law must provide for a mandatory sentence of not less than 5 days of imprisonment or 30 days of community service. For a third or subsequent offense, the law must provide for a mandatory sentence of not less than 10 days of imprisonment or 60 days of community service. The terms "mandatory sentence" and "imprisonment" are defined in 23 CFR 1275.3. The FAST Act retains these minimum sentence provisions, but allows States the option to certify as to their "general practice" for incarceration in lieu of having a compliant mandatory minimum sentence. The new certification option is addressed in the next section regarding exceptions.

In this IFR, the agencies are clarifying the number of hours for the various sentences identified above that are considered equivalent to each "day." Many States provide for sentencing in terms of hours rather than days. The agencies recognize that imprisonment and community service function differently. While imprisonment is generally an extended period of detainment that lasts through waking and sleeping hours, community service is a form of labor that occurs while the detainee is awake. A "day" for purposes of each of these penalties is therefore not equivalent. NHTSA's longstanding interpretation has been that one "day" of imprisonment equals 24 hours, and one "day" of community service equals 8 hours (a work day). The agencies have added corresponding hour equivalents to the minimum sentence criterion.

3. Exceptions (23 CFR 1275.4(b), 1275.5)

a. Special Exceptions (23 CFR 1275.4(b))

One of the three sanctions under the license sanction criterion described above is restriction of the repeat offender's driving privileges to the operation of only motor vehicles with an ignition interlock device installed. However, the FAST Act allows two exceptions to this restriction, which the agencies are adopting in this IFR verbatim. (Prior to enactment of the FAST Act, neither was allowed under the Section 164 program.) No other exceptions to a State's ignition interlock law are permitted.

First, the FAST Act allows a repeat offender subject to an ignition interlock restriction to operate an employer's motor vehicle in the course and scope of employment without an ignition interlock device installed, provided the business entity that owns the vehicle is not owned or controlled by the individual. A State's exception must explicitly exclude business entities owned or controlled by the repeat offender or it will not comply with the license sanction criterion. An exclusion for "self-employment," for example, does not cover all business entities potentially owned or controlled by a repeat offender, and would not allow a State's exception to comply with the license sanction criterion. Second, a State may except from its ignition interlock law a repeat offender that is certified by a medical doctor as being unable to provide a deep lung breath sample for analysis by an ignition interlock device.

b. "General Practice" Certifications (23 CFR 1275.5)

The FAST Act amends the minimum sentence criterion to provide an alternative compliance option. In lieu of enacting and enforcing a law that complies with the minimum sentence criterion, a State may certify to its "general practice" of incarceration. According to the FAST Act, the State must certify for a second offender that its "general practice is that such an individual will be incarcerated" and for a third or subsequent offender that its "general practice is that such an individual will receive 10 days of incarceration." 23 U.S.C. 164(a)(5)(C)(i)–(ii). This IFR establishes the process for a State to submit a "general practice" certification as an alternative means of satisfying the minimum sentence criterion.

The IFR sets forth separate certifications for second offender incarceration and for third and subsequent offender incarceration. This will allow maximum flexibility to States, because it allows a State whose laws are partly in compliance to satisfy the minimum sentence criterion through a combination of statute and certification.

To meet the statutory standard of "general practice," the agencies have elected to require a State to certify that 75 percent of repeat offenders are subject to mandatory incarceration. The agencies believe this percentage is a reasonable interpretation of what would constitute "general practice" in a State. Consistent with the FAST Act requirements, the certification for a second offender does not contain a minimum incarceration period, while that for third and subsequent offenders specifies 10 days.

The agencies elected not to base "general practice" on a State's average incarceration period for repeat offenders. That approach would allow a State to meet the standard for second offenders if a single offender is sentenced to any period of incarceration. For third and subsequent offenders, lengthy prison sentences could skew the average even if the vast majority of offenders received sentences well below 10 days. The agencies do not believe such an approach falls within the reasonable meaning of "general practice."

Each certification is required to be based on data from the full calendar year immediately preceding the date of certification. In other words, if the State is certifying for fiscal year 2018 (which begins on October 1, 2017), the State's "general practice" certification must be based on data from the entire period of January 1, 2016 through December 31, 2016. The certification must be signed by the Governor's Representative for Highway Safety and must be based on personal knowledge and other appropriate inquiry.

Because the State's "general practice" may change over time, the agencies are requiring States electing this compliance option to provide a new certification annually. Although certifications are due by October 1 each year, States are encouraged to submit their certification by August 15 to avoid any delay in the release of funds on October 1 of that calendar year.

IV. Non-Compliance Penalties and Procedures

This section describes the penalties affecting States that do not comply with one or both of the Section 154 and Section 164 programs. In general, these changes merely update the regulations to reflect amendments made by Federal statutes, such as MAP–21. The agencies are also streamlining some of the procedures that apply to States.

A. Reservation of Funds for Non-Compliance (23 CFR 1270.6 and 1275.6)

States that fail to enact or enforce compliant open container or repeat intoxicated driver laws by October 1 of each fiscal year will have an amount equal to 2.5 percent of Federal-aid funds apportioned under 23 U.S.C. 104(b)(1) and 23 U.S.C. 104(b)(2) for the National Highway Performance Program (NHPP) and the Surface Transportation Block Grant Program (STBG) reserved by FHWA. The penalties are separate and distinct; a 2.5 percent penalty applies separately for each program where non-compliance occurs. The IFR eliminates as obsolete the penalty provisions that applied to fiscal years 2001 and 2002. In addition, it updates the procedures to reflect the change to a reservation program (rather than immediate transfer to a State's Section 402 apportionment), the change in the penalty amount to 2.5 percent of Federal-aid funds (rather than 3 percent), and the change in the funds from which the penalty is reserved to those apportioned under 23 U.S.C. 104(b)(1) and (b)(2) (rather than 23 U.S.C. 104(b)(1), (b)(3), and (b)(4)), which all resulted from MAP–21.

The initial reservation of Federal-aid funds by FHWA for noncompliant States will be on a proportional basis from each of the apportionments under Sections 104(b)(1) and (b)(2). Each fiscal year, the State's Department of Transportation must inform FHWA, through the appropriate Division Administrator, within 30 days if it wishes to change the derivation of the total penalty amounts from the NHPP and STBG apportionments from the default proportional amounts. Prior to this IFR, States were required to submit this request by October 30. The change in the IFR ensures that States always receive 30 days to process this request in the event issuance of the notice of apportionments is delayed.

B. Use of Reserved Funds (23 CFR 1270.7 and 1275.7)

The agencies have reorganized 23 CFR 1270.7 and 1275.7 to improve clarity and better align them with the order of procedures for States. Not later than 60 days after the penalty funds are reserved, the Governor's Representative for Highway Safety and the Chief Executive Officer of the State's Department of Transportation must jointly identify, in writing, to the appropriate NHTSA Regional Administrator and FHWA Division Administrator how the penalty funds will be distributed for use among alcohol-impaired driving programs and highway safety improvement program (HSIP) eligible activities under 23 U.S.C. 148. The primary change in the IFR is to reflect the change in available uses from hazard elimination to HSIP eligible activities, which resulted from Federal legislation.

The penalty funds will continue to be reserved until the State provides this distribution request. As soon as practicable after its receipt by the agencies, the funds will either be transferred to the State's Section 402 apportionment for alcohol-impaired driving programs or released to the State Department of Transportation for HSIP eligible activities, pursuant to the changes in MAP–21. The Federal statutes do not authorize additional transfers between the Section 402 and HSIP programs. As a result, the IFR adds that once penalty funds have been transferred or released for the fiscal year, States are not able to revise their request.

The allowable uses for funds (specifically, for alcohol-impaired driving programs and HSIP eligible activities) are described in the implementing regulations and updated only to reflect the switch from hazard elimination to HSIP, pursuant to Federal legislation. Under both programs, the Federal share of the cost of any project carried out with penalty funds remains 100 percent.

Section 154 and 164 penalty funds are transferred or released from the State's apportionment of contract authority under 23 U.S.C. 104(b)(1) and 23 U.S.C. 104(b)(2). The contract authority is transferred or released with accompanying obligation authority, which is the maximum amount the State can obligate to eligible projects. If the State elects to transfer funds to its Section 402 apportionment for alcohol-impaired driving programs, the obligation limitation is provided based on a ratio specified in 23 CFR 1270.7 and 1275.7, which comes directly from 23 U.S.C. 154(c)(6) and 23 U.S.C. 164(b)(6). The IFR makes technical corrections and amendments to improve clarity in these provisions of the Federal implementing regulations, but they do not result in any change in how the ratio is calculated.

C. Procedures Affecting States in Noncompliance (23 CFR 1270.8 and 1275.8)

Under the original Federal implementing regulations, the agencies intended for States to be notified of their compliance status in FHWA's advance notice of apportionment, normally issued ninety days prior to final apportionment. Noncompliant States were then granted 30 days to submit documentation showing why they were in compliance. The agencies would then issue a final determination as part of the final notification of apportionments, which normally occurs on October 1 of each year. While the agencies have strived to notify States of pending changes in their compliance status in the advance notice of apportionment whenever possible, the Federal statute requires formal compliance determinations to be based on the State's law enacted and enforced on October 1 of each fiscal year. As a result, State compliance status may change up to that date, making this system unworkable in many cases. The IFR revises 23 CFR 1270.8 and 1275.8 to better reflect the actual practice the agencies have undertaken to give States full opportunity to present additional documentation (with some minor changes to streamline the process for States).

Each State determined to be noncompliant with 23 U.S.C. 154 or 23 U.S.C. 164 receives notice of its compliance status and the funds being reserved from apportionment as part of the final certification of apportionments required under 23 U.S.C. 104(e), which normally occurs on October 1 of each fiscal year. All States will be afforded 30 days from the date the final notice of apportionments is issued to submit additional documentation showing why they are in compliance. For the Section 164 program, this documentation may include a "general practice" certification. Previously, only newly noncompliant States were afforded 30 days to submit additional documentation demonstrating compliance.

While the agencies consider any additional documentation provided by the State, the reservation will remain in place on the State's affected funds. However, the State must still provide the requests regarding the derivation and distribution of funds referenced in Sections A and B (within 30 and 60 days, respectively) while the documentation is reviewed to expedite the distribution of funds. If the agencies affirm the noncompliance determination, the State will be notified of the decision and the affected funds will be processed in accordance with the requests provided by the State. If the agencies reverse the noncompliance determination, the funds will be released from reservation and restored to the State's NHPP and STBG accounts. These procedures are intended to preserve the maximum possible flexibility for States, while ensuring that the agencies meet their statutory obligations.

D. States' Responsibilities Regarding Compliance (23 CFR 1270.9 and 1275.9)

Under the original Federal implementing regulations, if a State enacted a newly compliant law, the State was required to submit to the NHTSA Regional Office a copy of the law along with a certification meeting the requirements of the applicable Federal regulation (23 CFR 1270.5 or 1275.5, prior to amendment by this IFR). States were required to promptly submit an amendment or supplement to their certifications if their law changed or they ceased to enforce their law.

The agencies are eliminating this certification requirement in this IFR, thereby reducing the paperwork burden on the States. In practice, few States submitted certifications, and the agencies found them to be of limited value in enforcement. Instead, this IFR adds a new section for each of the programs (23 CFR 1270.9 and 1275.9) related to States' responsibilities regarding compliance. First, these sections make clear that it is the State's sole responsibility to ensure compliance with the Section 154 and 164 programs. While NHTSA conducts an annual review of State laws to assess whether legislation has affected their compliance status, this does not occur until late in the fiscal year, often after State legislative sessions have ended. NHTSA cannot and does not actively monitor all pending legislation in all States. Instead, each State Highway Safety Office and State Department of Transportation should actively monitor their legislatures for potential amendments to their open container and repeat intoxicated driver laws.

Second, the agencies have added a provision indicating that States must promptly notify the appropriate NHTSA Regional Administrator in writing of any change or change in enforcement to the State's open container or repeat intoxicated driver law, identifying the specific change(s). This replaces the requirement to submit a supplement or amendment to the State's certification. To the extent appropriate, NHTSA will conduct a preliminary review of the State's amended law and identify to the State any potential compliance issues resulting from the change. Absent early notification from the State, NHTSA may not identify a potential compliance issue until later in the fiscal year, often after the State's legislative session has ended.

V. Notice and Comment, Effective Date, and Request for Comments

The Administrative Procedure Act authorizes agencies to dispense with certain procedures for rules when they find "good cause" to do so. The agencies must ensure that States receive instructions that are important to upcoming compliance determinations to be made on October 1, 2016, as the changes in the FAST Act are effective on that date. In light of the short time frame for implementing the FAST Act, the agencies find good cause to dispense with the notice and comment requirements and the 30-day delayed effective date requirement.

Under Section 553(b)(B), the requirements of notice and comment do not apply when the agency, for good cause, finds that those procedures are "impracticable, unnecessary, or contrary to public interest." Because of the short time frame for implementing the FAST Act, the agencies find it impracticable to implement the new compliance criteria with notice and comment for FY 2017. However, the agencies invite public comment on all aspects of this IFR. The agencies will consider and address comments in a final rule, which the agencies commit to publishing during the first quarter of calendar year 2017, and which will be effective beginning with FY 2018.

Under Section 553(d), the agencies may make a rule effective immediately, avoiding the 30-day delayed effective date requirement for good cause. We have determined that it is in the public interest for this IFR to have an immediate effective date. The agencies are expediting this rulemaking to provide instructions that are important to upcoming compliance determinations to be made on October 1, 2016, such as those related to the new "general practice" certifications. States also need clarification for the processes related to noncompliance.

For these reasons, the agencies are issuing this rulemaking as an interim final rule that will be effective immediately. As an interim final rule, this regulation is fully in effect and binding upon its effective date. No further regulatory action by the agencies is necessary to make this rule effective. However, in order to benefit from comments that interested parties and the public may have, the agencies are requesting that comments be submitted to the docket for this notice.

Comments received in response to this notice will be considered by the agencies. The agencies will then issue a final rule, including any appropriate amendments based on those comments. The notice for that final rule will respond to substantive comments received.

VI. Regulatory Analyses and Notices

A. Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563, and DOT Regulatory Policies and Procedures

The agencies have considered the impact of this rulemaking action under Executive Order 12866, Executive Order 13563, and the Department of Transportation's regulatory policies and procedures. This rulemaking document was not reviewed under Executive Order 12866 or Executive Order 13563. This rule will only affect the compliance status of a very small handful of States and will therefore affect far less than $100 million annually. Whether a State chooses to enact a compliant law or make a certification is dependent on many variables, and cannot be linked with specificity to the issuance of this rule. States choose whether to enact and enforce compliant laws, thereby complying with the programs. If a State chooses not to enact and enforce a conforming law, its funds are conditioned, but not withheld. Accordingly, the total amount of funds provided to each State does not change. The costs to States associated with this rule are minimal (*e.g.*, passing and enforcing alcohol impaired driving laws) and are expected to be offset by resulting highway safety benefits. Therefore, this rulemaking has been determined to be not "significant" under the Department of Transportation's regulatory policies and procedures and the policies of the Office of Management and Budget.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. 601 *et seq.*) requires agencies to evaluate the potential effects of their proposed and final rules on small businesses, small organizations, and small governmental jurisdictions. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

The Small Business Regulatory Enforcement Fairness Act (SBREFA) amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that an action would not have a significant economic impact on a substantial number of small entities.

This IFR is a rulemaking that will update the Section 154 and Section 164 regulations based on recent Federal legislation. The requirements of these programs only affect State governments, which are not considered to be small entities as that term is defined by the RFA. Therefore, we certify that this action will not have a significant impact on a substantial number of small entities and find that the preparation of a Regulatory Flexibility Analysis is unnecessary.

C. Executive Order 13132 (Federalism)

Executive Order 13132 on "Federalism" requires the agencies to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." 64 FR 43255 (August 10, 1999). "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, an agency may not issue a regulation with Federalism implications that imposes substantial direct compliance costs and that is not required by statute unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the agency consults with State and local governments in the process of developing the proposed regulation. An agency also may not issue a regulation with Federalism implications that preempts a State law without consulting with State and local officials.

The agencies have analyzed this rulemaking action in accordance with the principles and criteria set forth in Executive Order 13132, and have determined that this IFR would not have sufficient Federalism implications as defined in the order to warrant formal consultation with State and local officials or the preparation of a federalism summary impact statement. However, the agencies continue to engage with State representatives regarding general implementation of the FAST Act, including these programs, and expects to continue these informal dialogues.

D. Executive Order 12988 (Civil Justice Reform)

Pursuant to Executive Order 12988 (61 FR 4729 (February 7, 1996)), "Civil Justice Reform," the agencies have considered whether this rule would have any retroactive effect. We conclude that it would not have any retroactive or preemptive effect, and judicial review of it may be obtained pursuant to 5 U.S.C. 702. That section does not require that a petition for reconsideration be filed prior to seeking judicial review. This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

E. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. This rulemaking would not establish any new information collection requirements.

F. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in expenditures by State, local or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually (adjusted annually for inflation with base year of 1995). This IFR would not meet the definition of a Federal mandate because the resulting annual State expenditures to comply with the programs would not exceed the minimum threshold.

G. National Environmental Policy Act

NHTSA has considered the impacts of this rulemaking action for the purposes of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4347). The agency has determined that this IFR would not have a significant impact on the quality of the human environment. FHWA has analyzed this action for the purposes of NEPA and has determined that it would not have any effect on the quality of the environment and meets the criteria for the categorical exclusion at 23 CFR 771.117(c)(20).

H. Executive Order 13211

Executive Order 13211 (66 FR 28355, May 18, 2001) applies to any rulemaking that: (1) Is determined to be economically significant as defined under Executive Order 12866, and is likely to have a significantly adverse effect on the supply of, distribution of, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. This rulemaking is not likely to have a significantly adverse effect on the supply of, distribution of, or use of energy. This rulemaking has not been designated as a significant energy action. Accordingly, this rulemaking is not subject to Executive Order 13211.

I. Executive Order 13175 (Consultation and Coordination With Indian Tribes)

The agencies have analyzed this IFR under Executive Order 13175, and have determined that today's action would not have a substantial direct effect on one or more Indian tribes, would not impose substantial direct compliance costs on Indian tribal governments, and would not preempt tribal law. Therefore, a tribal summary impact statement is not required.

J. Plain Language

Executive Order 12866 and the President's memorandum of June 1, 1998, require each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

- Have we organized the material to suit the public's needs?
- Are the requirements in the rule clearly stated?
- Does the rule contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?

If you have any responses to these questions, please include them in your comments on this IFR.

K. Regulatory Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified

Agenda in or about April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

L. Privacy Act

Please note that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit *http://dms.dot.gov.*

VII. Public Participation

How do I prepare and submit comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the docket number of this document in your comments.

Your comments must not be more than 15 pages long. (49 CFR 553.21). We established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments.

Comments may also be submitted to the docket electronically by logging onto the Docket Management System Web site at *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Please note that pursuant to the Data Quality Act, in order for substantive data to be relied upon and used by the agencies, it must meet the information quality standards set forth in the OMB and DOT Data Quality Act guidelines. Accordingly, we encourage you to consult the guidelines in preparing your comments. OMB's guidelines may be accessed at *http://www.whitehouse.gov/omb/fedreg/reproducible.html.*

How can I be sure that my comments were received?

If you wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

How do I submit confidential business information?

If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given above under **FOR FURTHER INFORMATION CONTACT**. In addition, you should submit a copy, from which you have deleted the claimed confidential business information, to the docket at the address given above under **ADDRESSES**. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation. (49 CFR part 512.)

Will the agencies consider late comments?

We will consider all comments received before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments that the docket receives after that date. If the docket receives a comment too late for us to consider in developing a final rule (assuming that one is issued), we will consider that comment as an informal suggestion for future rulemaking action.

How can I read the comments submitted by other people?

You may read the comments received by the docket at the address given above under **ADDRESSES**. The hours of the docket are indicated above in the same location. You may also see the comments on the Internet. To read the comments on the Internet, go to *http://www.regulations.gov.* Follow the online instructions for accessing the dockets.

Please note that even after the comment closing date, we will continue to file relevant information in the docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material. You can arrange with the docket to be notified when others file comments in the docket. See *http://www.regulations.gov* for more information.

Authority: 23 U.S.C. 154 and 164; delegation of authority at 49 CFR 1.85 and 1.95.

List of Subjects in 23 CFR Parts 1270 and 1275

Reservation and transfer programs—Transportation, Highway safety, Intergovernmental relations, Alcohol abuse.

For the reasons discussed in the preamble, under the authority of 23 U.S.C. 154 and 164, the National Highway Traffic Safety Administration and the Federal Highway Administration amend 23 CFR Chapter II as follows:

■ 1. Revise part 1270 to read as follows:

PART 1270—OPEN CONTAINER LAWS

Sec.
1270.1 Scope.
1270.2 Purpose.
1270.3 Definitions.
1270.4 Compliance criteria.
1270.5 [Reserved].
1270.6 Reservation of funds.
1270.7 Use of reserved funds.
1270.8 Procedures affecting States in noncompliance.
1270.9 States' responsibilities regarding compliance.

Authority: 23 U.S.C. 154; delegation of authority at 49 CFR 1.85 and 1.95.

§ 1270.1 Scope.

This part prescribes the requirements necessary to implement Section 154 of Title 23 of the United States Code which encourages States to enact and enforce open container laws.

§ 1270.2 Purpose.

The purpose of this part is to specify the steps that States must take to avoid the reservation and transfer of Federal-aid highway funds for noncompliance with 23 U.S.C. 154.

§ 1270.3 Definitions.

As used in this part:

(a) *Alcoholic beverage* means:

(1) Beer, ale, porter, stout, and other similar fermented beverages (including sake or similar products) of any name or description containing one-half of 1 percent or more of alcohol by volume, brewed or produced from malt, wholly or in part, or from any substitute therefor;

(2) Wine of not less than one-half of 1 per centum of alcohol by volume; or

(3) Distilled spirits which is that substance known as ethyl alcohol, ethanol, or spirits of wine in any form (including all dilutions and mixtures thereof from whatever source or by whatever process produced).

(b) *FHWA* means the Federal Highway Administration.

(c) *Motor vehicle* means a vehicle driven or drawn by mechanical power and manufactured primarily for use on public highways, but does not include a vehicle operated solely on a rail or rails.

(d) *NHTSA* means the National Highway Traffic Safety Administration.

(e) *Open alcoholic beverage container* means any bottle, can, or other receptacle that:

(1) Contains any amount of alcoholic beverage; and

(2) Is open or has a broken seal or the contents of which are partially removed (regardless of whether it has been closed or resealed).

(f) *Open container law* means a State law or combination of laws that meets the minimum requirements specified in § 1270.4.

(g) *Passenger area* means the area designed to seat the driver and passengers while the motor vehicle is in operation and any area that is readily accessible to the driver or a passenger while in their seating positions, including the glove compartment.

(h) *Public highway or right-of-way of a public highway* means the width between and immediately adjacent to the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel; inclusion of the roadway and shoulders is sufficient.

(i) *State* means any of the 50 States, the District of Columbia, or the Commonwealth of Puerto Rico.

§ 1270.4 Compliance criteria.

(a) To avoid the reservation of funds specified in § 1270.6, a State must enact and enforce an open container law that prohibits the possession of any open alcoholic beverage container, and the consumption of any alcoholic beverage, in the passenger area of any motor vehicle (including possession or consumption by the driver of the vehicle) located on a public highway, or the right-of-way of a public highway, in the State.

(b) The law must apply to:

(1) The possession of any open alcoholic beverage container and the consumption of any alcoholic beverage;

(2) The passenger area of any motor vehicle;

(3) All alcoholic beverages;

(4) All occupants of a motor vehicle; and

(5) All motor vehicles located on a public highway or the right-of-way of a public highway.

(c) The law must provide for primary enforcement.

(d) *Exceptions.* (1) If a State has in effect a law that makes unlawful the possession of any open alcoholic beverage container and the consumption of any alcoholic beverage in the passenger area of any motor vehicle, but permits the possession of an open alcoholic beverage container in a locked container (such as a locked glove compartment), or, in a motor vehicle that is not equipped with a trunk, either behind the last upright seat or in an area not normally occupied by the driver or a passenger, the State will be deemed to have in effect a law that applies to the passenger area of any vehicle, as provided in paragraph (b)(2) of this section.

(2) If a State has in effect a law that makes unlawful the possession of any open alcoholic beverage container and the consumption of any alcoholic beverage by the driver (but not by a passenger) in the passenger area of a motor vehicle designed, maintained, or used primarily for the transportation of persons for compensation, or in the living quarters of a house coach or house trailer, the State shall be deemed to have in effect a law that applies to all occupants of a motor vehicle with respect to such motor vehicles, as provided in paragraph (b)(4) of this section.

§ 1270.5 [Reserved].

§ 1270.6 Reservation of funds.

(a) On October 1 of each fiscal year, if a State has not enacted or is not enforcing a law that complies with § 1270.4, FHWA will reserve an amount equal to 2.5 percent of the funds apportioned to the State for that fiscal year under each of 23 U.S.C. 104(b)(1) and (b)(2).

(b) The reservation of funds will be made based on proportionate amounts from each of the apportionments under 23 U.S.C. 104(b)(1) and (b)(2). The State's Department of Transportation will have 30 days from the date the funds are reserved under this section to notify FHWA, through the appropriate Division Administrator, if it would like to change the distribution of the amounts reserved between 23 U.S.C. 104(b)(1) and (b)(2).

§ 1270.7 Use of reserved funds.

(a) Not later than 60 days after the funds are reserved under § 1270.6, the Governor's Representative for Highway Safety and the Chief Executive Officer of the State's Department of Transportation for each State must jointly identify, in writing to the appropriate NHTSA Regional Administrator and FHWA Division Administrator, how the funds will be programmed between alcohol-impaired driving programs under paragraph (c) of this section and highway safety improvement program activities under paragraph (d) of this section. Funds will remain reserved until this notification is provided by the State.

(b) As soon as practicable after NHTSA and FHWA receive the notification described in paragraph (a) of this section, the Secretary will:

(1) Transfer the reserved funds identified by the State for alcohol-impaired driving programs under paragraph (c) of this section to the apportionment of the State under 23 U.S.C. 402; and

(2) Release the reserved funds identified by the State for highway safety improvement program activities under paragraph (d) of this section to the State Department of Transportation.

(c) Any funds transferred under paragraph (b)(1) of this section shall be—

(1) Used for approved projects for alcohol-impaired driving countermeasures; or

(2) Directed to State and local law enforcement agencies for enforcement of laws prohibiting driving while intoxicated or driving under the influence and other related laws (including regulations), including the purchase of equipment, the training of officers, and the use of additional personnel for specific alcohol-impaired driving countermeasures, dedicated to enforcement of the laws (including regulations).

(d) Any funds released under paragraph (b)(2) of this section shall be used for highway safety improvement program activities eligible under 23 U.S.C. 148.

(e) Once the funds have been transferred or released under paragraph (b) of this section, the State may not revise the notification described in paragraph (a) of this section identifying how the funds will be programmed between alcohol-impaired driving programs and highway safety improvement program activities.

(f) The Federal share of the cost of any project carried out with the funds transferred or released under paragraph (b) of this section is 100 percent.

(g)(1) If any funds are transferred under paragraph (b)(1) of this section to the apportionment of a State under Section 402 for a fiscal year, the amount of obligation authority determined under paragraph (g)(2) of this section shall be transferred for carrying out projects described in paragraph (c) of this section.

(2) The obligation authority referred to in paragraph (g)(1) of this section shall be transferred from the obligation authority distributed for the fiscal year to the State for Federal-aid highways and highway safety construction programs, and the amount shall be determined by multiplying:

(i) The amount of funds transferred under paragraph (b)(1) of this section to the apportionment of the State under Section 402 for the fiscal year; by

(ii) The ratio that:

(A) The amount of obligation authority distributed for the fiscal year to the State for Federal-aid highways and highway safety construction programs; bears to

(B) The total of the sums apportioned to the State for Federal-aid highways and highway safety construction programs (excluding sums not subject to any obligation limitation) for the fiscal year.

(h) Notwithstanding any other provision of law, no limitation on the total obligations for highway safety programs under Section 402 shall apply to funds transferred under paragraph (b)(1) of this section.

§ 1270.8 Procedures affecting States in noncompliance.

(a) Each fiscal year, each State determined to be in noncompliance with 23 U.S.C. 154 and this part will be advised of the funds reserved from apportionment under § 1270.6 in the notice of apportionments required under 23 U.S.C. 104(e), which normally occurs on October 1.

(b) Each State whose funds are reserved under § 1270.6 will be afforded 30 days from the date of issuance of the notice of apportionments described in paragraph (a) of this section to submit documentation showing why it is in compliance. Documentation must be submitted to the appropriate NHTSA Regional Administrator. If such documentation is provided, a reservation will remain in place on the State's affected funds while the agencies consider the information. If the agencies affirm the noncompliance determination, the State will be notified of the decision and the affected funds will be processed in accordance with the requests regarding the derivation and distribution of funds provided by the State as required by §§ 1270.6(b) and 1270.7(a).

§ 1270.9 States' responsibilities regarding compliance.

(a) States are responsible for ensuring compliance with 23 U.S.C. 154 and this part.

(b) A State that has been determined to be in compliance with the requirements of 23 U.S.C. 154 and this part must promptly notify the appropriate NHTSA Regional Administrator in writing of any change or change in enforcement of the State's open container law, identifying the specific change(s).

■ 2. Revise part 1275 to read as follows:

PART 1275—REPEAT INTOXICATED DRIVER LAWS

Sec.

1275.1 Scope.
1275.2 Purpose.
1275.3 Definitions.
1275.4 Compliance criteria.
1275.5 "General practice" certification option.
1275.6 Reservation of funds.
1275.7 Use of reserved funds.
1275.8 Procedures affecting States in noncompliance.
1275.9 States' responsibilities regarding compliance.

Authority: 23 U.S.C. 164; delegation of authority at 49 CFR 1.85 and 1.95.

§ 1275.1 Scope.

This part prescribes the requirements necessary to implement Section 164 of Title 23, United States Code, which encourages States to enact and enforce repeat intoxicated driver laws.

§ 1275.2 Purpose.

The purpose of this part is to specify the steps that States must take to avoid the reservation and transfer of Federal-aid highway funds for noncompliance with 23 U.S.C. 164.

§ 1275.3 Definitions.

As used in this part:

(a) *24–7 sobriety program* has the meaning given the term in § 1300.23(b) of this title.

(b) *Alcohol concentration* means grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

(c) *Driving while intoxicated* means driving or being in actual physical control of a motor vehicle while having an alcohol concentration above the permitted limit as established by each State, or an equivalent non-BAC intoxicated driving offense.

(d) *Driving under the influence* has the same meaning as "driving while intoxicated."

(e) *FHWA* means the Federal Highway Administration.

(f) *Ignition interlock system* means a State-certified system designed to prevent drivers from starting their car when their breath alcohol concentration is at or above a preset level.

(g) *Imprisonment* means confinement in a jail, minimum security facility, community corrections facility, house arrest with electronic monitoring, inpatient rehabilitation or treatment center, or other facility, provided the individual under confinement is in fact being detained.

(h) *Mandatory sentence* means a sentence that cannot be waived, suspended, or otherwise reduced by the State.

(i) *Motor vehicle* means a vehicle driven or drawn by mechanical power and manufactured primarily for use on public highways, but does not include a vehicle operated solely on a rail line or a commercial vehicle.

(j) *NHTSA* means the National Highway Traffic Safety Administration.

(k) *Repeat intoxicated driver* means a person who has been convicted of driving while intoxicated or driving under the influence of alcohol more than once in any five-year period.

(l) *Repeat intoxicated driver law* means a State law or combination of laws or programs that impose the minimum penalties specified in § 1275.4 for all repeat intoxicated drivers.

(m) *State* means any of the 50 States, the District of Columbia or the Commonwealth of Puerto Rico.

§ 1275.4 Compliance criteria.

(a) To avoid the reservation of funds specified in § 1275.6, a State must enact and enforce a repeat intoxicated driver law that establishes, as a minimum penalty, that all repeat intoxicated drivers:

(1) Receive, for a period of not less than one year, one or more of the following penalties:

(i) A suspension of all driving privileges;

(ii) A restriction on driving privileges that limits the individual to operating only motor vehicles with an ignition interlock device installed, unless a special exception described in paragraph (b) of this section applies; or

(iii) A restriction on driving privileges that limits the individual to operating motor vehicles only if participating in, and complying with, a 24–7 sobriety program;

(2) Receive an assessment of their degree of alcohol abuse, and treatment as appropriate; and

(3) Except as provided in § 1275.5, receive a mandatory sentence of—

(i) Not less than five days (120 hours) of imprisonment or 30 days (240 hours) of community service for a second offense; and

(ii) Not less than ten days (240 hours) of imprisonment or 60 days (480 hours) of community service for a third or subsequent offense.

(b) *Special exceptions.* As used in paragraph (a)(1)(ii) of this section, *special exception* means an exception under a State alcohol-ignition interlock law for the following circumstances only:

(1) The individual is required to operate an employer's motor vehicle in the course and scope of employment and the business entity that owns the

vehicle is not owned or controlled by the individual; or

(2) The individual is certified by a medical doctor as being unable to provide a deep lung breath sample for analysis by an ignition interlock device.

§ 1275.5 "General practice" certification option.

(a) Notwithstanding § 1275.4(a)(3), a State that otherwise meets the requirements of § 1275.4 may comply with 23 U.S.C. 164 and this part based on the State's "general practice" for incarceration. A State electing this option shall—

(1) If the State law does not comply with the requirements of § 1275.4(a)(3)(i), submit the following certification signed by the Governor's Representative for Highway Safety:

I, [Name], Governor's Representative for Highway Safety, certify that, in [State name], at least 75 percent of *repeat intoxicated drivers* receive a *mandatory sentence* of *imprisonment* for a second offense, as those terms are defined in 23 CFR 1275.3. This certification is based on data from the period of twelve consecutive months of the calendar year immediately preceding the date of this certification. I sign this certification based on personal knowledge and other appropriate inquiry. [Signature of Governor's Representative for Highway Safety] [Date of signature]

(2) If the State law does not comply with the requirements of § 1275.4(a)(3)(ii), submit the following certification signed by the Governor's Representative for Highway Safety:

I, [Name], Governor's Representative for Highway Safety, certify that, in [State name], at least 75 percent of *repeat intoxicated drivers* receive a *mandatory sentence* of not less than ten days (240 hours) of *imprisonment* for a third or subsequent offense, as those terms are defined in 23 CFR 1275.3. This certification is based on data from the period of twelve consecutive months of the calendar year immediately preceding the date of this certification. I sign this certification based on personal knowledge and other appropriate inquiry. [Signature of Governor's Representative for Highway Safety] [Date of signature]

(b) A State electing the option under this section must submit a new certification to the appropriate NHTSA Regional Administrator by not later than October 1 of each fiscal year to avoid the reservation of funds specified in § 1275.6. The State is encouraged to submit the certification by August 15 to avoid any delay in release of funds on October 1 of that calendar year while NHTSA evaluates its certification.

§ 1275.6 Reservation of funds.

(a) On October 1 of each fiscal year, if a State has not enacted or is not enforcing a law that complies with § 1275.4, FHWA will reserve an amount equal to 2.5 percent of the funds apportioned to the State for that fiscal year under each of 23 U.S.C. 104(b)(1) and (b)(2).

(b) The reservation of funds will be made based on proportionate amounts from each of the apportionments under 23 U.S.C. 104(b)(1) and (b)(2). The State's Department of Transportation will have 30 days from the date the funds are reserved under this section to notify FHWA, through the appropriate Division Administrator, if it would like to change the distribution of the amounts reserved between 23 U.S.C. 104(b)(1) and (b)(2).

§ 1275.7 Use of reserved funds.

(a) Not later than 60 days after the funds are reserved under § 1275.6, the Governor's Representative for Highway Safety and the Chief Executive Officer of the State's Department of Transportation for each State must jointly identify, in writing to the appropriate NHTSA Regional Administrator and FHWA Division Administrator, how the funds will be programmed between alcohol-impaired driving programs under paragraph (c) of this section and highway safety improvement program activities under paragraph (d) of this section. Funds will remain reserved until this notification is provided by the State.

(b) As soon as practicable after NHTSA and FHWA receive the notification described in paragraph (a) of this section, the Secretary will:

(1) Transfer the reserved funds identified by the State for alcohol-impaired driving programs under paragraph (c) of this section to the apportionment of the State under 23 U.S.C. 402; and

(2) Release the reserved funds identified by the State for highway safety improvement program activities under paragraph (d) of this section to the State Department of Transportation.

(c) Any funds transferred under paragraph (b)(1) of this section shall be—

(1) Used for approved projects for alcohol-impaired driving countermeasures; or

(2) Directed to State and local law enforcement agencies for enforcement of laws prohibiting driving while intoxicated or driving under the influence and other related laws (including regulations), including the purchase of equipment, the training of officers, and the use of additional personnel for specific alcohol-impaired driving countermeasures, dedicated to enforcement of the laws (including regulations).

(d) Any funds released under paragraph (b)(2) of this section shall be used for highway safety improvement program activities eligible under 23 U.S.C. 148.

(e) Once the funds have been transferred or released under paragraph (b) of this section, the State may not revise the notification described in paragraph (a) of this section identifying how the funds will be programmed between alcohol-impaired driving programs and highway safety improvement program activities.

(f) The Federal share of the cost of any project carried out with the funds transferred or released under paragraph (b) of this section is 100 percent.

(g)(1) If any funds are transferred under paragraph (b)(1) of this section to the apportionment of a State under Section 402 for a fiscal year, the amount of obligation authority determined under paragraph (g)(2) of this section shall be transferred for carrying out projects described in paragraph (c) of this section.

(2) The obligation authority referred to in paragraph (g)(1) of this section shall be transferred from the obligation authority distributed for the fiscal year to the State for Federal-aid highways and highway safety construction programs, and the amount shall be determined by multiplying:

(i) The amount of funds transferred under paragraph (b)(1) of this section to the apportionment of the State under Section 402 for the fiscal year; by

(ii) The ratio that:

(A) The amount of obligation authority distributed for the fiscal year to the State for Federal-aid highways and highway safety construction programs; bears to

(B) The total of the sums apportioned to the State for Federal-aid highways and highway safety construction programs (excluding sums not subject to any obligation limitation) for the fiscal year.

(h) Notwithstanding any other provision of law, no limitation on the total obligations for highway safety programs under Section 402 shall apply to funds transferred under paragraph (b)(1) of this section.

§ 1275.8 Procedures affecting States in noncompliance.

(a) Each fiscal year, each State determined to be in noncompliance with 23 U.S.C. 164 and this part will be advised of the funds reserved from apportionment under § 1275.6 in the notice of apportionments required under 23 U.S.C. 104(e), which normally occurs on October 1.

(b) Each State whose funds are reserved under § 1275.6 will be afforded 30 days from the date of issuance of the notice of apportionments described in paragraph (a) of this section to submit documentation showing why it is in compliance (which may include a "general practice" certification under § 1275.5). Documentation must be submitted to the appropriate NHTSA Regional Administrator. If such documentation is provided, a reservation will remain in place on the State's affected funds while the agencies consider the information. If the agencies affirm the noncompliance determination, the State will be notified of the decision and the affected funds will be processed in accordance with the requests regarding the derivation and distribution of funds provided by the State as required by §§ 1275.6(b) and 1275.7(a).

§ 1275.9 State' responsibilities regarding compliance.

(a) States are responsible for ensuring compliance with 23 U.S.C. 164 and this part.

(b) A State that has been determined to be in compliance with the requirements of 23 U.S.C. 164 and this part must promptly notify the appropriate NHTSA Regional Administrator in writing of any change or change in enforcement of the State's repeat intoxicated driver law, identifying the specific change(s).

Dated: September 27, 2016, under authority delegated in 49 CFR 1.95.

Mark R. Rosekind,

Administrator, National Highway Traffic Safety Administration.

Dated: September 27, 2016, under authority delegated in 49 CFR 1.85.

Gregory G. Nadeau,

Administrator, Federal Highway Administration.

[FR Doc. 2016–23788 Filed 9–28–16; 4:15 pm]

BILLING CODE 4910–59–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2016–0891]

Drawbridge Operation Regulation; Newtown Creek, Brooklyn and Queens, NY

AGENCY: Coast Guard, DHS.

ACTION: Notice of deviation from drawbridge regulation.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule that governs the Pulaski Bridge across the Newtown Creek, mile 0.6, between Brooklyn and Queens, New York. This deviation is necessary to allow the bridge owner to perform span locks adjustment at the bridge.

DATES: This deviation is effective from 12:01 a.m. on October 3, 2016 to 5 a.m. on October 14, 2016.

ADDRESSES: The docket for this deviation, [USCG–2016–0891] is available at *http://www.regulations.gov.* Type the docket number in the "SEARCH" box and click "SEARCH". Click on Open Docket Folder on the line associated with this deviation.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email Judy Leung-Yee, Project Officer, First Coast Guard District, telephone (212) 514–4330, email *judy.k.leung-yee@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Pulaski Bridge, mile 0.6, across the Newtown Creek, has a vertical clearance in the closed position of 39 feet at mean high water and 43 feet at mean low water. The existing bridge operating regulations are found at 33 CFR 117.801(g)(1).

The waterway is transited by commercial barge traffic of various sizes.

The bridge owner, New York City DOT, requested a temporary deviation from the normal operating schedule to perform span locks adjustment at the bridge.

Under this temporary deviation, the Pulaski Bridge shall remain in the closed position from October 3, 2016 to October 14, 2016 between 12:01 a.m. and 5 a.m.

Vessels able to pass under the bridge in the closed position may do so at anytime. The bridge will not be able to open for emergencies and there is no immediate alternate route for vessels to pass.

The Coast Guard will inform the users of the waterways through our Local Notice and Broadcast to Mariners of the change in operating schedule for the bridge so that vessel operations can arrange their transits to minimize any impact caused by the temporary deviation. The Coast Guard notified known companies of the commercial oil and barge vessels in the area and they have no objections to the temporary deviation.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: September 27, 2016.

C.J. Bisignano,

Supervisory Bridge Management Specialist, First Coast Guard District.

[FR Doc. 2016–23690 Filed 9–29–16; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2016–0893]

Eighth Coast Guard District Annual Safety Zones; Pittsburgh Steelers Fireworks; Allegheny River Mile 0.0–0.25, Ohio River 0.0–0.1, Monongahela River 0.0–0.1

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce a safety zone for the Pittsburgh Steelers Fireworks on the Allegheny River, from mile 0.0 to 0.25, Ohio River mile 0.0–0.1 and Monongahela River 0.0–0.1, to protect vessels transiting the area and event spectators from the hazards associated with the Pittsburgh Steelers barge-based fireworks display. During the enforcement period, entry into, transiting, or anchoring in the safety zone is prohibited to all vessels not registered with the sponsor as participants or official patrol vessels, unless specifically authorized by the Captain of the Port (COTP) Pittsburgh or a designated representative.

DATES: The regulations in 33 CFR 165.801 Table 1, Sector Ohio Valley, No. 67 is effective from 7 p.m. until 9 p.m., on October 2, 2016.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email MST1 Jennifer Haggins, Marine Safety Unit Pittsburgh, U.S. Coast Guard; telephone 412–221–0807, email *Jennifer.L.Haggins@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the Safety Zone for the annual Pittsburgh Pirates Fireworks listed in 33 CFR 165.801 Table 1, Sector Ohio Valley, No. 67 from 7 p.m. to 9 p.m. on October 2, 2016. Entry into the safety zone is prohibited unless authorized by the COTP or a designated representative. Persons or vessels desiring to enter into or passage through the safety zone must request permission from the COTP or a designated representative. If permission is granted, all persons and vessels shall comply with the instructions of the COTP or designated representative.

This notice of enforcement is issued under authority of 33 CFR 165.801 and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via Local Notice to Mariners and updates via Marine Information Broadcasts.

L. McClain, Jr.,

Commander, U.S. Coast Guard, Captain of the Port Pittsburgh.

[FR Doc. 2016–23635 Filed 9–29–16; 8:45 am]

BILLING CODE P

POSTAL SERVICE

39 CFR Part 111

Enterprise Payment System and Enterprise PO Boxes Online

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service is revising *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) to provide an enhanced method for commercial customers to pay for and manage their services online using a single account.

DATES: *Effective Date:* September 30, 2016.

FOR FURTHER INFORMATION CONTACT: Ingrid Molinary at (202) 268–4138, or Jacqueline Erwin at (202) 268–2158.

SUPPLEMENTARY INFORMATION: The Postal Service published an interim final rule (81 FR 48711) on July 26, 2016, to enhance online payment options for commercial customers, with a comment period which ended August 26, 2016. The Postal Service did not receive any customer comments.

The U.S. Postal Service is upgrading its payment architecture for business customers. The new Enterprise Payment System (EPS) will replace the current product-centric payment system with a centralized account management system enabling commercial customers to pay for and manage their services online using a single account.

EPS has been designed to be part of USPS products and services offered through the existing Business Customer Gateway (BCG) portal. Commercial customers who want to use EPS will need to be a registered BCG user, request access to EPS and open an Enterprise Payment Account (EPA) to pay for their products and services. EPA requires that the customers fund the account via Electronic Funds Transfer—either Automated Clearing House (ACH) Debit or ACH Credit.

The first feature of EPS will allow business customers to open, close, and pay for their PO Boxes and Caller Service numbers (including reserved numbers) online using the new Enterprise PO Boxes Online (EPOBOL). EPS customers are required to have an EPA to pay for EPOBOL service. Future phases of EPS will provide commercial customers functionality to pay for additional services.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

The Postal Service adopts the following changes to *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), incorporated by reference in the *Code of Federal Regulations.* See 39 CFR 111.1.

Accordingly, 39 CFR part 111 is amended as follows:

PART 111—[AMENDED]

■ 1. The authority citation for 39 CFR part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

■ 2. Revise the *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM) as follows:

Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM)

* * * * *

500 Additional Mailing Services

* * * * *

508 Recipient Services

* * * * *

4.0 Post Office Box Service

* * * * *

4.4 Basis of Fees and Payment

* * * * *

4.4.3 Payment

[Revise third sentence and add e to text in 4.4.3 as follows:]

* * * Customers may pay the fee using one of the following methods:

* * * e. Online using an Enterprise Payment Account (EPA) when business customers are registered at the Enterprise PO Boxes Online (EPOBOL) system. The EPA with automatic yearly renewal (at twice the semi-annual fee) is the required payment method for EPOBOL customers.

* * * * *

5.0 Caller Service

* * * * *

5.5 Basis of Fees and Payment

* * * * *

5.5.5 Payment

[Add text at the end of 5.5.5 as follows:]

* * * Registered customers may also pay the fee online using an Enterprise Payment Account (EPA). The EPA with automatic yearly renewal (at twice the semi-annual fee) is the required payment method for EPOBOL customers.

* * * * *

We will publish an appropriate amendment to 39 CFR part 111 to reflect these changes.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–22517 Filed 9–29–16; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2015–0155; FRL–9953–35–Region 4]

Air Plan Approval; Mississippi; Infrastructure Requirements for the 2010 Sulfur Dioxide National Ambient Air Quality Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve, in part, and disapprove in part, the State Implementation Plan (SIP) submission, submitted by the State of Mississippi, through the Mississippi Department of Environmental Quality (MDEQ), on June 20, 2013, for inclusion into the Mississippi SIP. This final action pertains to the infrastructure requirements of the Clean Air Act (CAA or Act) for the 2010 1-hour sulfur dioxide (SO_2) national ambient air quality standard (NAAQS). The CAA requires that each state adopt and submit a SIP for the implementation, maintenance and enforcement of each NAAQS promulgated by EPA, which is commonly referred to as an

"infrastructure SIP submission." MDEQ certified that the Mississippi SIP contains provisions that ensure the 2010 1-hour SO_2 NAAQS is implemented, enforced, and maintained in Mississippi. EPA has determined that Mississippi's infrastructure SIP submission, provided to EPA on June 20, 2013, satisfies certain required infrastructure elements for the 2010 1-hour SO_2 NAAQS.

DATES: This rule will be effective October 31, 2016.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2015–0155. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Michele Notarianni, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Ms. Notarianni can be reached via electronic mail at *notarianni.michele@epa.gov* or via telephone at (404) 562–9031.

SUPPLEMENTARY INFORMATION:

I. Background and Overview

On June 2, 2010 (75 FR 35520, June 22, 2010), EPA promulgated a revised primary SO_2 NAAQS to an hourly standard of 75 parts per billion (ppb) based on a 3-year average of the annual 99th percentile of 1-hour daily maximum concentrations. Pursuant to section 110(a)(1) of the CAA, states are required to submit SIPs meeting the applicable requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as EPA may prescribe. Section 110(a)(2) requires states to address basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS. States were required to submit such SIPs for the 2010 1-hour SO_2 NAAQS to EPA no later than June 2, 2013.[1]

EPA is acting upon the SIP submission from Mississippi that addresses the infrastructure requirements of CAA sections 110(a)(1) and 110(a)(2) for the 2010 1-hour SO_2 NAAQS. In a proposed rulemaking published on February 11, 2016, EPA proposed to approve portions of Mississippi's June 20, 2013, 2010 1-hour SO_2 NAAQS infrastructure SIP submission. *See* 81 FR 7259. The details of Mississippi's submission and the rationale for EPA's actions are explained in the proposed rulemaking. Comments on the proposed rulemaking were due on or before March 14, 2016. EPA received adverse comments on the proposed action.

II. Response to Comments

EPA received one set of comments on the February 11, 2016, proposed rulemaking to approve portions of Mississippi's 2010 1-hour SO_2 NAAQS infrastructure SIP submission intended to meet the CAA requirements for the 2010 1-hour SO_2 NAAQS. A summary of the comments and EPA's responses are provided below.[2] A full set of these comments is provided in the docket for this final rulemaking action.

A. Comments on Infrastructure SIP Requirements for Enforceable Emission Limits

1. The Plain Language of the CAA

Comment 1: The Commenter contends that the plain language of section 110(a)(2)(A) of the CAA requires the inclusion of enforceable emission limits in an infrastructure SIP to prevent NAAQS exceedances in areas not designated nonattainment. In support, the Commenter quotes the language in section 110(a)(1) that requires states to adopt a plan for implementation, maintenance, and enforcement of the NAAQS and the language in section 110(a)(2)(A) that requires SIPs to include enforceable emissions limitations as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of the CAA. The Commenter then states that applicable requirements of the CAA include requirements for the attainment and maintenance of the NAAQS, and that CAA section 110(a)(2)(A) requires infrastructure SIPs to include enforceable emission limits to prevent exceedances of the NAAQS. The Commenter claims that Mississippi's SIP submission does not meet this asserted requirement. Thus, the Commenter asserts that EPA must disapprove Mississippi's SO_2 infrastructure SIP submission because it fails to include enforceable emission limitations necessary to ensure attainment and maintenance of the NAAQS as required by CAA section 110(a)(2)(A). The Commenter then contends that the Mississippi 2010 1-hour SO_2 infrastructure SIP submission fails to comport with CAA requirements for SIPs to establish enforceable emission limits that are adequate to prohibit NAAQS exceedances in areas not designated nonattainment.

Response 1: EPA disagrees that section 110 must be interpreted in the manner suggested by the Commenter in the context of infrastructure SIP submissions. Section 110 is only one provision that is part of the complicated structure governing implementation of the NAAQS program under the CAA, as amended in 1990, and it must be interpreted in the context of not only that structure, but also of the historical evolution of that structure. In light of the revisions to section 110 since 1970 and the later-promulgated and more specific SIP planning requirements of the CAA, EPA interprets the requirement in section 110(a)(1) that the plan provide for "implementation, maintenance and enforcement" in conjunction with the requirements in section 110(a)(2)(A) to mean that the infrastructure SIP must contain enforceable emission limits that will aid in attaining and/or maintaining the NAAQS and that the state demonstrate that it has the necessary tools to implement and enforce a NAAQS, such as adequate state personnel and an enforcement program.

With regard to the requirement for emission limitations in section 110(a)(2)(A), EPA has interpreted this to mean, for purposes of infrastructure SIP submissions, that the state may rely on measures already in place to address the pollutant at issue or any new control measures that the state may elect to impose as part of such SIP submission. As EPA stated in "Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2)," dated September 13, 2013, (Infrastructure SIP Guidance), "[t]he conceptual purpose of an infrastructure SIP submission is to assure that the air agency's SIP contains the necessary structural requirements for the new or revised NAAQS, whether by establishing that the SIP already contains the necessary provisions, by making a substantive SIP revision to update the SIP, or both. Overall, the infrastructure SIP submission process provides an opportunity . . . to review the basic structural requirements of the air agency's air quality management program in light of each new or revised NAAQS." Infrastructure SIP Guidance at pp. 1–2. Mississippi appropriately demonstrated that its SIP has SO_2 emissions limitations and the "structural requirements" to implement the 2010 1-hour SO_2 NAAQS in its infrastructure SIP submission.

---

[1] In the proposed action, EPA incorrectly cited a date of June 22, 2013, for the due date of infrastructure SIPs for the 2010 1-hour SO_2 NAAQS. 80 FR 51158 (August 24, 2015).

[2] EPA's responses to these comments are consistent with actions taken on 2010 1-hour SO_2 NAAQS infrastructure SIP submissions for Virginia (80 FR 11557, March 4, 2015) at *https://www.gpo.gov/fdsys/pkg/FR-2015-03-04/pdf/2015-04377.pdf* and West Virginia (79 FR 62022, October 16, 2014) at *https://www.gpo.gov/fdsys/pkg/FR-2014-10-16/pdf/2014-24658.pdf.*

The Commenter makes general allegations that Mississippi does not have sufficient protective measures to prevent SO_2 NAAQS exceedances. EPA addressed the adequacy of Mississippi's infrastructure SIP for 110(a)(2)(A) purposes in the proposed rule and explained why the SIP includes enforceable emission limitations and other control measures that aid in maintaining the 2010 1-hour SO_2 NAAQS throughout the State. These include State regulations which collectively establish enforceable emissions limitations and other control measures, means or techniques for activities that contribute to SO_2 concentrations in the ambient air, and provide authority for MDEQ to establish such limits and measures as well as schedules for compliance through SIP-approved permits to meet the applicable requirements of the CAA. *See* 81 FR 7259. As discussed in this rulemaking, EPA finds these provisions adequately address section 110(a)(2)(A) to aid in attaining and/or maintaining the 2010 1-hour SO_2 NAAQS and finds Mississippi demonstrated that it has the necessary tools to implement and enforce the 2010 1-hour SO_2 NAAQS.

2. The Legislative History of the CAA

Comment 2: The Commenter cites two excerpts from the legislative history of the 1970 CAA and claims that the "legislative history of infrastructure SIPs provides that states must include enforceable emission limits in their infrastructure SIPs sufficient to ensure the implementation, maintenance, and attainment of each NAAQS in all areas of the State."

Response 2: As provided in the previous response, the CAA, as enacted in 1970, including its legislative history, cannot be interpreted in isolation from the later amendments that refined that structure and deleted relevant language from section 110 concerning attainment. In any event, the two excerpts of legislative history the Commenter cites merely provide that states should include enforceable emission limits in their SIPs and they do not mention or otherwise address whether states are required to impose additional emission limitations or control measures as part of the infrastructure SIP submission, as opposed to requirements for other types of SIP submissions such as attainment plans required under section 110(a)(2)(I). As provided in Response 1, the proposed rule explains why the SIP includes sufficient enforceable emissions limitations for purposes of the infrastructure SIP submission.

3. Case Law

Comment 3: The Commenter also discusses several court decisions concerning the CAA, which the Commenter claims support its contention that courts have been clear that section 110(a)(2)(A) requires enforceable emissions limits in infrastructure SIP submissions to prevent violations of the NAAQS. The Commenter first cites to language in *Train* v. *NRDC,* 421 U.S. 60, 78 (1975), addressing the requirement for "emission limitations" and stating that emission limitations "are the specific rules to which operators of pollution sources are subject, and which if enforced should result in ambient air which meets the national standards." The Commenter also cites to *Pennsylvania Dept. of Envtl. Resources* v. *EPA,* 932 F.2d 269, 272 (3d Cir. 1991) for the proposition that the CAA directs EPA to withhold approval of a SIP where it does not ensure maintenance of the NAAQS, and to *Mision Industrial, Inc.* v. *EPA,* 547 F.2d 123, 129 (1st Cir. 1976), which quoted section 110(a)(2)(B) of the CAA of 1970. The Commenter contends that the 1990 Amendments do not alter how courts have interpreted the requirements of section 110, quoting *Alaska Dept. of Envtl. Conservation* v. *EPA,* 540 U.S. 461, 470 (2004) which in turn quoted section 110(a)(2)(A) of the CAA and also stated that "SIPs must include certain measures Congress specified" to ensure attainment of the NAAQS. The Commenter also quotes several additional opinions in this vein. *Mont. Sulphur & Chem. Co.* v. *EPA,* 666 F.3d 1174, 1180 (9th Cir. 2012) ("[t]he Clean Air Act directs states to develop implementation plans—SIPs—that 'assure' attainment and maintenance of [NAAQS] through enforceable emissions limitations"); *Mich. Dept. of Envtl. Quality* v. *Browner,* 230 F.3d 181 (6th Cir. 2000) ("EPA's deference to a state is conditioned on the state's submission of a plan 'which satisfies the standards of § 110(a)(2)' and which includes emission limitations that result in compliance with the NAAQS"; and *Hall* v. *EPA* 273 F.3d 1146 (9th Cir. 2001) for the proposition that EPA may not approve a SIP revision that does not demonstrate how the rules would not interfere with attainment and maintenance of the NAAQS.

Response 3: None of the cases the Commenter cites support the Commenter's contention that it is clear that section 110(a)(2)(A) requires infrastructure SIP submissions to include detailed plans providing for attainment and maintenance of the NAAQS in all areas of the state, nor do they shed light on how EPA may reasonably interpret section 110(a)(2)(A). With the exception of *Train,* none of the cases the Commenter cites specifically concerned the interpretation of CAA section 110(a)(2)(A) (or section 110(a)(2)(B) of the pre-1990 Act). Rather, the other courts referenced section 110(a)(2)(A) (or section 110(a)(2)(B) of the pre-1990 CAA) in the background section of decisions involving challenges to EPA actions on revisions to SIPs that were required and approved under other provisions of the CAA or in the context of an enforcement action.

In *Train,* 421 U.S. 60, the Court was addressing a state revision to an attainment plan submission made pursuant to section 110 of the CAA, the primary statutory provision at that time addressing such submissions. The issue in that case was whether changes to requirements that would occur before attainment was required were variances that should be addressed pursuant to the provision governing SIP revisions or were "postponements" that must be addressed under section 110(f) of the CAA of 1970, which contained prescriptive criteria. The Court concluded that EPA reasonably interpreted section 110(f) not to restrict a state's choice of the mix of control measures needed to attain the NAAQS, so long as the state met other applicable requirements of the CAA, and that revisions to SIPs that would not impact attainment of the NAAQS by the attainment date were not subject to the limits of section 110(f). Thus the issue was not whether the specific SIP at issue needs to provide for attainment or whether emissions limits are needed as part of the SIP; rather the issue was which statutory provision governed when the state wanted to revise the emission limits in its SIP if such revision would not impact attainment or maintenance of the NAAQS.

The decision in *Pennsylvania Dept. of Envtl. Resources* was also decided based on a pre-1990 provision of the CAA. At issue was whether EPA properly rejected a revision to an approved SIP where the inventories relied on by the state for the updated submission had gaps. The Court quoted section 110(a)(2)(B) of the pre-1990 CAA in support of EPA's disapproval, but did not provide any interpretation of that provision. This decision did not address the question at issue in this action, *i.e.,* what a state must include in an infrastructure SIP submission for purposes of section 110(a)(2)(A). Yet, even if the Court had interpreted that provision, EPA notes that it was modified by Congress in 1990; thus, this decision has little bearing on the issue here.

At issue in *Mision Industrial,* 547 F.2d 123, was the definition of "emissions limitation" not whether section 110 requires the state to demonstrate how all areas of the state will attain and maintain the NAAQS as part of their infrastructure SIPs. The language from the opinion the Commenter quotes does not interpret but rather merely describes section 110(a)(2)(A). The Commenter does not cite to this case to assert that the measures relied on by the state in the infrastructure SIP are not "emissions limitations" and the decision in this case has no bearing here. In *Mont. Sulphur & Chem. Co.,* 666 F.3d 1174, the Court was reviewing a Federal implementation plan (FIP) that EPA promulgated after a long history of the State failing to submit an adequate SIP in response to EPA's finding under section 110(k)(5) that the previously approved SIP was substantially inadequate to attain or maintain the NAAQS, which triggered the State's duty to submit a new SIP to show how it would remedy that deficiency and attain the NAAQS. The Court cited generally to sections 107 and 110(a)(2)(A) of the CAA for the proposition that SIPs should assure attainment and maintenance of NAAQS through emission limitations, but this language was not part of the Court's holding in the case, which focused instead on whether EPA's finding of SIP inadequacy and adoption of a remedial FIP were lawful. The Commenter suggests that *Alaska Dept. of Envtl. Conservation,* 540 U.S. 461, stands for the proposition that the 1990 CAA Amendments do not alter how courts interpret section 110. This claim is inaccurate. Rather, the Court quoted section 110(a)(2)(A), which, as noted previously, differs from the pre-1990 version of that provision and the court makes no mention of the changed language. Furthermore, the Commenter also quotes the Court's statement that "SIPs must include certain measures Congress specified," but that statement specifically referenced the requirement in section 110(a)(2)(C), which requires an enforcement program and a program for the regulation of the modification and construction of new sources. Notably, at issue in that case was the State's "new source" permitting program, not what is required for purposes of an infrastructure SIP submission for purposes of section 110(a)(2)(A).

EPA does not believe any of these court decisions addressed required measures for infrastructure SIPs and believes nothing in the opinions addressed whether infrastructure SIP submissions must contain emission limitations or measures to ensure attainment and maintenance of the NAAQS.

4. EPA Regulations, Such as 40 CFR 51.112(a)

Comment 4: The Commenter cites to 40 CFR 51.112(a), providing that "Each plan must demonstrate that the measures, rules, and regulations contained in it are adequate to provide for the timely attainment and maintenance of the national standard that it implements." The Commenter relies on a statement in the preamble to the 1986 action restructuring and consolidating provisions in part 51, in which EPA stated that "[i]t is beyond the scope of th[is] rulemaking to address the provisions of Part D of the Act . . ." 51 FR 40656. Thus, the Commenter contends that "the provisions of 40 CFR 51.112 are not limited to nonattainment SIPs; the regulation instead applies to Infrastructure SIPs, which are required to attain and maintain the NAAQS in all areas of a state, including those not designated nonattainment."

Response 4: The Commenter's reliance on 40 CFR 51.112 to support its argument that infrastructure SIPs must contain emission limits which ensure attainment and maintenance of the NAAQS is incorrect. It is clear on its face that 40 CFR 51.112 directly applies to state SIP submissions for control strategy SIPs, *i.e.,* plans that are specifically required to attain and/or maintain the NAAQS. These regulatory requirements apply when states are developing "control strategy" SIPs under other provisions of the CAA, such as attainment plans required for the various NAAQS in Part D and maintenance plans required in section 175A. The Commenter's suggestion that 40 CFR 51.112 must apply to all SIP submissions required by section 110 based on the preamble to EPA's action "restructuring and consolidating" provisions in part 51, is also incorrect.[3] EPA's action in 1986 was not to establish new substantive planning requirements, but rather was meant merely to consolidate and restructure provisions that had previously been promulgated.

Although EPA was explicit that it was not establishing requirements interpreting the provisions of new "Part D" of the CAA, it is clear that the regulations being restructured and consolidated were intended to address control strategy plans. In the preamble, EPA clearly stated that 40 CFR 51.112 was replacing 40 CFR 51.13 ("Control strategy: SO_X and PM (portion)"), 51.14 ("Control strategy: CO, HC, O_X and NO_2 (portion)"), 51.80 ("Demonstration of attainment: Pb (portion)"), and 51.82 ("Air quality data (portion)"). *Id.* at 40660. Thus, the present-day 40 CFR 51.112 contains consolidated provisions that are focused on control strategy SIPs, and the infrastructure SIP is not such a plan.

5. EPA Interpretations in Other Rulemakings

Comment 5: The Commenter also references a 2006 partial approval and partial disapproval of revisions to Missouri's existing plan addressing the SO_2 NAAQS and claims it was an action in which EPA relied on section 110(a)(2)(A) and 40 CFR 51.112 to reject an infrastructure SIP. Specifically, the Commenter asserts that in that action, EPA cited section 110(a)(2)(A) as a basis for disapproving a revision to the State plan on the basis that the State failed to demonstrate the SIP was sufficient to ensure attainment and maintenance of the SO_2 NAAQS after revision of an emission limit and cited to 40 CFR 51.112 as requiring that a plan demonstrates the rules in a SIP are adequate to attain the SO_2 NAAQS.

Response 5: EPA's partial approval and partial disapproval of revisions to restrictions on emissions of sulfur compounds for the Missouri SIP in 71 FR 12623 specifically addressed Missouri's attainment SIP submission—not Missouri's infrastructure SIP submission. It is clear from the final Missouri rule that EPA was not reviewing an initial infrastructure SIP submission, but rather reviewing proposed SIP revisions that would make an already approved SIP designed to demonstrate attainment of the NAAQS less stringent. Therefore, EPA does not agree that the 2006 Missouri action referenced by the Commenter establishes how EPA reviews infrastructure SIP submissions for purpose of section 110(a)(2)(A).

---

[3] EPA noted that it had already issued guidance addressing the new "Part D" attainment planning obligations. Also, as to maintenance regulations, EPA expressly stated that it was not making any revisions other than to re-number those provisions. *See* 51 FR 40657.

As discussed in the proposed rule, EPA finds that the Mississippi 2010 1-hour SO_2 infrastructure SIP meets the appropriate and relevant structural requirements of section 110(a)(2) of the CAA that will aid in attaining and/or maintaining the 2010 1-hour SO_2 NAAQS and that the State demonstrated that it has the necessary tools to implement and enforce the 2010 1-hour SO_2 NAAQS.[4]

B. Comments on Mississippi SIP SO_2 Emission Limits

Comment 6: The Commenter asserts that EPA may not approve the Mississippi proposed SO_2 infrastructure SIP because it fails to include enforceable emission limitations with a 1-hour averaging time that applies at all times. The Commenter cites to CAA section 302(k) which requires that emission limits must limit the quantity, rate or concentration of emissions and must apply on a continuous basis. The Commenter states that "[e]nforceable emission limitations contained in the I–SIP must, therefore, be accompanied by proper averaging times; otherwise an appropriate numerical emission limit could allow for peaks that exceed the NAAQS and yet still be permitted since they would be averaged with lower emissions at other times." The Commenter also cites to recommended averaging times in EPA guidance providing that SIP emissions limits, "should not exceed the averaging time of the applicable NAAQS that the limit is intended to help attain." EPA Memorandum of April 23, 2014, to Regional Air Division Directors, Regions 1–10, Guidance for 1-Hour SO_2 NAAQS Nonattainment Area SIP Submissions, at 22, available at *https://www.epa.gov/sites/production/files/2016-06/documents/20140423guidance_nonattainment_sip.pdf.* The Commenter notes that this EPA guidance provides that " 'any emissions limits based on averaging periods longer than 1 hour should be designed to have comparable stringency to a 1-hour average limit at the critical emission value.' "

The Commenter also cites to a February 3, 2011, EPA Region 7 letter to the Kansas Department of Health and Environment regarding the need for 1-hour SO_2 emission limits in a prevention of significant deterioration (PSD) permit, an EPA Environmental Appeals Board decision rejecting use of a 3-hour averaging time for a SO_2 limit in a PSD permit, and EPA's disapproval of a Missouri SIP which relied on annual averaging for SO_2 emission rates and claims EPA has stated that 1-hour averaging times are necessary for the 2010 1-hour SO_2 NAAQS.[5] The Commenter states, "Therefore, in order to ensure that Mississippi's Infrastructure SIP actually implements the SO_2 NAAQS in every area of the state, the I–SIP must contain enforceable emission limits with one-hour averaging times, monitored continuously, for large sources of SO_2." The Commenter asserts that EPA must disapprove Mississippi's infrastructure SIP because it fails to require emission limits with adequate averaging times.

Response 6: As explained in detail in previous responses, the purpose of the infrastructure SIP is to ensure that a state has the structural capability to implement and enforce the NAAQS and thus, additional SO_2 emission limitations to ensure attainment and maintenance of the NAAQS are not required for such infrastructure SIPs.[6] EPA disagrees that it must disapprove the proposed Mississippi infrastructure SIP submission merely because the SIP does not contain enforceable SO_2 emission limitations with 1-hour averaging periods that apply at all times, as this issue is not appropriate for resolution in this action.[7] Therefore, because EPA finds Mississippi's SO_2 infrastructure SIP approvable without the additional SO_2 emission limitations showing attainment of the NAAQS, EPA finds the issue of appropriate averaging periods for such future limitations not relevant at this time.

Further, the Commenter's citation to a prior EPA discussion on emission limitations required in PSD permits (from EPA's Environmental Appeals Board decision and EPA's letter to Kansas' permitting authority) pursuant to part C of the CAA is neither relevant nor applicable to infrastructure SIP submissions under CAA section 110. In addition, and as previously discussed, the EPA disapproval of the 2006 Missouri SIP was a disapproval relating to an attainment plan SIP submission required pursuant to part D attainment planning and is likewise not relevant to the analysis of infrastructure SIP requirements.

Comment 7: Citing to section 110(a)(1) and (a)(2)(A) of the CAA, the Commenter contends that EPA may not approve Mississippi's infrastructure SIP because it does not include enforceable 1-hour emission limits for sources that the Commenter claims are currently contributing to NAAQS exceedances. The Commenter asserts that emission limits are especially important for meeting the 1-hour SO_2 NAAQS because SO_2 impacts are strongly source oriented. The Commenter states that "[d]espite the large contribution from coal-fired EGUs [electricity generating units] to the State's SO_2 pollution, Mississippi's I–SIP lacks enforceable emissions limitations applicable to its coal-fired EGUs sufficient to ensure the implementation, attainment, and maintenance of the 2010 SO_2 NAAQS." The Commenter refers to air dispersion modeling it conducted for one power plant in Mississippi, the R.D. Morrow Power Plant. Further, the Commenter cites two court cases to support its statement that ". . . an agency may not ignore information put in front of it" and that thus, the Commenter contends that EPA must consider its expert air dispersion modeling "which demonstrates the inadequacy of Mississippi's rules and regulations for

---

[4] EPA's final action does not address CAA section 110(a)(2)(D)(i)(I) because Mississippi has not made a submission for these elements.

[5] The Commenter cited to *In re: Mississippi Lime Co.*, PSD APPEAL 11–01, 2011 WL 3557194, at *26–27 (EPA Aug. 9, 2011) and 71 FR 12623, 12624 (March 13, 2006) (EPA disapproval of a control strategy SO_2 SIP).

[6] For a discussion on emission averaging times for emissions limitations for SO_2 attainment SIPs, see the April 23, 2014, *Guidance for 1-Hour SO_2 Nonattainment Area SIP Submissions.* As noted by the Commenter, EPA explained that it is possible, in specific cases, for states to develop control strategies that account for variability in 1-hour emissions rates through emission limits with averaging times that are longer than 1-hour, using averaging times as long as 30-days, but still provide for attainment of the 2010 SO_2 NAAQS as long as the limits are of at least comparable stringency to a 1-hour limit at the critical emission value. EPA has not taken final action to approve any specific submission of such a limit that a state has relied upon to demonstrate NAAQS attainment, and Mississippi has not submitted such a limit for that purpose here, so it is premature at this time to evaluate whether any emission limit in Mississippi's SIP is in accordance with the April 23, 2014, guidance. If and when Mississippi submits an emission limitation that relies upon such a longer averaging time to demonstrate NAAQS attainment, EPA will evaluate it then.

[7] There are currently no areas designated nonattainment pursuant to CAA section 107 for the 2010 1-hour SO_2 NAAQS in Mississippi. EPA believes the appropriate time for examining the necessity of 1-hour SO_2 emission limits on specific sources is within the attainment planning process.

SO_2 emissions." The Commenter summarizes its modeling results for the R.D. Morrow Power Plant claiming that the data predict exceedances of the standard. Thus, the Commenter contends that Mississippi's infrastructure submission is "substantially inadequate to attain and maintain the NAAQS which it implements, as evidenced by expert air dispersion modeling demonstrating that the emission limits under the laws and regulations cited to in the SO_2 I–SIP Certification allow for exceedances of the NAAQS." Thus, the Commenter asserts that EPA must disapprove Mississippi's SIP submission, and must establish a FIP "which incorporates necessary and appropriate source-specific enforceable emission limitations (preferably informed by modeling) on Plant Morrow, as well as any other major sources of SO_2 pollution in the State which are not presently located in nonattainment areas and have modeled exceedances of the NAAQS." Further, the Commenter states that "For Plant Morrow enforceable emission limitations must be at least as stringent as the modeling-based limits [provided by the Commenter] in order to protect the one-hour SO_2 NAAQS and implement, maintain, and enforce the standard in Mississippi."

The Commenter also asserts that Mississippi's infrastructure SIP must contain enforceable emission limits to avoid additional nonattainment designations "where modeling (or monitoring) shows that SO_2 levels exceed the one-hour NAAQS." The Commenter cites to EPA's *Next Steps for Area Designations and Implementation of the Sulfur Dioxide National Ambient Air Quality Standard*[8] (February 6, 2013), and EPA's Final SO_2 NAAQS Rule at 75 FR 35553. The Commenter further contends that EPA's proposal to designate Lamar County, Mississippi, as attainment/unclassifiable is based on modeling for Plant Morrow provided by the State of Mississippi with two "significant problems": (1) The modeling scenario using allowable emissions was not included in accordance with the EPA-approved modeling protocol and (2) the background SO_2 concentrations (14 parts per billion, or 36.65 micrograms per cubic meter) from the Jackson Monitoring Station in Hinds County monitor were "erroneously relied on", given that "EPA has determined the design values for the Hinds County monitors invalid." For these two issues related to the modeling, the Commenter cites to the modeling from the State performed by Trinity Consultants, *1-Hour SO_2 NAAQS DESIGNATION MODELING REPORT*, pp. 23 and 32, available at *https://www.epa.gov/sites/production/files/2016-03/documents/ms-rec-att1-r2.pdf*, and EPA's August 3, 2015, SO_2 Design Values file.

Response 7: As stated previously, EPA believes that the proper inquiry is whether Mississippi has met the basic, structural SIP requirements appropriate at the point in time EPA is acting upon the infrastructure submissions. Emissions limitations and other control measures, whether on coal-fired EGUs or other SO_2 sources, that may be needed to attain and maintain the NAAQS in areas designated nonattainment for that NAAQS are due on a different schedule from the section 110 infrastructure SIP submission. A state, like Mississippi, may reference pre-existing SIP emission limits or other rules contained in part D plans for previous NAAQS in an infrastructure SIP submission for purposes of section 110(a)(2)(A). For example, Mississippi submitted a list of existing emission reduction measures in the SIP that control emissions of SO_2 as discussed above in response to a prior comment and discussed in the proposed rulemaking on Mississippi's SO_2 infrastructure SIP. These provisions have the ability to reduce SO_2 overall. Although the Mississippi SIP relies on measures and programs used to implement previous SO_2 NAAQS, these provisions are not limited to reducing SO_2 levels to meet one specific NAAQS and will continue to provide benefits for the 2010 1-hour SO_2 NAAQS.

Regarding the air dispersion modeling conducted by the Commenter pursuant to AERMOD and its comments on the modeling submitted by Mississippi pursuant to the section 107 designation process for the R.D. Morrow Power Plant, EPA is not in this action making a determination regarding the air quality status in the area where this facility is located, and is not evaluating whether emissions applicable to this facility are adequate to attain and maintain the NAAQS. Consequently, the EPA does not find the modeling information relevant for review of an infrastructure SIP for purposes of section 110(a)(2)(A). When additional areas in Mississippi are designated under the 2010 1-hour SO_2 NAAQS, and if any additional areas in Mississippi are designated nonattainment in the future, any potential future modeling submitted by the State with designations or attainment demonstrations would need to account for any new emissions limitations Mississippi develops to support such designation or demonstration, which at this point is unknown. While EPA has extensively discussed the use of modeling for attainment demonstration purposes and for designations,[9] EPA has recommended that such modeling was not needed for the SO_2 infrastructure SIPs for the 2010 1-hour SO_2 NAAQS for purposes of section 110(a)(2)(A), which are not actions in which EPA makes determinations regarding current air quality status. *See* April 12, 2012, letters to states and 2012 Draft White Paper.[10]

In conclusion, EPA disagrees with the Commenter's statements that EPA must disapprove Mississippi's infrastructure SIP submission because it does not establish specific enforceable SO_2 emission limits, either on coal-fired EGUs or other large SO_2 sources, in order to demonstrate attainment and maintenance with the 2010 1-hour SO_2 NAAQS at this time.

Comment 8: The Commenter alleges that the SO_2 infrastructure SIP submittal does not address sources significantly contributing to nonattainment or interfering with maintenance of the 2010 1-hour SO_2 NAAQS in other states as required by section 110(a)(2)(D)(i)(I) of the CAA, and asserts EPA must therefore disapprove the infrastructure SIP and impose a FIP. The Commenter states that "EPA must implement a FIP containing source-specific emission limitations and other measures to ensure that pollution from Mississippi is not preventing other states from attaining or maintaining the NAAQS." The Commenter notes that regardless of whether the Mississippi submitted a SIP revision to address CAA section 110(a)(2)(D)(i)(I), the State "has long since passed the June 2013 deadline to submit such provisions; rather than await some potential future submission, Mississippi's failure to satisfy its Good Neighbor obligations must be rectified now." The Commenter explains that the Supreme Court disapproved the view that states cannot address section 110(a)(2)(D)(i) until EPA resolves issues related to CSAPR and that compliance with this provision is a "mandatory duty", citing to *Homer City*, 696 F.3d 7, 37 (D.C. Cir. 2012), rev'd, No. 12–1182, slip op. at 27–28 (U.S. Apr. 29, 2014). The Commenter also highlights from

---

[9] *See for example*, EPA's discussion of modeling for characterizing air quality in the Agency's August 21, 2015, final rule at 80 FR 51052 and for nonattainment planning in the April 23, 2014, *Guidance for 1-Hour SO_2 Nonattainment Area SIP Submissions.*

[10] *Implementation of the 2010 Primary 1-Hour SO_2 NAAQS, Draft White Paper for Discussion*, May 2012 (2012 Draft White Paper) and a sample April 12, 2012, letter from EPA to states are available in the docket for this action.

Order on Petition No. VI–2014–04 at 10 (*citing EPA* v. *EME Homer City Generation,* 134 S.Ct. 1584, 1601 (2014)) that, "[T]he Supreme Court has affirmed that the EPA is not required to provide any implementation guidance before states' interstate transport obligation can be addressed."

Response 8: This action does not address whether sources in Mississippi are significantly contributing to nonattainment or interfering with maintenance of the 2010 1-hour SO_2 NAAQS in another state as required by section 110(a)(2)(D)(i)(I) of the CAA (the good neighbor provision). Thus, EPA disagrees with the Commenter's statement that EPA must disapprove the submitted 2010 1-hour SO_2 infrastructure SIP due to Mississippi's failure to address section 110(a)(2)(D)(i)(I). In EPA's rulemaking proposing to approve Mississippi's infrastructure SIP for the 2010 1-hour SO_2 NAAQS, EPA clearly stated that it was not taking any action with respect to the good neighbor provision in section 110(a)(2)(D)(i)(I). Mississippi did not make a submission to address the requirements of section 110(a)(2)(D)(i)(I) for the 2010 1-hour SO_2 NAAQS, and thus there is no such submission upon which EPA proposed to take action on under section 110(k) of the CAA. Similarly, EPA disagrees with the Commenter's assertion that EPA cannot approve other elements of an infrastructure SIP submission without the good neighbor provision. There is no basis for the contention that EPA has triggered its obligation to issue a FIP to address the good neighbor obligation under section 110(c), as EPA has neither found that Mississippi failed to timely submit a required 110(a)(2)(D)(i)(I) SIP submission for the 2010 1-hour SO_2 NAAQS or found that such a submission was incomplete, nor has EPA disapproved a SIP submission addressing 110(a)(2)(D)(i)(I) with respect to the 2010 1-hour SO_2 NAAQS.

EPA acknowledges the Commenter's concern for the interstate transport of air pollutants and agrees in general with the Commenter that sections 110(a)(1) and (a)(2) of the CAA generally require states to submit, within three years of promulgation of a new or revised NAAQS, a plan which addresses cross-state air pollution under section 110(a)(2)(D)(i)(I). However, EPA disagrees with the Commenter's argument that EPA cannot approve an infrastructure SIP submission without the good neighbor provision. Section 110(k)(3) of the CAA authorizes EPA to approve a plan in full, disapprove it in full, or approve it in part and disapprove it in part, depending on the extent to which such plan meets the requirements of the CAA. This authority to approve state SIP revisions in separable parts was included in the 1990 Amendments to the CAA to overrule a decision in the Court of Appeals for the Ninth Circuit holding that EPA could not approve individual measures in a plan submission without either approving or disapproving the plan as a whole. *See* S. Rep. No. 101–228, at 22, 1990 U.S.C.C.A.N. 3385, 3408 (discussing the express overruling of *Abramowitz* v. *EPA,* 832 F.2d 1071 (9th Cir. 1987)).

EPA interprets its authority under section 110(k)(3) of the CAA, as affording EPA the discretion to approve, or conditionally approve, individual elements of Mississippi's infrastructure SIP submissions for the 2010 1-hour SO_2 NAAQS, separate and apart from any action with respect to the requirements of section 110(a)(2)(D)(i)(I) of the CAA with respect to that NAAQS. EPA views discrete infrastructure SIP requirements, such as the requirements of 110(a)(2)(D)(i)(I), as severable from the other infrastructure elements and interprets section 110(k)(3) as allowing it to act on individual severable measures in a plan submission. In short, EPA believes that even if Mississippi had made a SIP submission for section 110(a)(2)(D)(i)(I) of the CAA for the 2010 1-hour SO_2 NAAQS, which to date it has not, EPA would still have discretion under section 110(k) of the CAA to act upon the various individual elements of the State's infrastructure SIP submission, separately or together, as appropriate.

The Commenter raises no compelling legal or environmental rationale for an alternate interpretation. Nothing in the Supreme Court's April 2014 decision in *EME Homer City* alters EPA's interpretation that EPA may act on individual severable measures, including the requirements of section 110(a)(2)(D)(i)(I), in a SIP submission. *See EPA* v. *EME Homer City Generation, L.P.,* 134 S. Ct. 1584 (affirming a state's obligation to submit a SIP revision addressing section 110(a)(2)(D)(i)(I) independent of EPA's action finding significant contribution or interference with maintenance). In sum, the concerns raised by the Commenter do not establish that it is inappropriate or unreasonable for EPA to approve the portions of Mississippi's infrastructure SIP submission for the 2010 1-hour SO_2 NAAQS.

EPA has no obligation at this time to issue a FIP pursuant to 110(c)(1) to address Mississippi's obligations under section 110(a)(2)(D)(i)(I) until EPA first either finds Mississippi failed to make a required submission addressing the element or the State has made such a submission but it is incomplete, or EPA disapproves a SIP submission addressing that element. Until either occurs, EPA does not have the obligation to issue a FIP pursuant to section 110(c) with respect to the good neighbor provision. Therefore, EPA disagrees with the Commenter's contention that it must issue a FIP for Mississippi to address 110(a)(2)(D)(i)(I) for the 2010 1-hour SO_2 NAAQS at this time.

III. Final Action

With the exception of the interstate transport requirements of section 110(a)(2)(D)(i)(I) and (II) (prongs 1, 2, and 4) and the state board majority requirements respecting significant portion of income of section 110(a)(2)(E)(ii), EPA is taking final action to approve Mississippi's infrastructure submission submitted on June 20, 2013, for the 2010 1-hour SO_2 NAAQS for the above described infrastructure SIP requirements. EPA is taking final action to approve Mississippi's infrastructure SIP submission for the 2010 1-hour SO_2 NAAQS for the above described infrastructure SIP requirements because the submission is consistent with section 110 of the CAA.

With regard to the state board majority requirements respecting significant portion of income, EPA is finalizing a disapproval of Mississippi's June 20, 2013, infrastructure submission. Under section 179(a) of the CAA, final disapproval of a submittal that addresses a requirement of a CAA Part D Plan or is required in response to a finding of substantial inadequacy as described in CAA section 110(k)(5) (SIP call) starts a sanctions clock. The portion of section 110(a)(2)(E)(ii) provisions (the provisions being proposed for disapproval in this notice) were not submitted to meet requirements for Part D or a SIP call, and therefore, no sanctions will be triggered. However, this final action will trigger the requirement under section 110(c) that EPA promulgate a Federal Implementation Plan (FIP) no later than two years from the date of the disapproval unless the State corrects the deficiency, and EPA approves the plan or plan revision before EPA promulgates such FIP.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations.

See 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 29, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: September 16, 2016.

Kenneth R. Lapierre,

Acting Regional Administrator, Region 4.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart Z—Mississippi

■ 2. Section 52.1270(e) is amended by adding a new entry "110(a)(1) and (2) Infrastructure Requirements for the 2010 1-hour SO_2 NAAQS" at the end of the table to read as follows:

§ 52.1270 Identification of plan.

* * * * *

(e) * * *

EPA APPROVED MISSISSIPPI NON-REGULATORY PROVISIONS

Name of non-regulatory SIP provision	Applicable geographic or non-attainment area	State submittal date/effective date	EPA approval date	Explanation
*	*	*	*	* * *
110(a)(1) and (2) Infrastructure Requirements for the 2010 1-hour SO_2 NAAQS.	Mississippi	6/20/2013	9/30/2016, [Insert ***Federal Register*** *citation*].	With the exception of the interstate transport requirements of section 110(a)(2)(D)(i)(I) and (II) (prongs 1, 2, and 4) and the state board majority requirements respecting significant portion of income of section 110(a)(2)(E)(ii).

■ 3. Section 52.1272 is amended by adding paragraph (e) to read as follows:

§ 52.1272 Approval status.

* * * * *

(e) *Disapproval.* Submittal from the State of Mississippi, through the Mississippi Department of Environmental Quality (MDEQ) on June 20, 2013, to address the Clean Air Act section 110(a)(2)(E)(ii) for the 2010 1-hour sulfur dioxide (SO_2) National Ambient Air Quality Standards (NAAQS) concerning state board majority requirements respecting significant portion of income of section 128(a)(1). EPA is disapproving MDEQ's submittal with respect to section 110(a)(2)(E)(ii) because a majority of board members may still derive a significant portion of income from persons subject to permits or enforcement orders issued by the Mississippi Boards, and therefore, its current SIP does not meet the section 128(a)(1) majority requirements respecting significant portion of income for the 2010 1-hour SO_2 NAAQS.

[FR Doc. 2016–23598 Filed 9–29–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2014–0423; FRL–9953–18–Region 4]

Air Plan Approval; Florida; Infrastructure Requirements for the 2010 Sulfur Dioxide National Ambient Air Quality Standard

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve the State Implementation Plan (SIP) submissions, submitted by the State of Florida, through the Florida Department of Environmental Protection (FDEP), on June 3, 2013, and supplemented on January 8, 2014, for inclusion into the Florida SIP. This final action pertains to the infrastructure requirements of the Clean Air Act (CAA or Act) for the 2010 1-hour sulfur dioxide (SO_2) national ambient air quality standard (NAAQS). The CAA requires that each state adopt and submit a SIP for the implementation, maintenance and enforcement of each NAAQS promulgated by EPA, which is commonly referred to as an "infrastructure SIP submission." FDEP certified that the Florida SIP contains provisions that ensure the 2010 1-hour SO_2 NAAQS is implemented, enforced, and maintained in Florida. EPA has determined that the Florida's infrastructure SIP submissions, provided to EPA on June 3, 2013, and supplemented on January 8, 2014, satisfy the required infrastructure elements for the 2010 1-hour SO_2 NAAQS.

DATES: This rule is effective October 31, 2016.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2014–0423. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Michele Notarianni, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Ms. Notarianni can be reached via electronic mail at *notarianni.michele@epa.gov* or via telephone at (404) 562–9031.

SUPPLEMENTARY INFORMATION:

I. Background and Overview

On June 2, 2010 (75 FR 35520, June 22, 2010), EPA promulgated a revised primary SO_2 NAAQS to an hourly standard of 75 parts per billion (ppb) based on a 3-year average of the annual 99th percentile of 1-hour daily maximum concentrations. Pursuant to section 110(a)(1) of the CAA, states are required to submit SIPs meeting the applicable requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as EPA may prescribe. Section 110(a)(2) requires states to address basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS. States were required to submit such SIPs for the 2010 1-hour SO_2 NAAQS to EPA no later than June 2, 2013.[1]

EPA is acting upon the SIP submissions from Florida that address the infrastructure requirements of CAA sections 110(a)(1) and 110(a)(2) for the 2010 1-hour SO_2 NAAQS. The requirement for states to make a SIP submission of this type arises out of CAA section 110(a)(1). Pursuant to section 110(a)(1), states must make SIP submissions "within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof)," and these SIP submissions are to provide for the "implementation, maintenance, and enforcement" of such NAAQS.

In a proposed rulemaking published on August 24, 2015, EPA proposed to approve Florida's June 3, 2013, and January 8, 2014, 2010 1-hour SO_2 NAAQS infrastructure SIP submissions.[2] *See* 80 FR 51157. The details of Florida's submissions and the rationale for EPA's actions are explained in the proposed rulemaking. Comments on the proposed rulemaking were due on or before September 23, 2015. EPA received adverse comments on the proposed action.

II. Response to Comments

EPA received one set of comments on the August 24, 2015, proposed rulemaking to approve Florida's 2010 1-hour SO_2 NAAQS infrastructure SIP submissions intended to meet the CAA requirements for the 2010 1-hour SO_2 NAAQS. A summary of the comments and EPA's responses are provided below.[3] A full set of these comments is provided in the docket for today's final rulemaking action.

A. Comments on Infrastructure SIP Requirements for Enforceable Emission Limits

1. The Plain Language of the CAA

Comment 1: The Commenter contends that the plain language of section 110(a)(2)(A) of the CAA requires the inclusion of enforceable emission limits in an infrastructure SIP to prevent NAAQS exceedances in areas not designated nonattainment. In support, the Commenter quotes the language in section 110(a)(1) that requires states to adopt a plan for implementation, maintenance, and enforcement of the NAAQS and the language in section 110(a)(2)(A) that requires SIPs to include enforceable emissions limitations as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of the CAA.

---

[1] In the proposed action, EPA incorrectly cited a date of June 22, 2013, for the due date of infrastructure SIPs for the 2010 1-hour SO_2 NAAQS. 80 FR 51158 (August 24, 2015).

[2] Florida's 2010 1-hour SO_2 NAAQS infrastructure SIP submission dated June 3, 2013, and supplemented on January 8, 2014, are also collectively referred to as "Florida's SO_2 infrastructure SIP" in this action.

[3] EPA's responses to these comments are consistent with actions taken on 2010 1-hour SO_2 NAAQS infrastructure SIP submissions for Virginia (80 FR 11557, March 4, 2015) at *https://www.gpo.gov/fdsys/pkg/FR-2015-03-04/pdf/2015-04377.pdf* and West Virginia (79 FR 62022, October 16, 2014) at *https://www.gpo.gov/fdsys/pkg/FR-2014-0-16/pdf/2014-24658.pdf.*

The Commenter then states that applicable requirements of the CAA include requirements for the attainment and maintenance of the NAAQS, and that CAA section 110(a)(2)(A) requires infrastructure SIPs to include enforceable emission limits to prevent exceedances of the NAAQS. The Commenter claims that Florida's SIP submission does not meet this asserted requirement. Thus, the Commenter asserts that EPA must disapprove Florida's proposed SO_2 infrastructure SIP submission because it fails to include enforceable emission limitations necessary to ensure attainment and maintenance of the NAAQS as required by CAA section 110(a)(2)(A). The Commenter then contends that the Florida 2010 1-hour SO_2 infrastructure SIP submission fails to comport with CAA requirements for SIPs to establish enforceable emission limits that are adequate to prohibit NAAQS exceedances in areas not designated nonattainment.

Response 1: EPA disagrees that section 110 must be interpreted in the manner suggested by the Commenter in the context of infrastructure SIP submissions. Section 110 is only one provision that is part of the complicated structure governing implementation of the NAAQS program under the CAA, as amended in 1990, and it must be interpreted in the context of not only that structure, but also of the historical evolution of that structure. In light of the revisions to section 110 since 1970 and the later-promulgated and more specific SIP planning requirements of the CAA, EPA interprets the requirement in section 110(a)(1) that the plan provide for "implementation, maintenance and enforcement" in conjunction with the requirements in section 110(a)(2)(A) to mean that the infrastructure SIP must contain enforceable emission limits that will aid in attaining and/or maintaining the NAAQS and that the state demonstrate that it has the necessary tools to implement and enforce a NAAQS, such as adequate state personnel and an enforcement program.

With regard to the requirement for emission limitations in section 110(a)(2)(A), EPA has interpreted this to mean, for purposes of infrastructure SIP submissions, that the state may rely on measures already in place to address the pollutant at issue or any new control measures that the state may elect to impose as part of such SIP submission. As EPA stated in "Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2)," dated September 13, 2013, (Infrastructure SIP Guidance), "[t]he conceptual purpose of an infrastructure SIP submission is to assure that the air agency's SIP contains the necessary structural requirements for the new or revised NAAQS, whether by establishing that the SIP already contains the necessary provisions, by making a substantive SIP revision to update the SIP, or both. Overall, the infrastructure SIP submission process provides an opportunity . . . to review the basic structural requirements of the air agency's air quality management program in light of each new or revised NAAQS." Infrastructure SIP Guidance at pp. 1–2. Florida appropriately demonstrated that its SIP has SO_2 emissions limitations and the "structural requirements" to implement the 2010 1-hour SO_2 NAAQS in its infrastructure SIP submission.

The Commenter makes general allegations that Florida does not have sufficient protective measures to prevent SO_2 NAAQS exceedances. EPA addressed the adequacy of Florida's infrastructure SIP for 110(a)(2)(A) purposes in the proposed rule and explained why the SIP includes enforceable emission limitations and other control measures that aid in maintaining the 2010 1-hour SO_2 NAAQS throughout the State. These include State regulations which collectively establish enforceable emissions limitations and other control measures, means or techniques for activities that contribute to SO_2 concentrations in the ambient air, and provide authority for FDEP to establish such limits and measures as well as schedules for compliance through SIP-approved permits to meet the applicable requirements of the CAA. *See* 80 FR 51161. EPA finds these provisions adequately address section 110(a)(2)(A) to aid in attaining and/or maintaining the 2010 1-hour SO_2 NAAQS and finds Florida demonstrated that it has the necessary tools to implement and enforce the 2010 1-hour SO_2 NAAQS.

2. The Legislative History of the CAA

Comment 2: The Commenter cites two excerpts from the legislative history of the 1970 CAA and claims that the "legislative history of infrastructure SIPs provides that states must include enforceable emission limits in their infrastructure SIPs sufficient to ensure the implementation, maintenance, and attainment of each NAAQS in all areas of the State."

Response 2: As provided in the previous response, the CAA, as enacted in 1970, including its legislative history, cannot be interpreted in isolation from the later amendments that refined that structure and deleted relevant language from section 110 concerning attainment. In any event, the two excerpts of legislative history the Commenter cites merely provide that states should include enforceable emission limits in their SIPs and they do not mention or otherwise address whether states are required to impose additional emission limitations or control measures as part of the infrastructure SIP submission, as opposed to requirements for other types of SIP submissions such as attainment plans required under section 110(a)(2)(I). As provided in Response 1, the proposed rule explains why the SIP includes sufficient enforceable emissions limitations for purposes of the infrastructure SIP submission.

3. Case Law

Comment 3: The Commenter also discusses several court decisions concerning the CAA, which the Commenter claims support its contention that courts have been clear that section 110(a)(2)(A) requires enforceable emissions limits in infrastructure SIP submissions to prevent violations of the NAAQS. The Commenter first cites to language in *Train* v. *NRDC,* 421 U.S. 60, 78 (1975), addressing the requirement for "emission limitations" and stating that emission limitations "are the specific rules to which operators of pollution sources are subject, and which if enforced should result in ambient air which meets the national standards." The Commenter also cites to *Pennsylvania Dept. of Envtl. Resources* v. *EPA,* 932 F.2d 269, 272 (3d Cir. 1991) for the proposition that the CAA directs EPA to withhold approval of a SIP where it does not ensure maintenance of the NAAQS, and to *Mission Industrial, Inc.* v. *EPA,* 547 F.2d 123, 129 (1st Cir. 1976), which quoted section 110(a)(2)(B) of the CAA of 1970. The Commenter contends that the 1990 Amendments do not alter how courts have interpreted the requirements of section 110, quoting *Alaska Dept. of Envtl. Conservation* v. *EPA,* 540 U.S. 461, 470 (2004) which in turn quoted section 110(a)(2)(A) of the CAA and also stated that "SIPs must include certain measures Congress specified" to ensure attainment of the NAAQS. The Commenter also quotes several additional opinions in this vein. *Mont. Sulphur & Chem. Co.* v. *EPA,* 666 F.3d 1174, 1180 (9th Cir. 2012) ("[t]he Clean Air Act directs states to develop implementation plans—SIPs—that 'assure' attainment and maintenance of [NAAQS] through enforceable emissions limitations"); *Mich. Dept. of Envtl. Quality* v. *Browner,* 230 F.3d 181 (6th Cir. 2000) ("EPA's deference to a state is conditioned on the state's submission of a plan 'which satisfies the standards of § 110(a)(2)' and which includes emission limitations that result in compliance with the NAAQS"; and *Hall* v. *EPA* 273 F.3d 1146 (9th Cir. 2001) for the proposition that EPA may not approve a SIP revision that does not demonstrate how the rules would not interfere with attainment and maintenance of the NAAQS.

Response 3: None of the cases the Commenter cites support the Commenter's contention that it is clear that section 110(a)(2)(A) requires infrastructure SIP submissions to include detailed plans providing for attainment and maintenance of the NAAQS in all areas of the state, nor do they shed light on how EPA may reasonably interpret section 110(a)(2)(A). With the exception of *Train,* none of the cases the Commenter cites specifically concerned the interpretation of CAA section 110(a)(2)(A) (or section 110(a)(2)(B) of the pre-1990 Act). Rather, the other courts referenced section 110(a)(2)(A) (or section 110(a)(2)(B) of the pre-1990 CAA) in the background section of decisions in the context of a challenge to an EPA action on revisions to a SIP that was required and approved as meeting other provisions of the CAA or in the context of an enforcement action.

In *Train,* 421 U.S. 60, the Court was addressing a state revision to an attainment plan submission made pursuant to section 110 of the CAA, the primary statutory provision at that time addressing such submissions. The issue in that case concerned whether changes to requirements that would occur before attainment was required were variances that should be addressed pursuant to the provision governing SIP revisions or were "postponements" that must be addressed under section 110(f) of the CAA of 1970, which contained prescriptive criteria. The Court concluded that EPA reasonably interpreted section 110(f) not to restrict a state's choice of the mix of control measures needed to attain the NAAQS, so long as the state met other applicable requirements of the CAA, and that revisions to SIPs that would not impact attainment of the NAAQS by the attainment date were not subject to the limits of section 110(f). Thus the issue was not whether the specific SIP at issue needs to provide for attainment or whether emissions limits are needed as part of the SIP; rather the issue was which statutory provision governed when the state wanted to revise the emission limits in its SIP if such revision would not impact attainment or maintenance of the NAAQS.

The decision in *Pennsylvania Dept. of Envtl. Resources* was also decided based on a pre-1990 provision of the CAA. At issue was whether EPA properly rejected a revision to an approved SIP where the inventories relied on by the state for the updated submission had gaps. The Court quoted section 110(a)(2)(B) of the pre-1990 CAA in support of EPA's disapproval, but did not provide any interpretation of that provision. This decision did not address the question at issue in this action, *i.e.,* what a state must include in an infrastructure SIP submission for purposes of section 110(a)(2)(A). Yet, even if the Court had interpreted that provision, EPA notes that it was modified by Congress in 1990; thus, this decision has little bearing on the issue here.

At issue in *Mission Industrial,* 547 F.2d 123, was the definition of "emissions limitation" not whether section 110 requires the state to demonstrate how all areas of the state will attain and maintain the NAAQS as part of their infrastructure SIPs. The language from the opinion the Commenter quotes does not interpret but rather merely describes section 110(a)(2)(A). The Commenter does not cite to this case to assert that the measures relied on by the state in the infrastructure SIP are not "emissions limitations" and the decision in this case has no bearing here. In *Mont. Sulphur & Chem. Co.,* 666 F.3d 1174, the Court was reviewing a Federal implementation plan (FIP) that EPA promulgated after a long history of the State failing to submit an adequate SIP in response to EPA's finding under section 110(k)(5) that the previously approved SIP was substantially inadequate to attain or maintain the NAAQS, which triggered the State's duty to submit a new SIP to show how it would remedy that deficiency and attain the NAAQS. The Court cited generally to sections 107 and 110(a)(2)(A) of the CAA for the proposition that SIPs should assure attainment and maintenance of NAAQS through emission limitations, but this language was not part of the Court's holding in the case, which focused instead on whether EPA's finding of SIP inadequacy and adoption of a remedial FIP were lawful. The Commenter suggests that *Alaska Dept. of Envtl. Conservation,* 540 U.S. 461, stands for the proposition that the 1990 CAA Amendments do not alter how courts interpret section 110. This claim is inaccurate. Rather, the Court quoted section 110(a)(2)(A), which, as noted previously, differs from the pre-1990 version of that provision and the court makes no mention of the changed language. Furthermore, the Commenter also quotes the Court's statement that "SIPs must include certain measures Congress specified," but that statement specifically referenced the requirement in section 110(a)(2)(C), which requires an enforcement program and a program for the regulation of the modification and construction of new sources. Notably, at issue in that case was the State's "new source" permitting program, not what is required for purposes of an infrastructure SIP submission for purposes of section 110(a)(2)(A).

Two of the cases the Commenter cites, *Mich. Dept. of Envtl. Quality,* 230 F.3d 185, and *Hall,* 273 F.3d 1146, interpret CAA section 110(l), the provision governing "revisions" to plans. Neither case, however, addressed the question at issue here, *i.e,* what states are required to address for purposes of an infrastructure SIP submission for purposes of section 110(a)(2)(A). In those cases, the courts cited to section 110(a)(2)(A) solely for the purpose of providing a brief background of the CAA.

EPA does not believe any of these court decisions addressed required measures for infrastructure SIPs and believes nothing in the opinions addressed whether infrastructure SIP submissions must contain emission limitations or measures to ensure attainment and maintenance of the NAAQS.

4. EPA Regulations, Such as 40 CFR 51.112(a)

Comment 4: The Commenter cites to 40 CFR 51.112(a), providing that "Each plan must demonstrate that the measures, rules, and regulations contained in it are adequate to provide for the timely attainment and maintenance of the national standard that it implements." The Commenter relies on a statement in the preamble to the 1986 action restructuring and consolidating provisions in part 51, in which EPA stated that "[i]t is beyond the scope of th[is] rulemaking to address the provisions of Part D of the Act . . ." 51 FR 40656. Thus, the Commenter contends that "the provisions of 40 CFR 51.112 are not limited to nonattainment SIPs; the regulation instead applies to Infrastructure SIPs, which are required to attain and maintain the NAAQS in all areas of a state, including those not designated nonattainment."

Response 4: The Commenter's reliance on 40 CFR 51.112 to support its argument that infrastructure SIPs must contain emission limits which ensure attainment and maintenance of the NAAQS is incorrect. It is clear on its face that 40 CFR 51.112 directly applies to state SIP submissions for control strategy SIPs, *i.e.*, plans that are specifically required to attain and/or maintain the NAAQS. These regulatory requirements apply when states are developing "control strategy" SIPs under other provisions of the CAA, such as attainment plans required for the various NAAQS in Part D and maintenance plans required in section 175A. The Commenter's suggestion that 40 CFR 51.112 must apply to all SIP submissions required by section 110 based on the preamble to EPA's action "restructuring and consolidating" provisions in part 51, is also incorrect.[4] EPA's action in 1986 was not to establish new substantive planning requirements, but rather was meant merely to consolidate and restructure provisions that had previously been promulgated.

Although EPA was explicit that it was not establishing requirements interpreting the provisions of new "Part D" of the CAA, it is clear that the regulations being restructured and consolidated were intended to address control strategy plans. In the preamble, EPA clearly stated that 40 CFR 51.112 was replacing 40 CFR 51.13 ("Control strategy: SO_X and PM (portion)"), 51.14 ("Control strategy: CO, HC, O_X and NO_2 (portion)"), 51.80 ("Demonstration of attainment: Pb (portion)"), and 51.82 ("Air quality data (portion)"). *Id.* at 40660. Thus, the present-day 40 CFR 51.112 contains consolidated provisions that are focused on control strategy SIPs, and the infrastructure SIP is not such a plan.

5. EPA Interpretations in Other Rulemakings

Comment 5: The Commenter also references a 2006 partial approval and partial disapproval of revisions to Missouri's existing plan addressing the SO_2 NAAQS and claims it was an action in which EPA relied on section 110(a)(2)(A) and 40 CFR 51.112 to reject an infrastructure SIP. Specifically, the Commenter asserts that in that action, EPA cited section 110(a)(2)(A) as a basis for disapproving a revision to the State plan on the basis that the State failed to demonstrate the SIP was sufficient to ensure attainment and maintenance of the SO_2 NAAQS after revision of an emission limit and cited to 40 CFR 51.112 as requiring that a plan demonstrates the rules in a SIP are adequate to attain the SO_2 NAAQS.

Response 5: EPA's partial approval and partial disapproval of revisions to restrictions on emissions of sulfur compounds for the Missouri SIP in 71 FR 12623 specifically addressed Missouri's attainment SIP submission—not Missouri's infrastructure SIP submission. It is clear from the final Missouri rule that EPA was not reviewing an initial infrastructure SIP submission, but rather reviewing proposed SIP revisions that would make an already approved SIP designed to demonstrate attainment of the NAAQS less stringent. Therefore, EPA does not agree that the 2006 Missouri action referenced by the Commenter establishes how EPA reviews infrastructure SIP submissions for purpose of section 110(a)(2)(A).

As discussed in the proposed rule, EPA finds that the Florida 2010 1-hour SO_2 infrastructure SIP meets the appropriate and relevant structural requirements of section 110(a)(2) of the CAA that will aid in attaining and/or maintaining the 2010 1-hour SO_2 NAAQS and that the State demonstrated that it has the necessary tools to implement and enforce the 2010 1-hour SO_2 NAAQS.[5]

B. Comments on Florida SIP SO_2 Emission Limits

Comment 6: The Commenter asserts that EPA may not approve the Florida proposed SO_2 infrastructure SIP because it fails to include enforceable emission limitations with a 1-hour averaging time that applies at all times. The Commenter cites to CAA section 302(k) which requires that emission limits must limit the quantity, rate or concentration of emissions and must apply on a continuous basis. The Commenter states that "[e]nforceable emission limitations contained in the I–SIP must, therefore, be accompanied by proper averaging times; otherwise an appropriate numerical emission limit could allow for peaks that exceed the NAAQS and yet still be permitted since they would be averaged with lower emissions at other times." The Commenter also cites to recommended averaging times in EPA guidance providing that SIP emissions limits, "should not exceed the averaging time of the applicable NAAQS that the limit is intended to help attain." EPA Memorandum of Apr. 23, 2014, to Regional Air Division Directors, Regions 1–10, Guidance for 1-Hour SO_2 NAAQS Nonattainment Area SIP Submissions, at 22, available at *https://www.epa.gov/sites/production/files/2016-06/documents/20140423guidance_nonattainment_sip.pdf.* The Commenter also notes that this EPA guidance provides that "'any emissions limits based on averaging periods longer than 1 hour should be designed to have comparable stringency to a 1-hour average limit at the critical emission value.'"

The Commenter also cites to a February 3, 2011, EPA Region 7 letter to the Kansas Department of Health and Environment regarding the need for 1-hour SO_2 emission limits in a prevention of significant deterioration (PSD) permit, an EPA Environmental Hearing Board decision rejecting use of a 3-hour averaging time for a SO_2 limit in a PSD permit, and EPA's disapproval of a Missouri SIP which relied on annual averaging for SO_2 emission rates and claims EPA has stated that 1-hour averaging times are necessary for the 2010 1-hour SO_2 NAAQS.[6] The Commenter states, "Therefore, in order to ensure that Florida's Infrastructure SIP actually implements the SO_2 NAAQS in every area of the state, the I–SIP must contain enforceable emission limits with one-hour averaging times, monitored continuously, for large sources of SO_2." The Commenter asserts that EPA must disapprove Florida's infrastructure SIP because it fails to require emission limits with adequate averaging times.

Response 6: As explained in detail in previous responses, the purpose of the infrastructure SIP is to ensure that a state has the structural capability to implement and enforce the NAAQS and thus, additional SO_2 emission limitations to ensure attainment and maintenance of the NAAQS are not required for such infrastructure SIPs.[7]

---

[4] EPA noted that it had already issued guidance addressing the new "Part D" attainment planning obligations. Also, as to maintenance regulations, EPA expressly stated that it was not making any revisions other than to re-number those provisions. *See* 51 FR 40657.

[5] EPA's final action does not address CAA section 110(a)(2)(D)(i)(I) because Florida has not made a submission for these elements.

[6] The Commenter cited to *In re: Mississippi Lime Co.*, PSDAPLPEAL 11–01, 2011 WL 3557194, at * 26–27 (EPA Aug. 9, 2011) and 71 FR 12623, 12624 (March 13, 2006) (EPA disapproval of a control strategy SO_2 SIP).

[7] For a discussion on emission averaging times for emissions limitations for SO_2 attainment SIPs, see the April 23, 2014, *Guidance for 1-Hour SO_2 Nonattainment Area SIP Submissions.* As noted by the commenter, EPA explained that it is possible, in specific cases, for states to develop control strategies that account for variability in 1-hour emissions rates through emission limits with averaging times that are longer than 1-hour, using averaging times as long as 30-days, but still provide for attainment of the 2010 SO_2 NAAQS as long as the limits are of at least comparable stringency to a 1-hour limit at the critical emission value. EPA has not taken final action to approve any specific submission of such a limit that a state has relied upon to demonstrate NAAQS attainment, and Florida has not submitted such a limit for that purpose here, so it is premature at this time to evaluate whether any emission limit in Florida's

EPA disagrees that it must disapprove the proposed Florida infrastructure SIP submission merely because the SIP does not contain enforceable SO_2 emission limitations with 1-hour averaging periods that apply at all times, as this issue is not appropriate for resolution in this action in advance of EPA action on the State's submissions of other required SIP submissions including an attainment plan for two areas which are designated nonattainment pursuant to section 107 of the CAA.[8] Therefore, because EPA finds Florida's SO_2 infrastructure SIP approvable without the additional SO_2 emission limitations showing attainment of the NAAQS, EPA finds the issue of appropriate averaging periods for such future limitations not relevant at this time.

Further, Commenter's citation to a prior EPA discussion on emission limitations required in PSD permits (from EPA's Environmental Appeals Board decision and EPA's letter to Kansas' permitting authority) pursuant to part C of the CAA is neither relevant nor applicable to infrastructure SIP submissions under CAA section 110. In addition, and as previously discussed, the EPA disapproval of the 2006 Missouri SIP was a disapproval relating to an attainment plan SIP submission required pursuant to part D attainment planning and is likewise not relevant to the analysis of infrastructure SIP requirements.

Comment 7: Citing to section 110(a)(1) and (a)(2)(A) of the CAA, the Commenter contends that EPA may not approve Florida's infrastructure SIP because it does not include enforceable 1-hour emission limits for sources that the Commenter claims are currently contributing to NAAQS exceedances. The Commenter asserts that emission limits are especially important for meeting the 1-hour SO_2 NAAQS because SO_2 impacts are strongly source oriented. The Commenter states that "[d]espite the large contribution from coal-fired EGUs [electricity generating units] to the State's SO_2 pollution, Florida's I–SIP lacks enforceable emissions limitations applicable to its coal-fired EGUs sufficient to ensure the implementation, attainment, and maintenance of the 2010 SO_2 NAAQS." The Commenter refers to air dispersion modeling it conducted for two power plants in Florida, the C.D. McIntosh, Jr. Power Plant and the Crist Electric Generating Plant, which are located outside of the State's two nonattainment areas, and claims that ". . . the emission limitations relied on for implementation of the NAAQS in the I–SIP are insufficient to prevent exceedances of the NAAQS." Further, the Commenter cites two court cases to support its statement that ". . . an agency may not ignore information put in front of it" and that thus, the Commenter contends that EPA must consider its expert air dispersion modeling submitted over the years which demonstrate the inadequacy of Florida's rules and regulations for SO_2 emissions." The Commenter summarizes its modeling results for the C.D. McIntosh, Jr. Power Plant and the Crist Electric Generating Plant, stating that the data predict exceedances of the standard "over wide areas of the state." Thus, the Commenter contends that Florida's infrastructure submissions are "substantially inadequate to attain and maintain the NAAQS which it implements as evidenced by expert air dispersion modeling demonstrating that the emission limits under the laws and regulations cited to in the SO_2 I–SIP Certification allow for exceedances of the NAAQS." Thus, the Commenter asserts that EPA must disapprove Florida's SIP submissions, and must establish a FIP "which incorporates necessary and appropriate source-specific enforceable emission limitations (preferably informed by modeling) on C.D. McIntosh, Jr. Power Plant and Crist Electric Generating Plant, as well as any other major sources of SO_2 pollution in the State which are not presently located in nonattainment areas and have modeled exceedances of the NAAQS." Further, the Commenter states that "For C.D. McIntosh and Crist, enforceable emission limitations must be at least as stringent as the modeling-based limits [provided by the Commenter] in order to protect the one-hour SO_2 NAAQS and implement, maintain, and enforce the standard in Florida."

Response 7: As stated previously, EPA believes that the proper inquiry is whether Florida has met the basic, structural SIP requirements appropriate at the point in time EPA is acting upon the infrastructure submissions. Emissions limitations and other control measures, whether on coal-fired EGUs or other SO_2 sources, that may be needed to attain and maintain the NAAQS in areas designated nonattainment for that NAAQS are due on a different schedule from the section 110 infrastructure SIP submission. A state, like Florida, may reference pre-existing SIP emission limits or other rules contained in part D plans for previous NAAQS in an infrastructure SIP submission for purposes of section 110(a)(2)(A). For example, Florida submitted a list of existing emission reduction measures in the SIP that control emissions of SO_2 as discussed above in response to a prior comment and discussed in the proposed rulemaking on Florida's SO_2 infrastructure SIP. These provisions have the ability to reduce SO_2 overall. Although the Florida SIP relies on measures and programs used to implement previous SO_2 NAAQS, these provisions are not limited to reducing SO_2 levels to meet one specific NAAQS and will continue to provide benefits for the 2010 1-hour SO_2 NAAQS.

Regarding the air dispersion modeling conducted by the Commenter pursuant to AERMOD for the C.D. McIntosh, Jr. Power Plant and the Crist Electric Generating Plant, EPA is not in this action making a determination regarding the air quality status in the area where these EGUs are located, and is not evaluating whether emissions applicable to these EGUs are adequate to attain and maintain the NAAQS. Consequently, the EPA does not find the modeling information relevant for review of an infrastructure SIP for purposes of section 110(a)(2)(A). When additional areas in Florida are designated under the 2010 1-hour SO_2 NAAQS, and if any additional areas in Florida are designated nonattainment in the future, any potential future modeling submitted by the State with designations or attainment demonstrations would need to account for any new emissions limitations Florida develops to support such designation or demonstration, which at this point is unknown. While EPA has extensively discussed the use of modeling for attainment demonstration purposes and for designations,[9] EPA has recommended that such modeling was not needed for the SO_2 infrastructure SIPs for the 2010 1-hour SO_2 NAAQS for purposes of section 110(a)(2)(A), which are not actions in which EPA makes determinations regarding current air quality status. *See* April 12, 2012,

---

SIP is in accordance with the April 23, 2014, guidance. If and when Florida submits an emission limitation that relies upon such a longer averaging time to demonstrate NAAQS attainment, EPA will evaluate it then.

[8] There are two designated nonattainment areas pursuant to CAA section 107 for the 2010 1-hour SO_2 NAAQS in Florida and the State has submitted attainment plans for the 2010 1-hour SO_2 NAAQS for sections 172, 191 and 192. EPA believes the appropriate time for examining the necessity of 1-hour SO_2 emission limits on specific sources is within the attainment planning process.

[9] *See for example,* EPA's discussion of modeling for characterizing air quality in the Agency's August 21, 2015, final rule at 80 FR 51052 and for nonattainment planning in the April 23, 2014, *Guidance for 1-Hour SO_2 Nonattainment Area SIP Submissions.*

letters to states and 2012 Draft White Paper.[10]

In conclusion, EPA disagrees with the Commenter's statements that EPA must disapprove Florida's infrastructure SIP submissions because it does not establish specific enforceable SO_2 emission limits, either on coal-fired EGUs or other large SO_2 sources, in order to demonstrate attainment and maintenance with the 2010 1-hour SO_2 NAAQS at this time.

Comment 8: The Commenter alleges that the SO_2 infrastructure SIP submittal does not address sources significantly contributing to nonattainment or interfering with maintenance of the 2010 1-hour SO_2 NAAQS in other states as required by section 110(a)(2)(D)(i)(I) of the CAA, and asserts EPA must therefore disapprove the infrastructure SIP and impose a FIP. The Commenter states that "Florida's reliance on a 2012 EPA memorandum in which EPA stated that it did 'not intend to make findings that states failed to submit SIPs to comply with section 110(a)(2)(D)(i)(I)' is improper", and that such guidance contradicts the CAA. The Commenter notes that the Supreme Court disapproved the view that states cannot address section 110(a)(2)(D)(i) until EPA resolves issues related to CSAPR and that compliance with this provision is a "mandatory duty", citing to *Homer City,* 696 F.3d 7, 37 (D.C. Cir. 2012), rev'd, No. 12–1182, slip op. at 27–28 (U.S. Apr. 29, 2014). The Commenter also highlights from Order on Petition No. VI–2014–04 at 10 (*citing EPA* v. *EME Homer City Generation,* 134 S. Ct. 1584, 1601 (2014) that, "[T]he Supreme Court has affirmed that the EPA is not required to provide any implementation guidance before states' interstate transport obligation can be addressed."

Response 8: This action does not address whether sources in Florida are significantly contributing to nonattainment or interfering with maintenance of the 2010 1-hour SO_2 NAAQS in another state as required by section 110(a)(2)(D)(i)(I) of the CAA (the good neighbor provision). Thus, EPA disagrees with the Commenter's statement that EPA must disapprove the submitted 2010 1-hour SO_2 infrastructure SIP due to Florida's failure to address section 110(a)(2)(D)(i)(I). In EPA's proposed rulemaking to approve Florida's infrastructure SIP for the 2010 1-hour SO_2 NAAQS, EPA clearly stated that it was not taking any action with respect to the good neighbor provision in section 110(a)(2)(D)(i)(I). Florida did not make a submission to address the requirements of section 110(a)(2)(D)(i)(I) for the 2010 1-hour SO_2 NAAQS, and thus there is no such submission upon which EPA proposed to take action on under section 110(k) of the CAA. Similarly, EPA disagrees with the Commenter's assertion that EPA cannot approve other elements of an infrastructure SIP submission without the good neighbor provision. There is no basis for the contention that EPA has triggered its obligation to issue a FIP to address the good neighbor obligation under section 110(c), as EPA has neither found that Florida failed to timely submit a required 110(a)(2)(D)(i)(I) SIP submission for the 2010 1-hour SO_2 NAAQS or found that such a submission was incomplete, nor has EPA disapproved a SIP submission addressing 110(a)(2)(D)(i)(I) with respect to the 2010 1-hour SO_2 NAAQS.

EPA acknowledges the Commenter's concern for the interstate transport of air pollutants and agrees in general with the Commenter that sections 110(a)(1) and (a)(2) of the CAA generally require states to submit, within three years of promulgation of a new or revised NAAQS, a plan which addresses cross-state air pollution under section 110(a)(2)(D)(i)(I). However, EPA disagrees with the Commenter's argument that EPA cannot approve an infrastructure SIP submission without the good neighbor provision. Section 110(k)(3) of the CAA authorizes EPA to approve a plan in full, disapprove it in full, or approve it in part and disapprove it in part, depending on the extent to which such plan meets the requirements of the CAA. This authority to approve state SIP revisions in separable parts was included in the 1990 Amendments to the CAA to overrule a decision in the Court of Appeals for the Ninth Circuit holding that EPA could not approve individual measures in a plan submission without either approving or disapproving the plan as a whole. *See* S. Rep. No. 101–228, at 22, 1990 U.S.C.C.A.N. 3385, 3408 (discussing the express overruling of *Abramowitz* v. *EPA,* 832 F.2d 1071 (9th Cir. 1987)).

EPA interprets its authority under section 110(k)(3) of the CAA, as affording EPA the discretion to approve, or conditionally approve, individual elements of Florida's infrastructure SIP submissions for the 2010 1-hour SO_2 NAAQS, separate and apart from any action with respect to the requirements of section 110(a)(2)(D)(i)(I) of the CAA with respect to that NAAQS. EPA views discrete infrastructure SIP requirements, such as the requirements of 110(a)(2)(D)(i)(I), as severable from the other infrastructure elements and interprets section 110(k)(3) as allowing it to act on individual severable measures in a plan submission. In short, EPA believes that even if Florida had made a SIP submission for section 110(a)(2)(D)(i)(I) of the CAA for the 2010 1-hour SO_2 NAAQS, which to date it has not, EPA would still have discretion under section 110(k) of the CAA to act upon the various individual elements of the State's infrastructure SIP submission, separately or together, as appropriate.

The Commenter raises no compelling legal or environmental rationale for an alternate interpretation. Nothing in the Supreme Court's April 2014 decision in *EME Homer City* alters EPA's interpretation that EPA may act on individual severable measures, including the requirements of section 110(a)(2)(D)(i)(I), in a SIP submission. *See EPA* v. *EME Homer City Generation, L.P.,* 134 S. Ct. 1584 (affirming a state's obligation to submit a SIP revision addressing section 110(a)(2)(D)(i)(I) independent of EPA's action finding significant contribution or interference with maintenance). In sum, the concerns raised by the Commenter do not establish that it is inappropriate or unreasonable for EPA to approve the portions of Florida's infrastructure SIP submission for the 2010 1-hour SO_2 NAAQS.

EPA has no obligation at this time to issue a FIP pursuant to 110(c)(1) to address Florida's obligations under section 110(a)(2)(D)(i)(I) until EPA first either finds Florida failed to make a required submission addressing the element or the State has made such a submission but it is incomplete, or EPA disapproves a SIP submission addressing that element. Until either occurs, EPA does not have the obligation to issue a FIP pursuant to section 110(c) with respect to the good neighbor provision. Therefore, EPA disagrees with the Commenter's contention that it must issue a FIP for Florida to address 110(a)(2)(D)(i)(I) for the 2010 1-hour SO_2 NAAQS at this time.

III. Final Action

EPA is taking final action to approve Florida's infrastructure submissions submitted on June 3, 2013, and supplemented on January 8, 2014, for the 2010 1-hour SO_2 NAAQS for the above described infrastructure SIP requirements. EPA is taking final action to approve Florida's infrastructure SIP submissions for the 2010 1-hour SO_2

---

[10] *Implementation of the 2010 Primary 1-Hour SO_2 NAAQS, Draft White Paper for Discussion,* May 2012 (2012 Draft White Paper) and a sample April 12, 2012, letter from EPA to states are available in the docket for this action.

NAAQS because the submissions are consistent with section 110 of the CAA.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 29, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: September 14, 2016.

V. Anne Heard,

Acting Regional Administrator, Region 4.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart K—Florida

■ 2. Section 52.520(e), is amended by adding the entry "110(a)(1) and (2) Infrastructure Requirements for the 2010 1-hour SO_2 National Ambient Air Quality Standards" at the end of the table to read as follows:

§ 52.520 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED FLORIDA NON-REGULATORY PROVISIONS

Provision	State effective date	EPA approval date	**Federal Register** notice	Explanation
* *	*	*	*	* *
110(a)(1) and (2) Infrastructure Requirements for the 2010 1-hour Primary SO_2 National Ambient Air Quality Standards.	6/3/2013	9/30/2016	[Insert **Federal Register** citation].	With the exception of section for provisions relating to 110(a)(2)(D)(i)(I) (prongs 1 and 2) concerning interstate transport requirements.

[FR Doc. 2016–23292 Filed 9–29–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2015–0074; FRL–9953–14–Region 5]

Air Plan Approval; Indiana; Temporary Alternate Opacity Limits for American Electric Power, Rockport

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a revision to the Indiana State Implementation Plan (SIP), authorizing temporary alternate opacity limits (TAOLs) at the American Electric Power, Rockport (AEP Rockport) facility during periods of boiler startup and shutdown. This action is consistent with the Clean Air Act (CAA), the Indiana SIP, and EPA policy regarding emissions during periods of startup and shutdown. Indiana has provided an air quality analysis demonstrating that this revision will continue to protect the applicable National Ambient Air Quality Standards (NAAQS) for fine particulate matter ($PM_{2.5}$) in Spencer County, Indiana.

DATES: This final rule is effective on October 31, 2016.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2015–0074. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either through *www.regulations.gov* or at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Matt Rau, Environmental Engineer, at (312) 886–6524 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Matt Rau, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6524, *rau.matthew@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

I. What is the background for this action?
II. What is EPA's response to comment?
III. What action is EPA taking?
IV. Incorporation by Reference
V. Statutory and Executive Order Reviews

I. What is the background for this action?

EPA is approving into the Indiana SIP TAOLs for AEP Rockport Units #1 and Unit #2, which apply only during narrowly-drawn periods of boiler startup and shutdown. These two identical 1,300-megawatt coal-fired boilers are each equipped with an electrostatic precipitator (ESP) to control $PM_{2.5}$ emissions.

More specifically, 326 Indiana Administrative Code (IAC) 5–1–8 authorizes AEP Rockport to exceed the applicable SIP opacity limit only under the following circumstances: (1) During startup, for a period not to exceed two hours (twenty six-minute averaging periods), or until the flue gas temperature reaches 250 degrees Fahrenheit at the ESP inlet, whichever occurs first; and (2) during shutdown, once the flue gas temperatures has dropped below 250 degrees Fahrenheit at the ESP inlet, for a period not to exceed one and one-half hours (fifteen six-minute averaging periods).

EPA proposed to approve these alternate limits as revisions to Indiana SIP on December 28, 2015 (80 FR 80719). In this action, EPA is responding to comments submitted in response to its proposal and approving the AEP Rockport TAOLs. This is because they meet the criteria contained in Indiana SIP rule 326 IAC 5–1–3(d) as an appropriate method in determining alternative limits for facilities during startup and shutdown periods. These limits are also consistent with the CAA and applicable EPA policy. As discussed in EPA's proposal, AEP Rockport has met all of these criteria.

EPA has also previously approved TAOLs for 22 other Indiana power plants, all of which are controlled with ESPs (67 FR 46589, July 16, 2002). These TAOLs contained similar limits, and EPA's basis for approval was analogous. The approach taken by Indiana in establishing all of these TAOLs is also consistent with section 110 of the CAA and the criteria contained in EPA's September 20, 1999 guidance, "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown."

As discussed in the proposal, EPA has evaluated Continuous Opacity Monitoring System (COMS) data from the AEP Rockport facility and conducted air dispersion modeling in the surrounding area. The COMS data showed that, between 2009 and 2013, AEP's emissions were in compliance with the SIP opacity rule 99.81 percent of the time. Conversely, AEP's emissions exceeded the opacity standards just 0.19 percent of the time, which includes the startup and shutdown periods covered by the TAOL.

After EPA received public comments in response to the proposal, the Indiana Department of Environmental Management (IDEM) performed an additional air quality analysis in response to specific comments. AEP provided a revised emission profile for PM describing hourly emissions during a 24-hour period, including a startup event, in which the ESP would be entirely shut down during hours 9 and 10. IDEM made the conservative assumption that all of the boilers' PM_{10} emissions were 100 percent $PM_{2.5}$. The new analysis also considered two scenarios, in which one boiler is starting up while the other boiler is either not operating, or operating at its full, steady rate. Both boilers at Rockport exhaust through a common stack. The two scenarios represent the stack exhaust and dispersion rates for a boiler startup/shutdown event. IDEM modeled one scenario which assumed that the ESP is completely offline for the two hours of highest oil and coal combustion.

IDEM's modeling followed EPA's guidance in 40 CFR part 51, appendix W, using the current version of the AERMOD modeling system, over a full receptor grid, with five years of recent surface meteorological data from Evansville, Indiana (2010–2014). IDEM also included background from the near-by Dale monitor, in response to Sierra Club comments. The modeling with the background results yielded a 24-hour $PM_{2.5}$ value of 26.06 micrograms per cubic meter ($\mu g/m^3$), which is well below the 2012 24-hour $PM_{2.5}$ NAAQS of 35 $\mu g/m^3$.

II. What is EPA's response to comment?

EPA received comment letters from AEP and the Sierra Club, both on January 27, 2016.

The AEP comment letter supports the approval of 326 IAC 5–1–8 into the Indiana SIP. Sierra Club's comments are provided and addressed below.

Comment: The commenter stated that the fact that AEP Rockport often does not meet applicable opacity limitations is not sufficient to demonstrate that it cannot meet these limits. The commenter asserts that there are numerous options that might be effective in reducing emissions during startup and shutdown periods, including revamping plant maintenance practices, installing baghouses after the ESPs to collect uncontrolled PM, and using a startup fuel other than fuel oil.

Response: The TAOLs at AEP Rockport are needed during startup and shutdown because of temperature limitations of the ESP, which has lowered efficiency at times when temperatures are below 250 degrees. (See 67 FR 46589, July 16, 2002). In addition, AEP Rockport has provided data showing that during periods of low temperature when the control technology cannot efficiently control particulates, there may be violations of the SIP opacity limits. During normal operations, however, emission limits are met. The COMs data submitted by AEP Rockport demonstrate that it has operated in a manner consistent with good air pollution control and maintenance practices. The data show that, between 2009 and 2013, the facility was in compliance 99.81 percent of the time, and exceeded the opacity standards just 0.19 percent of the time. This includes the startup and shutdown periods covered by the TAOL.

The commenter suggests that other control devices should be added to the facility, or that there should be a fuel switch. EPA disagrees for several reasons. First, considering additional controls or changes in fuel is not a criterion in the Indiana SIP for evaluating the approvability of a TAOL. In addition, even if AEP Rockport were to add or modify its control such as by adding a fabric filter (baghouse), similar technical issues could also occur during the low-temperature, low-flow scenario of startups and shutdowns.

Comment: The commenter stated that the fact that AEP Rockport often meets applicable opacity limitations during startup and shutdown proves that it can meet these limits. To support this claim, the commenter cites opacity records from the facility on two specific dates in August 1999 in which the opacity did not exceed 40 percent during one startup event and one shutdown event. While conceding that these records also show violating emissions during startups and shutdowns on other occasions, the commenter further notes that the same records show that the facility was also able to comply with the opacity limits during startups and shutdowns as recently as last year.

Response: Because AEP Rockport often meets its limits speaks to the fact that it currently operates the controls in a fashion that is consistent with the TAOL approval criterion of maintaining and operating controls in a way to minimize emissions. AEP Rockport's control system also operates effectively during normal operations, enabling it to meet its opacity limitations. As explained in EPA's proposal, the need for a TAOL occurs only during startup and shutdown periods—when ESP effectiveness is hampered by temperature (See 67 FR 46589, July 16, 2002).

AEP Rockport's COM data from 2001 to 2004, and 2007 to 2013, indicate opacity exceedances during startup and shutdown periods, which shows this has been a long-running technical issue. EPA has also reviewed the opacity exceedance report summary for 2007 to 2013. It shows that AEP Rockport averaged 2 startups per year and 4.7 shutdowns per year that exceeded the opacity limitations.

There are aspects of ESP operation that cannot be predicted or controlled during unit startups. Therefore, it is impractical to set an opacity limitation during startup and shutdown periods, particularly given the noted history of limited exceedances and the potential for more irregular opacity episodes. Given that EPA expects SIP compliance 100 percent of the time, the fact that a source may "often" meet applicable emission limits is not sufficient.

Comment: The commenter stated that the air quality demonstration made in 2001 or 2004 is obsolete due to changing conditions that impact opacity compliance at the AEP Rockport. The commenter further asserted that the documents AEP submitted in support of its TAOL petition are outdated and fail to satisfy the requirements in 326 IAC 5–1–3–(d)(2)(B).

Response: The requirements of 326 IAC 5–1–3(d)(2)(B) were fulfilled for the AEP Rockport facility with the information provided by Indiana in 2015. This is current information, as Indiana evaluated the AEP Rockport TAOLs in 2014. The current data for AEP Rockport show it operates in manner that minimizes opacity emissions during both normal operation and during startup and shutdown periods.

AEP's updated COMs data, which reflects maintenance changes, upgrades, retrofits, or alterations at the facility, still records exceedances during some start-up and shutdown events during 2009 through 2013. This data which accounts for recent changes in conditions shows that there is an ongoing technical issue with the ESP temperature limitations during start-up and shutdowns that necessitates the TAOLs.

Comment: The commenter stated that the 2004 modeling does not address the current NAAQS. The Indiana SIP requires the owner or operator to demonstrate the TAOL will not impact the maintenance of the NAAQS. The commenter asserted that AEP Rockport's 2004 demonstration is clearly inadequate in that it does not address subsequently-adopted PM NAAQS, because the demonstration did not address the 2012 24-hour and annual $PM_{2.5}$ NAAQS.

Response: The submission by Indiana contained both 2004 and updated 2013 modeling. The modeling provided to EPA for SIP approval included an analysis of both PM_{10} and $PM_{2.5}$. The analysis used a conservative assumption that 100 percent of PM_{10} equals the $PM_{2.5}$ concentrations emitted. EPA concurred with this analysis, which further showed that the TAOL would not interfere with the NAAQS for fine particulate matter.

In addition, in response to the comment, Indiana performed and provided EPA with an updated AERMOD modeling analysis. The modeling shows that the $PM_{2.5}$ NAAQS should remain protected in Spencer County, Indiana with the TAOLs in place. More specifically, the results yielded a 24-hour $PM_{2.5}$ value of 26.06 $\mu g/m^3$, which is well below the 24-hour $PM_{2.5}$ NAAQS of 35 $\mu g/m^3$. Indiana did not address the annual $PM_{2.5}$ NAAQS, as the TAOL is only intended to address short-term situations. The 24-hour $PM_{2.5}$ NAAQS protects public health in this scenario. EPA also considered the 2012 NAAQS, and evaluated modeled concentrations from the TAOLs, using an hourly value of 1.59 $\mu g/m^3$ from the modeled scenario that would best represent a contribution to an annual average. EPA a determined that the modeled annual average combined with background concentrations (for current monitored data of 10.1 $\mu g/m^3$ for 2013–2015 period, and 9.3 for the current annual period) would be less than the 2012 $PM_{2.5}$ NAAQS of 12.0 $\mu g/m^3$.

Comment: The commenter stated that the 2004 modeling assumes PM emission will be controlled in ways the TAOL does not require. More specifically, AEP Rockport assumed that its ESPs would be partially energized and reducing particulate matter emissions, albeit at only 60 percent efficiency. Rockport's operating permit excuses it from running the ESPs during startup and shutdown. The emissions rate both Indiana and AEP Rockport used is based on the assumption that AEP Rockport will take steps to minimize opacity that are not required by law.

Response: EPA believes that the modeling done in support of the TAOL is an appropriate representation of the impact of the TAOL on the NAAQS. The parameters used in the modeling are consistent with EPA SSM guidance and rules (see, *e.g.,* 80 FR 33840), and reflect the operations at the facility, because Indiana has found through review of the reported data that AEP Rockport's ESP typically provides 75 percent control efficiency or more during startup.

It should also be noted that AEP Rockport is subject to other rules that limit its emissions, such as the Mercury and Air Toxics (MATS) rule (40 CFR part 63, subpart UUUUU). Controlling PM emissions under the MATS rule will further limit the opacity from the AEP Rockport units. Indiana's analysis without ESP control still shows the air quality will be protected. Therefore, EPA believes that the assumption of 60 percent efficiency in the modeling is conservative, and shows that the NAAQS would be protected at a level well below the standard.

Comment: The commenter stated that the 2013 modeling is unrealistic and retains flaws from the 2004 modeling. Some of the key modeling assumptions that Indiana used are unrealistic. These assumptions cut in both directions: Some overestimate air quality impact and some underestimate air quality impact. Indiana assumed that there was no background $PM_{2.5}$ concentration. Indiana's justifications for using a zero background PM concentration do not withstand scrutiny. Assuming zero background concentration for $PM_{2.5}$ produces an air quality modeling result that cannot be relied upon to show NAAQS compliance. The 2013 annual mean for $PM_{2.5}$ at the Dale, Spencer County, Indiana monitor was 10.20 $\mu g/m^3$. Indiana's modeling yielded an eighth high 24-hour $PM_{2.5}$ value of 22 $\mu g/m^3$. Even though the methodology for calculating these values is very different, adding them yields a total of 32.2 $\mu g/m^3$.

Response: The commenter notes in its own analysis that the modeling, with background concentration, still yield results that are below the standard of 35 $\mu g/m^3$.

The revised modeling analysis by Indiana addressed the concerns raised by the commenter. Background data was taken from the Dale monitor in Spencer County, Indiana. AEP Rockport is also in Spencer County, Indiana, about 20 miles from the Dale monitor. The latest three years of monitoring data from 2013–2015 were used. The background value of 23 $\mu g/m^3$ does include the expected impact from AEP Rockport's startup and shutdown periods, as no adjustment to the data was made. Thus, both Indiana and EPA considered a conservative background concentration in their evaluations of the AEP Rockport TAOLs.

Indiana's 2013 modeling is conservative in several additional ways. The dispersion modeling used averaged stack temperatures and flow rates in the startup process (which were not from the same hour the emissions value came from). Using the good engineering practice stack height of 220.7 m, instead of the actual 272.5 m stack height, also leads to a conservative estimate of dispersion and, therefore, conservatively high concentration results. The analysis used a cold-unit startup, which is expected to produce more opacity than a warm-unit startup. (A warm-unit startup is when the boiler is still warm, a scenario that could come from frequent startups and shutdowns.) Indiana used coarse particulate matter (PM_{10}) emission rates in its modeling analysis, making the conservative assumption that those emissions were 100 percent $PM_{2.5}$. Indiana compared the model result to the 24-hour $PM_{2.5}$ standard and determined that the NAAQS were protected.

A scenario considering two hours of uncontrolled emissions during startup gave a maximum concentration of 3.06 $\mu g/m^3$. Adding in the background concentration yields a total value of 26.06 $\mu g/m^3$. A second scenario was considered with one unit starting up while the other unit is in normal operation. This scenario yields a total concentration of 24.59 $\mu g/m^3$. The higher stack temperature and greater flow rate increase the dispersion characteristics leading to the lower concentration. Thus, the first scenario provides a worst-case analysis with a background concentration and no ESP operation during startup, and it still demonstrates attainment of the 24-hour $PM_{2.5}$ NAAQS.

Comment: The commenter stated that Indiana has not demonstrated that this TAOL is needed and justifiable, as required by 326 IAC 5–1–3(d)(2). The commenter noted that the Indiana SIP requires the owner to demonstrate that a particular TAOL is needed and justifiable during periods of startup and shutdown. The TAOL should be narrowly tailored and all steps must be taken to minimize emissions during startup and shutdown.

Response: The criteria for demonstrating that a TAOL is needed and justifiable are provided in SIP rule 326 IAC 5–1–3(d)(2). As discussed above, the need in this case is supported by both the COMs data showing exceedances and the limitations of the technology due to low temperatures specific to startup and shutdown.

The AEP Rockport TAOLs also meet the criteria contained in EPA's SSM guidance and rules (see, *e.g.,* 80 FR 33840). The TAOLs are narrowly tailored, as they apply only to Rockport Unit 1 and Unit 2. They also align the previously approved Indiana TAOLs as it is a coal-fired utility boiler controlled with an ESP. The data provided on previous startups and shutdowns for both units indicated the TAOLs were set properly to minimize emissions during startup and shutdown. AEP Rockport has satisfied the criteria for approval. Further, the AEP Rockport startup and shutdown TAOLs are consistent with the previously approved TAOLs at other similar Indiana facilities (See 67 FR 46589, July, 16, 2002). The TAOLs for AEP Rockport were also tailored specifically to the facility using monitored COM data to determine opacity limits that were appropriate given the operational limitations of the specific parameters on the ESP for AEP Rockport. AEP Rockport has demonstrated that the $PM_{2.5}$ NAAQS and thus the area's air quality will remain protected. The reports on the startups and shutdown do show the periods when the current opacity limitations are exceeded occurred during 14 startups and 33 shutdowns from 2007 to 2013, which is an average of 2.0 startup and 4.7 shutdown exceedances per year. Just one startup (2.1 hours) and two shutdowns (1.7 and 2.0 hours) during 2007 to 2013 exceeded the proposed TAOLs.

The air quality analysis of the TAOLs shows that the 24-hour $PM_{2.5}$ NAAQS is protected, and EPA's analysis of the annual standard based on the modeling provided supports that the annual $PM_{2.5}$ standard is protected. Compliance with this standard protects the public health from short-term events such as startups and shutdowns.

Comment: The proposed TAOLs include no upper limits on opacity during the specified timeframe. As such, they could potentially allow extremely high opacity scenarios. There is no concrete restriction on how many times AEP Rockport may startup or shutdown each unit in a year, or even in a week. The combination of these two events raises the potential for serious impacts on ambient air quality.

AEP Rockport has not demonstrated it requires a wholesale exemption from numerical opacity limits when the TAOL would apply. None of the opacity records show opacity reaching levels near 100 percent for two hours during a startup. AEP assumed the ESPs would run at 60 percent efficiency before the flue gas temperature reaches 250 °F. Furthermore, AEP Rockport claimed that 60 percent control efficiency was a low estimate. If true, that means AEP Rockport could partially control its opacity during the startup and shutdown periods. The TAOLs simply grants AEP Rockport an unneeded, unjustified free pass during the specified time period.

Response: EPA agrees that the data indicates opacity does not approach 100 percent opacity. The opacity readings vary in time and opacity level, which makes setting numerical opacity limitations impractical. While there is not a percent opacity limit, the TAOL does provide meaningful constraints of time and temperature that the facility must follow that limits the emissions during startup and shutdowns. The TAOL for unit startup is only allowed until the exhaust temperature reaches 250 °F at the ESP inlet, up to a maximum of 20 six-minute averaging periods (2 hours). The TAOL for unit shutdown begins when the exhaust temperature declines below 250 °F at the ESP inlet and goes for up to 15 six-minute averaging periods (1.5 hours).

III. What action is EPA taking?

EPA is approving the addition of the AEP Rockport TAOL to 326 IAC 5–1–8 to the Indiana SIP. The rule provides AEP Rockport Units #1 and Unit #2 with TAOLs under certain circumstances during unit startup and shutdown periods. All available data support that the AEP Rockport TAOLs are set at an appropriate level. The AEP Rockport TAOLs meet the requirements of 326 IAC 5–1–3(d)(2). The AEP Rockport TAOLs also meet the other requirements of 326 IAC 5–1–3(d), as approved into the Indiana SIP.

This action is consistent with the CAA, the Indiana SIP, and EPA policy regarding emissions during periods of startup and shutdown. Indiana has provided an air quality analysis demonstrating that the $PM_{2.5}$ NAAQS in Spencer County should continue to be protected with the revision.

IV. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of the Indiana Regulations described in the amendments to 40 CFR part 52 set forth below. Therefore, these materials have been approved by EPA for inclusion in the State implementation plan, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference by the Director of the Federal Register in the next update to the SIP compilation.[1] EPA has made, and will continue to make, these documents generally available electronically through *www.regulations.gov* and/or at the EPA Region 5 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 29, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

---

[1] 62 FR 27968 (May 22, 1997).

Dated: September 19, 2016.

Robert A. Kaplan,

Acting Regional Administrator, Region 5.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

■ 2. In § 52.770 the table in paragraph (c) is amended by adding an entry under "Article 5. Opacity Regulations" "Rule 1. Opacity Limitations" for 5–1–8 in numerical order to read as follows:

§ 52.770 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED INDIANA REGULATIONS

Indiana citation	Subject	Indiana effective date	EPA approval date	Notes
* * * * * * *				
Article 5. Opacity Regulations **Rule 1. Opacity Limitations**				
* * * * * * *				
5–1–8	Site-specific temporary alternate opacity limitations.	12/6/2014	9/30/2016, [insert **Federal Register** citation].	
* * * * * * *				

* * * * *

[FR Doc. 2016–23296 Filed 9–29–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 97

[EPA–HQ–OAR–2015–0500; FRL–9953–30–OAR]

Availability of Data on Allocations of Cross-State Air Pollution Rule Allowances to Existing Electricity Generating Units

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; notice of data availability (NODA).

SUMMARY: Under the Cross-State Air Pollution Rule (CSAPR) trading program regulations, the EPA allocates emission allowances to existing electricity generating units (EGUs) as provided in a notice of data availability (NODA). In the CSAPR Update promulgated earlier this year, the EPA finalized default allocations of CSAPR NO_X Ozone Season Group 2 allowances for the control periods in 2017 and subsequent years to existing EGUs in 22 eastern states for which the EPA finalized Federal Implementation Plans (FIPs)—Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. Through this NODA, the EPA is providing notice of the availability of data on these allowance allocations to existing units, as well as the data upon which the allocations are based.

DATES: September 30, 2016.

FOR FURTHER INFORMATION CONTACT: Questions concerning this notice should be addressed to Michael Cohen, at (202) 343–9497 or *cohen.michael@epa.gov;* or Robert Miller, at (202) 343–9077 or *miller.robertl@epa.gov.* The mailing address for each of these individuals is U.S. Environmental Protection Agency, Clean Air Markets Division, MC 6204M, 1200 Pennsylvania Avenue NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION: The CSAPR allowance trading programs require affected EGUs to hold emission allowances sufficient to cover their emissions of nitrogen oxides (NO_X) and/or sulfur dioxide in each control period. In the CSAPR Update for the 2008 ozone National Ambient Air Quality Standards (NAAQS), the EPA established new emissions budgets for ozone season NO_X emissions in 2017 and subsequent years for 22 eastern states and promulgated FIP provisions requiring affected EGUs in those states to participate in the CSAPR NO_X Ozone Season Group 2 Trading Program.[1] Beginning with the 2018 control period, each covered state generally has the option to determine how the CSAPR NO_X Ozone Season Group 2 allowances in its state emissions budget should be allocated among the state's EGUs through a State Implementation Plan (SIP) revision.[2] However, for the 2017 control period, and by default for subsequent control periods in situations where a state has not provided the EPA with the state's own allocations pursuant to an approved SIP revision, the allocations are made by the EPA.

In the case of units that commenced commercial operations before January 1, 2015, termed "existing" units for purposes of this trading program, the EPA determined default allocations for all control periods in the CSAPR Update rulemaking, according to a methodology finalized in the rulemaking but not included in the regulatory text.[3] Through this NODA, the EPA is providing notice of the availability of unit-level default allocations of CSAPR NO_X Ozone Season Group 2 allowances for EGUs that commenced commercial operation before January 1, 2015, as required by the CSAPR regulations.[4] The data are contained in an Excel spreadsheet titled "Unit-Level Allocations and Underlying Data for the

---

[1] *See* Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS (September 7, 2016), available at *https://www.epa.gov/airmarkets/final-cross-state-air-pollution-rule-update.*

[2] *See* 40 CFR 52.38 and 52.39.

[3] *See* CSAPR Allowance Allocations Final Rule TSD, available at *https://www.epa.gov/airmarkets/final-cross-state-air-pollution-rule-update.*

[4] *See* 40 CFR 97.811(a)(1). The approach of allocating emission allowances to existing EGUs as provided in a NODA was established in the original CSAPR and was unchanged in the CSAPR Update. *See, e.g.,* 40 CFR 97.511(a)(1).

CSAPR Update for the 2008 Ozone NAAQS" that is included in the docket for the CSAPR Update final rule and has been posted on the EPA's Web site at *https://www.epa.gov/airmarkets/final-cross-state-air-pollution-rule-update.* The spreadsheet contains the default allocations of allowances for each control period starting with 2017. For EGUs in all covered states except Arkansas, the unit-level allocations in the spreadsheet are the same for each year. For EGUs in Arkansas, the unit-level allocations for many EGUs are higher for the 2017 control period because Arkansas' 2017 ozone season NO_X emissions budget is higher than its emissions budget for the control period in 2018 and subsequent years. The spreadsheet also contains the data used to compute the allocations and describes how the computations are performed. The EPA is not requesting comment on the allocations, underlying data, or allocation methodology.

The EPA notes that an allocation or lack of allocation of emission allowances to a given EGU does not constitute a determination that CSAPR does or does not apply to the EGU.[5] The EPA also notes that allocations are subject to potential correction under the rule.[6]

In accordance with the allowance recordation deadlines set forth in the regulations, the EPA will record allocations of CSAPR NO_X Ozone Season Group 2 allowances to existing units for the 2017 control period by January 3, 2017 (the first business day after January 1, 2017).[7] The EPA will also record allocations for the 2018 control period by that same date except in instances where a state has provided the EPA with timely notice of the state's intent to submit a SIP revision with state-determined allowance allocations replacing the EPA's default allocations for the 2018 control period.[8]

For units commencing commercial operation on or after January 1, 2015, termed "new" units for purposes of the CSAPR NO_X Ozone Season Group 2 Trading Program, the EPA's default allocations for each control period are annually determined during and after the control period based on current and prior year emission data, using a methodology set out in the regulatory text.[9]

Dated: September 22, 2016.

Reid P. Harvey,

Director, Clean Air Markets Division.

[FR Doc. 2016–23434 Filed 9–29–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 435

[EPA–HQ–OW–2016–0598; FRL–9953–26–OW]

RIN 2040–AF68

Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category—Implementation Date Extension

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking direct final action to extend the implementation deadline for certain facilities subject to the final rule establishing pretreatment standards under the Clean Water Act (CWA) for discharges of pollutants into publicly owned treatment works (POTWs) from onshore unconventional oil and gas (UOG) extraction facilities (81 FR 41845; June 28, 2016). EPA is making this revision in response to new information suggesting that there are likely facilities subject to the final rule not presently meeting the zero discharge requirements in the final rule.

DATES: This direct final rule is effective on November 29, 2016 without further notice, unless EPA receives adverse comment by October 31, 2016. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the direct final rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. [EPA–HQ–OW–2016–0598], at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: For more information, see EPA's Web site: *https://www.epa.gov/eg/unconventional-oil-and-gas-extraction-effluent-guidelines.* For technical information, contact Karen Milam, Engineering and Analysis Division (4303T), Office of Water, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone: 202–566–1915; email: *milam.karen@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Does this action apply to me?

Entities potentially regulated by this final action include:

Category	Example of regulated entity	North American Industry Classification System (NAICS) code
Industry	Crude Petroleum and Natural Gas Extraction	211111
Industry	Natural Gas Liquid Extraction	211112

II. Why is EPA issuing a direct final rule?

EPA is publishing this direct final rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no adverse comment. This direct final rule merely extends the implementation deadline for existing onshore UOG extraction facilities that were discharging to POTWs on or between the date of the **Federal Register** Notice of the proposed rule (April 7, 2015) and the date of the **Federal Register** Notice of the final rule (June 28, 2016) to the default three year period provided in the General Pretreatment Regulations. This direct final rule does not otherwise amend the final pretreatment standards rule in any way. In the "Proposed Rules" section of today's **Federal Register**, however, we are publishing a separate document that will serve as the proposed rule to extend the implementation date if we receive adverse comments on this direct final rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this direct final rule, see the **ADDRESSES** section of this document.

---

[5] *See* 40 CFR 97.811(a)(1).

[6] *See* 40 CFR 97.811(c).

[7] *See* 40 CFR 97.821(a).

[8] *See* 40 CFR 52.38(b)(7) and 97.821(b).

[9] *See* 40 CFR 97.812.

If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect. We would address all public comments in any subsequent final rule based on the proposed rule.

III. Supplementary Information

A. Background

EPA promulgated revisions to Effluent Guidelines and Standards for the Oil and Gas Extraction Point Source Category which established pretreatment standards for onshore unconventional oil and gas extraction facilities (81 FR 41845, June 28, 2016). In this final rule, EPA established pretreatment standards prohibiting the discharge of pollutants in UOG extraction wastewater to POTWs, and established an effective date of August 29, 2016. In the preamble to the final rule, EPA indicated that because UOG facilities were currently meeting this zero discharge requirement, the implementation deadline for these pretreatment standards would be the same as the effective date of the final rule. After promulgation of the final rule, EPA received two letters indicating that there are likely facilities discharging UOG wastewater to POTWs; this is new information to EPA.

B. Description of EPA's Action

Based on this post-promulgation information submitted to EPA suggesting that there are likely facilities subject to the final pretreatment standards rule that are currently discharging UOG wastewater to POTWs, EPA is extending the implementation deadline for existing sources that were lawfully discharging to POTWs on or between April 7, 2015 and June 28, 2016 to three years from the effective date of the rule—to August 29th, 2019. This direct final rule does not change the compliance date for all other facilities subject to the final onshore UOG extraction pretreatment standards rule. The final pretreatment standards did not specify a compliance date in the regulatory text; rather, EPA included a compliance date equal to the effective date of the rule in the preamble to the rule, based on the Agency's record indicating that no facilities were discharging UOG wastewater to POTWs. Because of post-promulgation information indicating that some facilities are likely discharging UOG wastewater to POTWs, EPA is extending the compliance date for these facilities. EPA notes that specifying a compliance date of three years from the effective date of the final pretreatment standards rule is consistent with EPA's General Pretreatment Regulations, which require existing sources to meet categorical pretreatment standards within three years of the effective date of such standards, unless a shorter compliance time is specified therein. 40 CFR 403.6(b). For purposes of this direct final rule, compliance date and implementation date are used interchangeably.

EPA will not consider any comment submitted on the direct final rule published today on any topic other than the appropriateness of an extension of the compliance date; any other comments will be considered to be outside the scope of this rulemaking.

IV. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993) and Executive Order 13563 (76 FR 3821, January 21, 2011), this action is not a "significant regulatory action" and is therefore not subject to OMB review. With respect to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), this action will not have a significant economic impact on a substantial number of small entities—as this direct final relieves regulatory burden by extending the compliance date for any business (including small businesses) that were discharging UOG wastewater to POTWs at the time of issuance of the pretreatment standard. For the Sections 202 and 205 of the Unfunded Mandates Reform Act of 1999 (UMRA) (Pub. L. 104–4), this action does not significantly or uniquely affect small governments. The action imposes no incremental enforceable duty on any state, local or tribal governments or the private sector. This action does not create new binding legal requirements that substantially and directly affect Tribes under Executive Order 13175 (65 FR 67249, November 9, 2000). This action does not have significant Federalism implications under Executive Order 13132 (64 FR 43255, August 10, 1999). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994). This action does not involve technical standards; thus, the requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

Congressional Review Act

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 435

Environmental protection, Pretreatment, Waste treatment and disposal, Water pollution control, Unconventional oil and gas extraction.

Dated: September 22, 2016.

Gina McCarthy,

Administrator.

Therefore, 40 CFR part 435 is amended as follows:

PART 435—OIL AND GAS EXTRACTION POINT SOURCE CATEGORY

■ 1. The authority citation for part 435 continues to read as follows:

Authority: 33 U.S.C. 1251, 1311, 1314, 1316, 1317, 1318, 1342 and 1361.

Subpart C—Onshore Subcategory

■ 2. Add paragraph (a)(3) to § 435.33 to read as follows:

§ 435.33 Pretreatment standards for existing sources (PSES).

(a) * * *

(3) *Compliance deadline for existing sources.* Existing sources lawfully discharging into publicly owned treatment works on or between April 7, 2015 and June 28, 2016 shall comply with the PSES by August 29, 2019. All other existing sources shall comply by August 29, 2016.

* * * * *

[FR Doc. 2016–23456 Filed 9–29–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R3–ES–2015–0145; 4500030113]

RIN 1018–BA98

Endangered and Threatened Wildlife and Plants; Threatened Species Status for the Eastern Massasauga Rattlesnake

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine threatened species status under the Endangered Species Act of 1973 (Act), as amended, for the eastern massasauga rattlesnake (*Sistrurus catenatus*), a rattlesnake species found in 10 States and 1 Canadian Province. The rule adds this species to the Federal List of Endangered and Threatened Wildlife. We have also determined that the designation of critical habitat for the eastern massasauga rattlesnake is not prudent due to an increased risk of collection and persecution.

DATES: This rule is effective October 31, 2016.

ADDRESSES: This final rule is available on the Internet at *http://www.regulations.gov* and *http://www.fws.gov/midwest/endangered/reptiles/eama/index.html.* Comments and materials we received, as well as supporting documentation we used in preparing this rule, are available for public inspection at *http://www.regulations.gov* or by appointment, during normal business hours at: U.S. Fish and Wildlife Service, Chicago Ecological Services Field Office, 230 South Dearborn, Suite 2938, Chicago, IL 60604; telephone 312–216–4720.

FOR FURTHER INFORMATION CONTACT: Louise Clemency, Field Supervisor, U.S. Fish and Wildlife Service, Chicago Ecological Services Field Office, 230 South Dearborn, Suite 2938, Chicago, IL 60604; telephone 312–216–4720. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, a species may warrant protection through listing if it is endangered or threatened throughout all or a significant portion of its range. Listing a species as an endangered species or threatened species can only be completed by issuing a rule. Additionally, under the Act, critical habitat shall be designated, to the maximum extent prudent and determinable, for any species determined to be an endangered species or threatened species under the Act. We have determined that designating critical habitat is not prudent for the eastern massasauga rattlesnake due to an increased risk of collection and persecution.

This rule makes final the listing of the eastern massasauga rattlesnake (*Sistrurus catenatus*) as a threatened species.

The basis for our action. Under the Act, we can determine that a species is an endangered or threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. Although there are several factors that are affecting the eastern massasauga rattlesnake's status, the loss of habitat was historically, and continues to be, the primary threat, either through development or through changes in habitat structure due to vegetative succession.

Peer review and public comment. A Species Status Assessment (SSA) team prepared an SSA report (Szymanski *et al.* 2016) for the eastern massasauga rattlesnake. The SSA team was composed of Service biologists, in consultation with other species experts. The SSA represents a compilation of the best available scientific and commercial data concerning the biological status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the eastern massasauga rattlesnake. We sought comments on the SSA from independent specialists to ensure that our determination is based on scientifically sound data, assumptions, and analyses. We invited these peer reviewers to comment on our listing proposal. We also considered all comments and information we received during the comment period.

The SSA report underwent independent peer review by 21 scientists with expertise in eastern massasauga rattlesnake biology, habitat management, and stressors (factors negatively affecting the species) to the species. The SSA report and other materials relating to this determination can be found on the Midwest Region Web site at *http://www.fws.gov/midwest/Endangered/* and at *http://www.regulations.gov* under Docket No. FWS–R3–ES–2015–0145.

Previous Federal Actions

On September 30, 2015, the Service published a proposed rule (80 FR 58688) to list the eastern massasauga rattlesnake as a threatened species under the Act (16 U.S.C. 1531 *et seq.*). We accepted public comments on the proposed rule for 60 days, ending November 30, 2015. Please refer to the proposed rule (80 FR 58688; September 30, 2015) for a detailed description of previous Federal actions concerning this species.

Background

Please refer to the proposed listing rule (80 FR 58688; September 30, 2015) for a summary of species information.

Summary of Biological Status and Threats

The Act directs us to determine whether any species is an endangered species or a threatened species because of any factors affecting its continued existence. We completed a comprehensive assessment of the biological status of the eastern massasauga rattlesnake, and prepared the SSA report, which provides a thorough description of the species' overall viability. We generally defined viability as the ability of the species to maintain self-sustaining populations over the long term. We used the conservation biology principles of resiliency, representation, and redundancy in our analysis. Briefly, resiliency is the ability of the species to withstand environmental stochasticity (unpredictable fluctuations in environmental conditions (for example, wet or dry, warm or cold years)); redundancy is the ability of the species to withstand catastrophic events (for example, droughts, hurricanes); and representation is the ability of the species to adapt over time to long-term changes in the environment (for example, climate changes). In general, the more redundant, representative, and resilient a species is, the more likely it is to sustain populations over time, even under changing environmental conditions. Using these principles, we considered the eastern massasauga rattlesnake's needs at the individual, population, and species scales. We also identified the beneficial factors and stressors influencing the species' viability. We considered the degree to which the species' ecological needs are met both currently and as can be reliably forecasted into the future, and we assessed the consequences of any unmet needs as they relate to species viability. In this section, we summarize the conclusions of the SSA, which can be accessed in the SSA report at *http://www.fws.gov/midwest/Endangered/* and at *http://www.regulations.gov* under Docket No. FWS–R3–ES–2015–0145.

For survival and reproduction at the individual level, the eastern massasauga rattlesnake requires appropriate habitat, which varies depending on the season and its life stage (see Background section of the proposed listing rule at 80 FR 58688, September 30, 2015). During the winter (generally October through March), they occupy hibernacula, such as crayfish burrows. Hydrology at eastern massasauga rattlesnake sites is important in maintaining conditions with high enough water levels to support the survival of hibernating eastern massasauga rattlesnakes. During their active season (after they emerge from hibernacula), they require sparse canopy cover and sunny areas (intermixed with shaded areas) for thermoregulation (basking and retreat sites), abundant prey (foraging sites), and the ability to escape predators (retreat sites). Habitat structure, including early successional stage and low canopy cover, appears to be more important for eastern massasauga rattlesnake habitat than plant community composition or soil type. Maintaining such habitat structure may require periodic management of most habitat types occupied by the eastern massasauga rattlesnake.

At the population level, the eastern massasauga rattlesnake requires sufficient population size, population growth, survivorship (the number of individuals that survive over time), recruitment (adding individuals to the population through birth or immigration), and population structure (the number and age classes of both sexes) to be sustainable over the long term. Populations also require a sufficient quantity of high-quality microhabitats with intact hydrological and ecological processes that maintain suitable habitat, and connectivity among these microhabitats. In the SSA report, a self-sustaining population of eastern massasauga rattlesnakes is defined as one that is demographically, genetically, and physiologically robust (a population with 50 or more adult females and a stable or increasing growth rate), with a high level of persistence (a probability of persistence greater than 0.9) given its habitat conditions and the risk or beneficial factors operating on it.

We relied on a population-specific model developed by Faust *et al.* (2011, entire) (hereafter referred to as the Faust model) to assess the health of populations across the eastern massasauga rattlesnake's range. Faust and colleagues developed a generic, baseline model for a hypothetical, healthy (growing) eastern massasauga rattlesnake population. Using this baseline model and site-specific information, including population size estimate, stressors operating at the site, and potential future management changes that might address those stressors, the Faust model forecasted the future condition of 57 eastern massasauga rattlesnake populations over three different time spans (10, 25, and 50 years) (for more details on the Faust model, see pp. 4–6 in the SSA report). We extrapolated the Faust model results and supplemental information gathered since 2011 to forecast the future conditions of the other (non-modeled; n = 290) eastern massasauga rattlesnake populations.

At the species level, the eastern massasauga rattlesnake requires multiple (redundant), self-sustaining (resilient) populations distributed across areas of genetic and ecological diversity (representative) to be sustainable over the long term. Using the literature on distribution of genetic diversity across the range of this species, we identified three geographic "analysis units" corresponding to "clumped" genetic variation patterns across the eastern massasauga rattlesnake populations (see Figure 1, below). A reasonable conclusion from the composite of genetic studies that exist (Gibbs *et al.* 1997, entire; Andre 2003, entire; Chiucchi and Gibbs 2010, entire; Ray *et al.* 2013, entire) is that there are broad-scale genetic differences across the range of the eastern massasauga rattlesnake, and within these broad units, there is genetic diversity among populations comprising the broad units. Thus, we interpret these genetic variation patterns to represent areas of unique adaptive diversity. We subsequently use these analysis units (western, central, and eastern) to structure our analysis of viability with regards to representation.

Species' Current Condition

The documented historical range of the eastern massasauga rattlesnake included sections of western New York, western Pennsylvania, southeastern Ontario, the upper and lower peninsulas of Michigan, the northern two-thirds of Ohio and Indiana, the northern three-quarters of Illinois, the southern half of Wisconsin, extreme southeast Minnesota, east-central Missouri, and the eastern third of Iowa. The limits of the current range of the species resemble the boundaries of its historical range; however, the geographic distribution of extant localities has been restricted by the loss of populations from much of the area within the boundaries of that range. As a result of the stressors acting on eastern massasauga rattlesnake populations, the resiliency of the eastern massasauga rattlesnake across its range and within each of the three analysis units has declined from its historically known condition. Rangewide, there are 558 known historical eastern massasauga rattlesnake populations, of which 263 are known to still be extant, 211 are likely extirpated or known extirpated, and 84 are of unknown status. For the purposes of our assessment, we considered all populations with extant or unknown statuses to be currently extant (referred to as presumed extant, n = 347). Of those 347 populations presumed extant, 40 percent (n = 139) are likely quasi-extirpated (have 25 or fewer adult females, which was considered by the Faust model to be too small to be viable (see the SSA report, pp. 46–47, for details)).

The rangewide number of presumed extant populations has declined from the number that was known historically by 38 percent (and 24 percent of the presumed extant populations have unknown statuses). Of those populations presumed extant, 139 (40 percent) are presumed to be quasi-extirpated while 105 (30 percent) are presumed to be demographically, genetically, and physiologically robust (see Table 1, below). Of these presumed demographically, genetically, and physiologically robust populations, 19 (0.5 percent of the presumed extant populations) are presumed to have conditions (stressors affecting the species at those populations are nonexistent or of low impact) suitable for maintaining populations over time and, thus, are self-sustaining. The greatest declines in resiliency occurred in the western analysis unit, where only 20 populations are presumed extant, and, of these, only 1 population is presumed to be self-sustaining. Loss of resiliency has also occurred, although to a lesser degree, in the central and eastern analysis units, where only 23 and 6 populations, respectively, are presumed to be self-sustaining.

TABLE 1—THE NUMBER OF POPULATIONS BY STATUS RANGEWIDE

[DGP = demographically, genetically, and physiologically]

Status	Number of populations rangewide	Percentage of presumed extant populations
Presumed Extant	347	
Quasi-extirpated	139	40
DGP robust	105	30
Self-sustaining	19	0.5

The degree of representation, as measured by spatial extent of occurrence (a measurement of the spatial spread of the areas currently occupied by a species), across the range of the eastern massasauga rattlesnake has declined, as illustrated by the higher proportion of populations lost in the southern and western part of the range and by the loss of area occupied within the analysis units (see Figure 1, below; see also pp. 52–55 in the SSA report). Overall, there has been more than a 41 percent reduction of extent of occurrence (as measured by a reduction in area) rangewide (see Table 2, below). This loss has not been uniform, with the western analysis unit encompassing most of this decline (70 percent reduction in extent of occurrence in the western analysis unit). However, losses of 33 percent and 26 percent of the extent of occurrence in the central analysis unit and eastern analysis unit, respectively, are notable as well. The results are not a true measure of area occupied by the species, but rather a coarse evaluation to make relative comparison among years. The reasons for this are twofold: (1) The calculations are done at the county, rather than the population, level; and (2) if at least one population was projected to be extant, the entire county was included in the analysis, even if other populations in the county were projected to be extirpated. Assuming that the loss of extent of occurrence equates to loss of adaptive diversity, the degree of representation of the eastern massasauga rattlesnake has declined since historical conditions.

Figure 1. The three genetically distinct "analysis units" (western, central, and eastern) (adapted from Ray *et al.* 2013, entire) within the historical range of the eastern massasauga rattlesnake and the geographical distribution of presumed extant (extant and unknown status) and extirpated populations within each analysis unit.

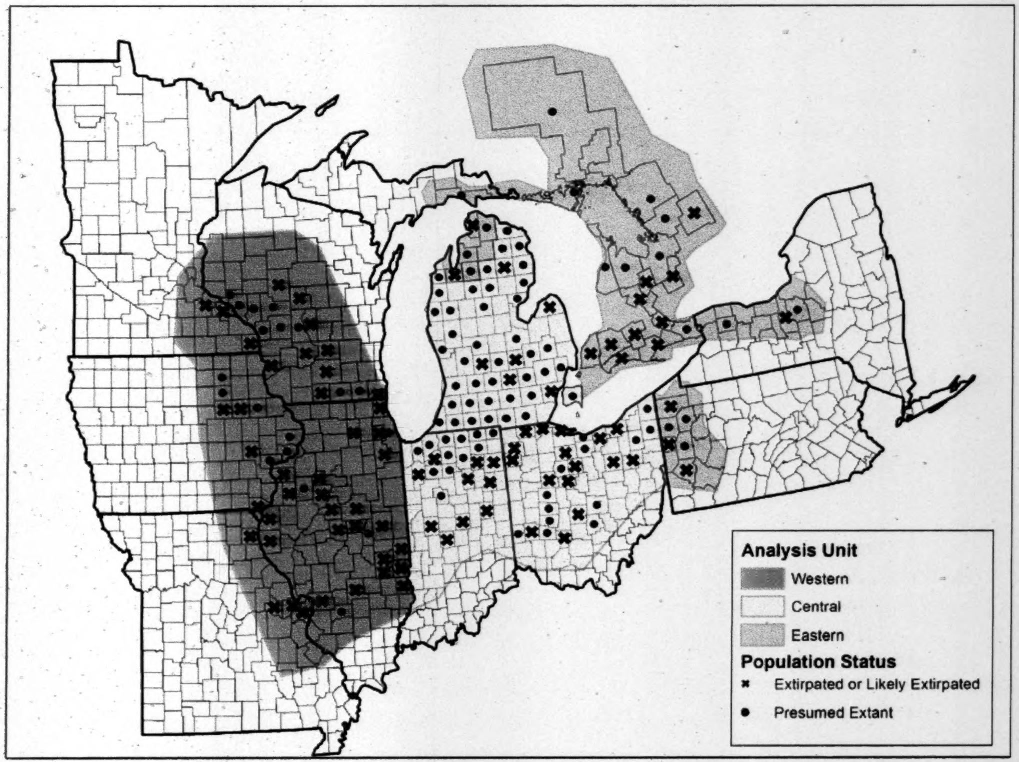


TABLE 2—THE PERCENT REDUCTION IN EXTENT OF OCCURRENCE FROM HISTORICAL TO PRESENT DAY

Analysis unit	Percent reduction
Western	70
Central	33
Eastern	26
Rangewide	41

The redundancy of the eastern massasauga rattlesnake has also declined since historical conditions. We evaluated the effects of potential catastrophic drought events on the eastern massasauga rattlesnake. Extreme fluctuations in the water table may negatively affect body condition for the following active season, cause early emergence, or cause direct mortality (Harvey and Weatherhead 2006, p. 71; Smith 2009, pp. vii, 33, 38–39). Changes in water levels under certain circumstances can cause mortality to individuals, particularly during hibernation (Johnson *et al.* 2000, p. 26; Kingsbury 2002, p. 38), when the snakes are underwater. The water in the hibernacula protects the eastern massasauga rattlesnake from dehydration and freezing, and, therefore, dropping water levels in the winter leaves the snakes vulnerable to both (Kingsbury 2002, p. 38; Moore and Gillingham 2006, p. 750; Smith 2009, p. 5). Because individual eastern massasauga rattlesnakes often return to the same hibernacula year after year, dropping water levels in hibernacula could potentially decimate an entire population if the majority of individuals in that population hibernate in the same area.

We assessed the vulnerability of unit-wide extirpation due to varying drought intensities, as summarized below (for a detailed description of the analysis, see the SSA report, pp. 55–60, 81–82). The Drought Monitor (a weekly map of drought conditions that is produced jointly by the National Oceanic and Atmospheric Administration, the U.S. Department of Agriculture, and the National Drought Mitigation Center (NDMC) at the University of Nebraska-Lincoln) classifies general drought areas by intensity, with D1 being the least intense drought and D4 being the most intense drought. For the eastern massasauga rattlesnake, the risk of unit-wide extirpation due to a catastrophic drought varies by analysis unit and by the level of drought considered. Experts believe drought intensities of magnitude D2 or higher are likely to make the species more vulnerable to overwinter mortality and cause catastrophic impacts to eastern massasauga rattlesnake populations. In the central and eastern analysis units, the annual frequency rate for a D3 or D4 drought is zero, so there is little to no risk of unit-wide extirpation regardless of how broadly dispersed the species is within the unit. In the eastern analysis unit, the annual frequency rate for a D2 drought is also zero. Portions of the central analysis unit are at risk of a D2-level catastrophic drought; populations in the southern portion of the central analysis unit and scattered portions in the north are at risk from such a drought. In the western analysis unit, the risk of unit-wide extirpation based on the frequency of a D3 drought is low, but the risk of losing clusters of populations within the western analysis unit is notable; 5 of the 8 population clusters are vulnerable to a catastrophic drought. The probability of unit-wide extirpation in the western analysis unit is notably higher with D2 frequency rates; 7 of the 8 clusters of populations are at risk of D2-level catastrophic drought. Thus, the probability of losing most populations within the western analysis unit due to a catastrophic drought is high (0.82 probability of unit-wide extirpation).

Assessment of Threats and Conservation Measures

The most prominent stressors affecting the eastern massasauga rattlesnake include habitat loss and fragmentation, especially through development and vegetative succession; road mortality; hydrologic alteration (hydrologic drawdown) resulting in drought or artificial flooding; persecution; collection; and mortality of individuals as a result of habitat management that includes post-emergent (after hibernation) prescribed fire and mowing for habitat management. Habitat loss includes direct habitat destruction of native land types (for example, grassland, swamp, fen, bog, wet prairie, sedge meadow, marshland, peatland, floodplain forest, coniferous forest) due to conversion to agricultural land, development, and infrastructure associated with development (roads, bridges). Because eastern massasauga rattlesnake habitat varies seasonally and also varies over its range, the destruction of parts of a population's habitat (for example, hibernacula or gestational sites) may cause a negative effect to individual snakes, thus reducing the numbers of individuals in a population and, in turn, reducing the viability of that population. Habitat is also lost due to invasion of nonnative plant species, dam construction, fire suppression, manipulation of ground water levels, and other incompatible habitat modifications (Jellen 2005, p. 33). These habitat losses continue even in publicly held areas protected from development.

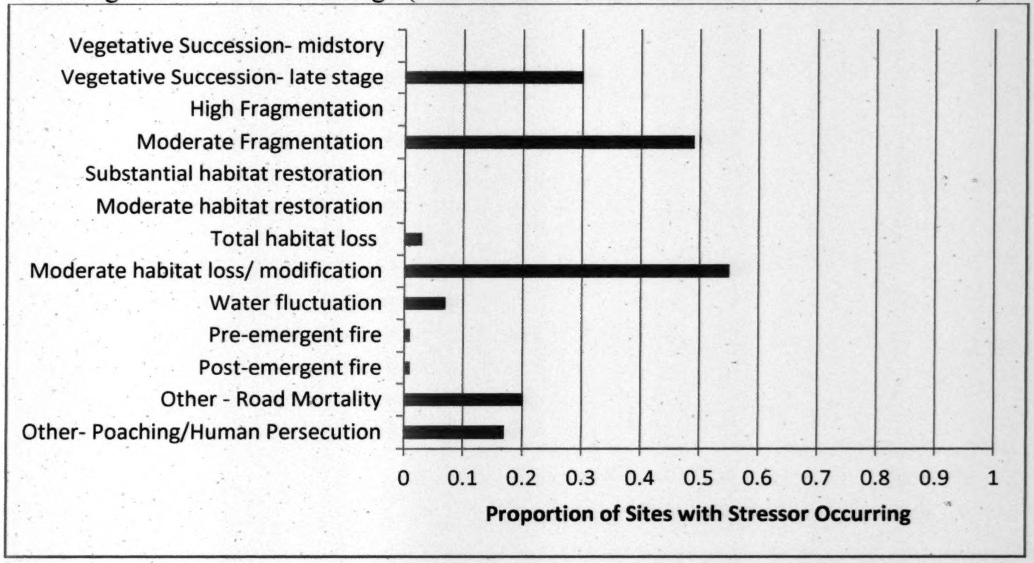
Vegetative succession is a major contributor to habitat loss of the eastern massasauga rattlesnake (Johnson and Breisch 1993, pp. 50–53; Reinert and Buskar 1992, pp. 56–58). The open vegetative structure, typical of eastern massasauga rattlesnake habitat, provides the desirable thermoregulatory areas, increases prey densities by enhancing the growth of sedges and grasses, and provides retreat sites. Degradation of eastern massasauga rattlesnake habitat typically happens through woody vegetation encroachment or the introduction of nonnative plant species. These events alter the structure of the habitat and make it unsuitable for the eastern massasauga rattlesnake by reducing and eventually eliminating thermoregulatory and retreat areas. Fire suppression has promoted vegetative succession and led to the widespread loss of open canopy habitats through succession (Kingsbury 2002, p. 37). Alteration in habitat structure and quality can also affect eastern massasauga rattlesnakes by reducing the forage for the species' prey base (Kingsbury 2002, p. 37).

Roads, bridges, and other structures constructed in eastern massasauga rattlesnake habitat fragment the snakes' habitat and impact the species both through direct mortality as snakes are killed trying to cross these structures (Shepard *et al.* 2008b, p. 6), as well as indirectly through the loss of access to habitat components necessary for the survival of the snakes.

Because of the fear and negative perception of snakes, many people have a low interest in snakes or their conservation and consequently large numbers of snakes are deliberately killed (Whitaker and Shine 2000, p. 121; Alves *et al.* 2014, p. 2). Human-snake encounters frequently result in the death of the snake (Whitaker and Shine 2000, pp. 125–126). Given the species' site fidelity and ease of capture once located, the eastern massasauga rattlesnake is particularly susceptible to collection. Poaching and unauthorized collection of the eastern massasauga rattlesnake for the pet trade is a factor contributing to declines in this species (for example, Jellen 2005, p. 11; Baily *et al.* 2011, p. 171).

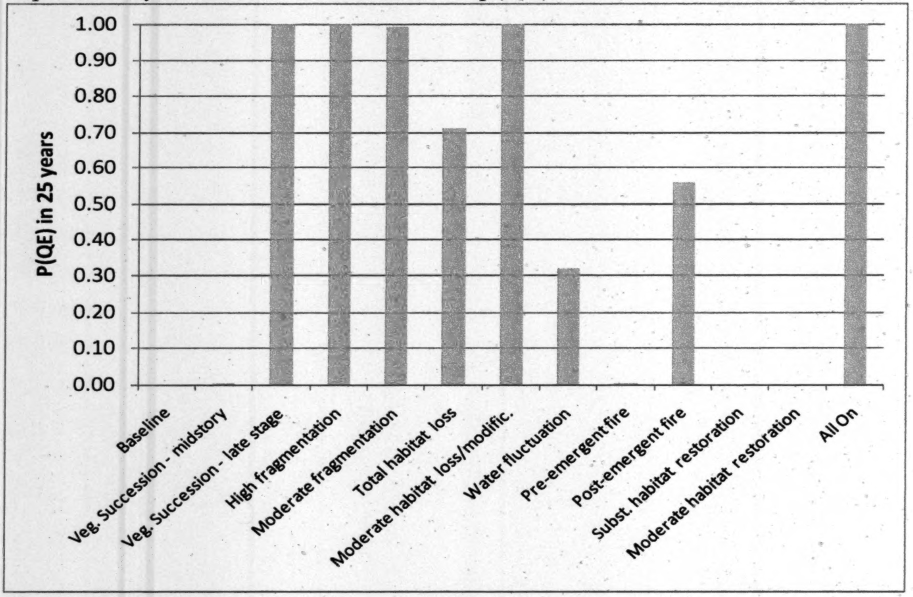
Assessing the occurrence of the above-mentioned stressors, we found that 94 percent of the presumed extant eastern massasauga rattlesnake populations have at least one stressor (with some degree of impact on the species) currently affecting the site. Habitat loss or modification is the most commonly occurring stressor (see Figure 2, below). Some form of habitat loss or modification is occurring at 55 percent of the sites; 3 percent of these sites are at risk of total habitat loss (all habitat at the site being destroyed or becoming unusable by the species). Fragmentation is the second most common factor (49 percent of sites), and unmanaged vegetative succession is the third most common factor (31 percent of sites). Among the other stressors, road mortality occurs at 20 percent, collection or persecution at 17 percent, water fluctuation at 7 percent, and pre- or post-emergent fire at less than 1 percent of the sites.

Figure 2. Proportion of eastern massasauga rattlesnake populations with stressor occurring at sites across the range (Factor data obtained from the States and Ontario).



We also considered the magnitude of impact of the various stressors (see Figure 3, below). The Faust model indicates that the stressors most likely to push a population to quasi-extirpation within 25 years (high magnitude stressors) are late-stage vegetative succession, high habitat fragmentation, moderate habitat fragmentation, total habitat loss, and moderate habitat loss or modification. Our analysis shows that 84 percent of eastern massasauga rattlesnake populations are impacted by at least one high magnitude stressor, and 63 percent are affected by multiple high magnitude stressors. These stressors are chronic and are expected to continue with a similar magnitude of impact into the future, unless ameliorated by increased implementation of conservation actions. Furthermore, these multiple factors are not acting independently, but are acting together, which can result in cumulative effects that lower the overall viability of the species. For a description of the methods used in this threats assessment, refer to pages 39–43 of the SSA report.

Figure 3: Probability of quasi-extirpation (p(QE)) in 25 years for a population experiencing each individual stressor and all modeled stressors combined (All On) (taken from Faust *et al.* 2011, p. 15). The probability of quasi-extirpation is a function of the magnitude of impact and the frequency (likelihood) of the stressor occurring (which explains why total habitat loss has lower p(QE) than moderate habitat loss).



In addition to the above stressors, other factors may be affecting individuals. Disease (whether new or currently existing at low levels but increasing in prevalence) is another emerging and potentially catastrophic stressor to eastern massasauga rattlesnake populations. In the eastern and Midwestern United States, the eastern massasauga rattlesnake is specifically vulnerable to disease due to *Ophidiomyces* fungal infections (snake fungal disease (SFD)). The emergence of SFD has been recently documented in the eastern massasauga rattlesnake (Allender *et al.* 2011, pp. 2383–2384) and many other reptiles (Cheatwood *et al.* 2003, pp. 333–334; Clark *et al.* 2011, p. 890; Paré *et al.* 2003, pp. 12–13; Rajeev *et al.* 2009, pp. 1265–1267; Sigler *et al.* 2013, pp. 3343–3344; Sleeman 2013, p. 1), and is concerning because of its broad geographic and taxonomic distributions. However, we did not have sufficient information on the emergence and future spread of SFD or other diseases to reliably model this stressor for forecasting future conditions for the rattlesnake. Our quantitative modeling analysis also does not consider two other prominent stressors, road mortality and persecution and collection, due to a lack of specific information on the magnitude of impacts from these factors. Additionally, this species is vulnerable to the effects of climate change through increasing intensity of winter droughts and increasing risk of summer floods, particularly in the southwestern part of its range (Pomara *et al.*, undated; Pomara *et al.* 2014, pp. 95–97). Thus, while we acknowledge and considered that disease, road mortality, persecution and collection, and climate changes are factors that affect the species, and which may increase or exacerbate existing threats in the future, our viability assessment does not include a quantitative analysis of these stressors.

The eastern massasauga rattlesnake is State-listed as endangered in Iowa, Illinois, Indiana, New York, Ohio, Pennsylvania, and Wisconsin, and is listed as endangered in Ontario. In Michigan, the species is listed as "special concern," and a Director of Natural Resources Order (No. DFI–166.98) prohibits take except by permit.

Of the 263 sites with extant eastern massasauga populations rangewide, 62 percent (164) occur on land (public and private) that is considered protected from development; development at the other 38 percent of sites may result in loss or fragmentation of habitat. Signed candidate conservation agreements with assurances (CCAAs) with the Service exist for one population in Ohio, one population in Wisconsin, and populations on State-owned lands in Michigan. These CCAAs include actions to mediate the stressors acting upon the populations and provide management prescriptions to perpetuate eastern massasauga rattlesnakes on these sites. The Wisconsin Department of Natural Resources (DNR) developed a CCAA for one population in Wisconsin. Through the agreement, existing savanna habitat on State land, especially important to gravid (pregnant) females, will be managed to maintain and expand open canopy habitat, restore additional savanna habitat, and enhance connectivity between habitat areas. In Ohio, a CCAA for a State Nature Preserve population addresses threats from habitat loss from the prevalence of late-stage successional vegetation, the threat of fire both pre- and post-emergence of eastern massasauga rattlesnakes, and limited connectivity through habitat fragmentation.

The State of Michigan developed a CCAA that will provide for management of eastern massasauga rattlesnakes on State-owned lands. This area includes 33 known eastern massasauga occurrences, which represents approximately 34 percent of the known extant occurrences within the State and

10 percent rangewide. In addition, other eastern massasauga rattlesnake sites on county- or municipally owned land, as well as on privately owned land, could be included in the CCAA through Certificates of Inclusion issued by the Michigan Department of Natural Resources (MI DNR) prior to the effective date of listing (see **DATES**, above). The CCAA includes management strategies with conservation measures designed to benefit the eastern massasauga rattlesnake; these management strategies will be implemented on approximately 136,311 acres (55,263 hectares) of State-owned land. Many of these management actions are ongoing, but we do not have site-specific data on these management actions to include them in our analysis in the SSA. Nonetheless, we determine that the management actions proposed will address some of the threats (for example, habitat loss, vegetative succession) impacting populations on State lands in Michigan.

We did not assess the CCAAs under our Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE policy) (68 FR 15100; March 28, 2003) because the plans cover only a small part of the range of the species, and the conservation measures in the plans will not change the overall biological status of the species.

We have information that at an additional 22 sites (that are not covered by a CCAA), habitat restoration or management, or both, is occurring; however, we do not have enough information for these sites to know if habitat management has mediated the current stressors acting upon the populations. The Faust model, however, did include these kinds of activities in the projections of trends, and, thus, our future condition analyses are based on the assumption that ongoing restoration would continue into the future. Lastly, an additional 18 populations have conservation plans in place. Although these plans are intended to manage for the eastern massasauga rattlesnake, sufficient site-specific information is not available to assess whether these restoration or management activities are currently ameliorating the stressors acting upon the population. Thus, we were unable to include the potential beneficial impacts into our quantitative analyses.

Species' Projected Future Condition

To assess the future resiliency, representation, and redundancy of the eastern massasauga rattlesnake, we used the Faust model results to predict the number of self-sustaining populations likely to persist over the next 10, 25, and 50 years, and extrapolated those proportions to the remaining presumed extant populations to forecast the number of self-sustaining populations likely to persist at the future time scales. We then predicted the change in representation and redundancy. The most pertinent results are summarized below. For the full results for all time periods, refer to pages 61–76 of the SSA report.

The projected future resiliency (the number of self-sustaining populations) varies across the eastern massasauga rattlesnake's range. In the western analysis unit, 83 percent of the modeled populations are projected to have a declining trajectory. Furthermore, 94 percent of the populations have a low probability of persistence (the probability of remaining above the quasi-extirpated threshold of 25 adult females is less than 90 percent) by year 25, and, thus, the number of forecasted populations likely to be extant declines over time. By year 50, 18 of the 20 presumed extant populations are projected to be extirpated (no individuals remain) or quasi-extirpated, with only 1 population projected to be self-sustaining. The resiliency of the western analysis unit is forecasted to decline over time. The situation is similar in the central and eastern analysis units, but to a lesser degree. In the central analysis unit, 70 percent of the modeled populations are projected to have a declining trajectory and 78 percent a low probability of persistence, and thus, by year 50, 180 of the 256 presumed extant populations are projected to be extirpated or quasi-extirpated, and 47 populations to be self-sustaining. In the eastern analysis unit, 83 percent of the modeled populations are projected to have a declining trajectory and 92 percent of the populations are projected to have a low probability of persistence, and, thus, by year 50, 65 of the 71 presumed extant populations are projected to be extirpated or quasi-extirpated, and 6 to be self-sustaining. Rangewide, 54 (16 percent) of the 347 populations that are currently presumed to be extant are projected to be self-sustaining by year 50.

We calculated the future extent of occurrence (representation) for the 57 modeled populations (Faust model) and for the populations forecasted to persist at years 10, 25, and 50 by using the counties occupied by populations to evaluate the proportions of the range falling within each analysis unit and the change in spatial distribution within each analysis unit. Our results indicate that eastern massasauga rattlesnake populations are likely to persist in all three analysis units; however, the distribution of the range is predicted to contract northeasterly, and the geographic area occupied will decline within each analysis unit over time. The results project an 80 percent reduction of the area occupied by the eastern massasauga rattlesnake rangewide by year 50, with the western analysis unit comprising most of the decline (91 percent reduction within the unit). These projected declines in extent of occurrence across the species' range and within the analysis units suggest that loss of adaptive diversity is likely to occur.

We assessed the ability of eastern massasauga rattlesnake populations to withstand catastrophic events (redundancy) by predicting the number of self-sustaining populations in each analysis unit and the spatial dispersion of those populations relative to future drought risk.

The projected future redundancy (the number and spatial dispersion of self-sustaining populations) across the eastern massasauga rattlesnake's range varies. In the western analysis unit, the risk of analysis-unit-wide extirpations from either a D2 or D3 catastrophic drought is high, given the low number of populations forecasted to be extant. Coupling this with a likely concurrent decline in population clusters (reduced spatial dispersion), the risk of analysis-unit-wide extirpation is likely even higher. Thus, the level of redundancy in the western analysis unit is projected to decline into the future.

Conversely, in the eastern analysis unit, there is little to no risk of a D2- or D3-level drought, and consequently the probability of unit-wide extirpation due to a catastrophic drought is very low. Thus, redundancy, from a catastrophic drought perspective, is not expected to decline over time in the eastern analysis unit.

Similarly, in the central analysis unit, there is little to no risk of a D3 catastrophic drought. The southern and northern portions of the central analysis unit, however, are at risk of a D2-level catastrophic drought. Losses of populations in these areas may lead to portions of the central analysis unit being extirpated and will also increase the probability of analysis-unit-wide extirpation. However, the risk of analysis-unit-wide extirpation will likely remain low given the presumed persistence of multiple populations scattered throughout low drought risk areas. Thus, from a drought perspective, the level of redundancy is not likely to be noticeably reduced in the central analysis unit (see Figure 4.3 (p. 60) in the SSA report for a detailed map). A caveat to this conclusion, however, is that the forecasted decline in extent of occurrence suggests our data are too coarse to tease out whether the forecasted decline in populations will lead to substantial losses in spatial distribution, and, thus, the risk of analysis-unit-wide extirpation might be higher than predicted. Therefore, the future trend in the level of redundancy in the central analysis unit is less clear than for either the western analysis unit or the eastern analysis unit.

Given the loss of populations to date, portions of the eastern massasauga rattlesnake's range are in imminent risk of extirpation in the near term. Specifically, our analysis suggests there is a high risk of extirpation of the western analysis unit and of southern portions of the central and eastern analysis units within 10 to 25 years. Although self-sustaining populations are expected to persist, loss of other populations within the central and eastern analysis units are expected to continue as well, and, thus, those populations are at risk of extirpation in the future. These losses have led to reductions in resiliency and redundancy across the range and may lead to irreplaceable loss of adaptive diversity across the range of the eastern massasauga rattlesnake, thereby leaving the eastern massasauga rattlesnake less able to adapt to a changing environment into the future. Thus, the viability of the eastern massasauga rattlesnake has declined and is projected to continue to decline over the next 50 years.

The reader is directed to the SSA report for a more detailed discussion of our evaluation of the biological status of the eastern massasauga rattlesnake and the influences that may affect its continued existence. Our conclusions are based upon the best available scientific and commercial data.

Summary of Changes From the Proposed Rule

In preparing this final rule, we reviewed and fully considered comments from the public and peer reviewers on the proposed rule. This final rule incorporates minor changes to our proposed listing based on the comments we received, as discussed below in Summary of Comments and Recommendations, and newly available scientific data. The SSA report was updated based on additional data provided, primarily by State fish and wildlife agencies. These data allowed us to refine site-specific information and improve our understanding of status for several populations. Thus, the final numerical results in the second version of the SSA report are slightly different from those in the first version that was used for the proposed rule. None of the new information we received changed our determination in this final rule that the eastern massasauga rattlesnake is a threatened species.

Summary of Comments and Recommendations

In the proposed rule published on September 30, 2015 (80 FR 58688), we requested that all interested parties submit written comments on the proposal by November 30, 2015. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. Newspaper notices inviting general public comment were published in USA Today. We did not receive any requests for a public hearing. All substantive information provided during the comment period has either been incorporated directly into this final determination or is addressed below.

Peer Reviewer Comments

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited review of the SSA report from 32 knowledgeable individuals with scientific expertise that included familiarity with eastern massasauga rattlesnake and its habitat, biological needs, and threats. We received responses from 21 of the peer reviewers.

We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding the eastern massasauga rattlesnake. Peer reviewer comments are addressed in an appendix to the SSA report, and in the SSA itself, as appropriate.

Federal Agency Comments

(1) Comment: The U.S. Forest Service (Huron-Manistee National Forest) stated that there is a need to differentiate between upland and lowland habitat in regard to seasonal restrictions on prescribed burning within management units of the Huron-Manistee National Forest where eastern massasauga rattlesnakes occur. The Forest Service cited a conservation plan (Kingsbury 2002) that stated that upon emerging from hibernation, most eastern massasauga rattlesnakes are lethargic and constrained by cool temperatures, and so remain in the vicinity of their wetland burrows through mid-May. They also recommended that the Service provide a framework for allowing prescribed fire in upland habitats until May 15 in ways that do not violate section 9 of the Act.

Our Response: We agree that the best available information suggests that, upon emerging from hibernation, most eastern massasauga rattlesnakes do remain lethargic, and stay in the vicinity of their burrows (usually located in wetlands) for up to several weeks, and during that time they are especially vulnerable to risks from predation, prescribed fire, or other sources of mortality. Prior to emergence from hibernation, when eastern massasauga rattlesnakes still have some protection in the confines of the burrows in which they hibernate, they are relatively protected from sources of mortality that would take place on the surface. Thus, risk of mortality caused by prescribed fire is greatest when snakes are above ground (Durbian 2006, pp. 329–330; Cross *et al.* 2015, pp. 346–347). Many populations of eastern massasauga rattlesnakes are small, and in such populations, loss of only a few individuals can have significant impacts (Seigel and Sheil 1999, p. 20), and prescribed fire was one of the most prominent stressors we identified in the SSA for the eastern massasauga rattlesnake.

Unfortunately, within the range of this species, unpredictable late winter or spring weather patterns, and resulting ground conditions (such as humidity, snow cover, prevailing winds), provide a number of constraints to land managers who need to implement prescribed fires to maintain habitats. Thus, we are also aware that a challenge to managing occupied eastern massasauga habitat with prescribed fire is determining the best time to apply fire without risking mortality. At most of the known sites within the range of the eastern massasauga rattlesnake that were included in our analysis, populations are small and vulnerable to additive mortality (any mortality beyond that which would be expected from predation or other natural factors), as could occur from poorly timed prescribed fire. While land managers often request ''cutoff'' dates before which burns can be assumed to be safe, natural variation in weather cycles can affect the dates when snakes emerge from hibernation, with fluctuations of 1 to 3 weeks not being uncommon. In addition to the conservation plan (Kingsbury 2002, entire) provided by the Forest Service, and that was also reviewed in our SSA, we discussed emergence biology of eastern massasauga rattlesnakes at the latitude of the Huron-Manistee National Forest with Dr. Bruce Kingsbury (2016, pers. comm.). Kingsbury shared additional observations of emerging eastern massasauga rattlesnakes in northern Michigan since his 2002 conservation plan; he added that his observations since 2002 now indicate that many eastern massasauga rattlesnakes that emerge from hibernation in central and northern Michigan in April begin to disperse into adjacent habitats as early as May 1. Because of this, Kingsbury cautioned against reliance on a firm calendar date as a rule by which to plan prescribed fires if unintentional mortality is to be avoided. Instead, he urged land managers to use predictive models to help forecast when eastern massasauga rattlesnakes are most likely to emerge from hibernacula in a given region and year. We thus cannot provide the framework requested by the Forest Service to conclude that use of prescribed fire before May 15 will never result in "take" of the eastern massasauga rattlesnake.

Because the issue of using prescribed fire as a tool for maintaining suitable habitat for eastern massasauga rattlesnakes is so important, but also understandably controversial (due to the potential for additive mortality), the Service funded a study (from 2010 through 2015) of rangewide phenology (relation between climate and periodic biological phenomena) of the species to better understand the factors influencing ingress and egress from hibernation. Preliminary results of that study indicate that emergence of eastern massasauga rattlesnakes from hibernation at sites throughout the range is predictable based on rising subsurface soil temperatures (King 2016, pers. comm.). In addition, regional weather stations maintained by the National Oceanic and Atmospheric Administration (NOAA) monitor soil temperatures at the strata crucial for predicting emergence. Near real-time data generated at these weather stations also are accessible to the public, and when stations are located near extant populations of the eastern massasauga rattlesnake, these could be used by land managers to determine whether emergence from hibernation is near, and thus whether burns should be avoided for the remainder of the active season. As further analyses are completed and the results of the study are made available, we will work cooperatively with interested land managers to incorporate the results into useful burn plans. Federal land management agencies, such as the Forest Service, that use prescribed fire to manage habitats occupied by the eastern massasauga rattlesnake should consult with the Service as provided by section 7(a)(2) of the Act. In addition, private and State land managers can work with the Service to develop plans and determine if permits are appropriate to conduct recovery efforts.

Comments From States

(2) Comment: A State fish and wildlife management agency (Pennsylvania Boat and Fish Commission (PBFC)), a State advisory group (Pennsylvania Biological Survey), and a private individual stated that the eastern massasauga rattlesnake has experienced a large range reduction in Pennsylvania, and current surveys confirm that extant populations remain at only three sites in the State. They further commented that the remaining populations are isolated from one another and subject to continued threats of habitat alteration, persecution, and illegal collecting.

Our Response: We thank the commenters for the detailed information. These data corroborate our analysis. We considered the continued decline of the eastern massasauga rattlesnake in Pennsylvania, as well as other States in the range of the eastern massasauga rattlesnake, in the SSA, and agree that the best available information indicates that this species is declining in Pennsylvania. Based on the status information throughout the species' range and continuing threats to the species, we determined that the eastern massasauga rattlesnake is likely to become in danger of extinction throughout its range within the foreseeable future, and thus are listing it as a threatened species.

(3) Comment: A State fish and wildlife management agency (PBFC), a State advisory group (Pennsylvania Biological Survey), and several private individuals commented that listing would benefit the eastern massasauga rattlesnake by encouraging recovery planning, surveys, outreach and education to the public, and other rangewide conservation efforts.

Our Response: After listing the species, the Service will continue to work closely with State conservation agencies, nongovernmental organizations (NGOs), and other willing partners throughout the range of the species to determine practical and comprehensive actions and outreach to conserve and recover the eastern massasauga rattlesnake.

(4) Comment: Two State fish and wildlife management agencies (PBFC and Wisconsin Department of Natural Resources (WI DNR)) commented that the Service incorporated data and comments provided by herpetologists from the commenter's staff on the SSA, and that the SSA represents the best available information on the eastern massasauga rattlesnake in their State.

Our Response: We thank the staffs of PBFC and WI DNR, as well as other State and county conservation agencies and NGOs, for assisting us in compiling the best available information on the current distribution and status of the eastern massasauga rattlesnake throughout its range and for providing review of the SSA report.

(5) Comment: A State fish and wildlife management agency (PBFC) and the Western Pennsylvania Conservancy (an NGO) commented that an Eastern Massasauga Species Action Plan for Pennsylvania was compiled in 2011, to prioritize and guide research and conservation actions at the State's extant and presumed extant sites, and noted recent conservation and management actions under that plan. A copy of the plan was provided.

Our Response: We thank the commenters for providing a copy of the plan, and we incorporated actions outlined in the plan into our revised SSA report. When the species is listed (see DATES, above), conservation and recovery planning will involve multiple stakeholders. In addition, relatively new tools (such as spatially explicit habitat models or collaborative processes such as Landscape Conservation Design) are available to plan recovery actions at landscape scales, and to involve multiple stakeholders in the planning process. After listing takes effect (see DATES, above), the Service will continue to work closely with State conservation agencies, NGOs, and other willing partners to determine practical and comprehensive conservation actions for the eastern massasauga rattlesnake.

(6) Comment: A State fish and wildlife management agency (PBFC) stated that the loss of resiliency and redundancy across the species' range within Pennsylvania leaves the eastern massasauga rattlesnake vulnerable and with little adaptability to future changes in its environment. In addition, this commenter stated that, given the small part of the eastern massasauga rattlesnake's range that is represented in Pennsylvania, the conservation actions undertaken within the State at these vulnerable, isolated sites are projected to have little impact on the overall persistence of the species without a more comprehensive, regional approach.

Our Response: We agree that loss of redundancy and loss of resiliency across the range of the eastern massasauga rattlesnake are of concern. As stated in the SSA report for the eastern massasauga rattlesnake, we used the genetic haplotypes identified by Ray *et al.* (2013) as geographic analysis units. We found variation in resiliency and redundancy within and between the three analysis units (western analysis unit, central analysis unit, and eastern analysis unit). While resiliency was lowest in the western analysis unit, there was notably low resiliency in the central analysis unit and eastern analysis unit, especially along the southern edges, which includes populations in Pennsylvania (in the eastern analysis unit). Following listing (see DATES, above), we will continue to work with our partners in State agencies as well as with local agencies, NGOs, and other interested parties to implement conservation measures for this species. We agree that, whenever possible, conservation measures undertaken as part of comprehensive regional plans have more value than actions taken on a site-by-site basis. In addition to recovery planning and other traditional tools, Landscape Conservation Design (LCD) may be an option to help catalyze such regional planning approaches for the eastern massasauga rattlesnake.

(7) Comment: A State fish and wildlife management agency (PBFC) stated that, because of the species' increasing isolation, habitat loss, and population decline, potential changes to the landscape and site conditions would have a high risk of adversely affecting Pennsylvania's eastern massasauga rattlesnake population.

Our Response: We agree that most of these factors present risks to the eastern massasauga rattlesnake, and these factors were considered in the SSA for the species. One exception was isolation, which was not evaluated as a direct stressor. While genetic isolation may operate as a stressor, our review of the literature for the SSA provides evidence that some high degree of genetic isolation in this species may be natural and pre-date European settlement; thus, isolation in and of itself is not necessarily a stressor to the species.

(8) Comment: Several commenters, including a State fish and wildlife management agency (WI DNR), provided statements supporting our determination that designating critical habitat for the eastern massasauga rattlesnake is not prudent due to the increased risks to the species if site locations are made publicly available.

Our Response: In the Critical Habitat section of this final rule, we have determined that the designation of critical habitat would increase the threat to eastern massasauga rattlesnakes from persecution, unauthorized collection, and trade; thus, designating critical habitat for the species is not prudent. Designation of critical habitat requires the publication of detailed maps and a specific narrative description of critical habitat in the **Federal Register**, and these in turn often become available through other media. We have determined that the publication of maps and descriptions outlining the locations of this species would further facilitate unauthorized collection and trade, as collectors would know the exact locations where eastern massasauga rattlesnakes occur. Due to the threat of unauthorized collection and trade, a number of biologists working for State and local conservation agencies that manage populations of eastern massasauga rattlesnakes also expressed to the Service serious concerns with publishing maps and boundary descriptions of occupied habitat areas that could be associated with critical habitat designation (Redmer 2015, pers. comm.).

(9) Comment: A State fish and wildlife management agency (WI DNR) commented that they will continue to encourage management of known eastern massasauga rattlesnake sites to address succession and other habitat concerns, and will continue to submit data and work collaboratively with the Service on eastern massasauga rattlesnake conservation.

Our Response: We thank WI DNR for their shared interest in conservation actions for the eastern massasauga rattlesnake, and for stating their interest in continuing our partnership for conserving this species following listing.

(10) Comment: WI DNR provided updated data on the status of the eastern massasauga rattlesnakes and their conservation actions at two specific sites.

Our Response: We thank WI DNR for their willingness to coordinate, for providing relevant data while we were preparing the SSA, and for providing additional information in their comments. We have incorporated that additional information into our revised SSA report.

(11) Comment: WI DNR commented that an additional conservation measure for the eastern massasauga rattlesnake in Wisconsin includes a broad incidental take permit/authorization for management work conducted within massasauga habitat (*http://dnr.wi.gov/topic/ERReview/ItGrasslands.html*).

Our Response: When the listing becomes effective (see **DATES**, above), any incidental take of eastern massasauga rattlesnakes will be prohibited under section 9 of the Act unless permitted under section 10(a)(1)(B) or section 7(a)(2) of the Act. We will work with WI DNR to clarify our respective roles and responsibilities with respect to incidental take.

(12) Comment: The Minnesota Department of Natural Resources (MN DNR) confirmed that there are no verified records of eastern massasauga rattlesnakes from within the State in the past 50 years. They stated that because of this lack of recent occurrence, they may request that the Service remove Minnesota from the eastern massasauga rattlesnake's current range.

Our Response: During our evaluation of the species, we consulted with staff from the MN DNR to assess the best available information on the species' occurrence in the State. We thank the commenter for providing additional information specific to surveys that led to historical populations in Minnesota being considered likely extirpated. We will consider a range of recovery actions following listing, and will work with local and State partners to determine and implement actions that would have the most benefit to the species. We concur that the best available information suggests that this species is likely extirpated from Minnesota, and thus Minnesota is not considered part of the current range. However, the species receives the protections of the Act wherever found; thus, if the species does occur in Minnesota in the future, it would be protected there.

(13) Comment: The MI DNR recommended that, to address public safety concerns, the Service develop a rule under section 4(d) of the Act (a "4(d) rule") that would allow people to move the snakes from "high risk environments (for example, backyards, state campgrounds, schools) to areas with low risk." They further commented that such a 4(d) rule would reduce persecution of the snakes.

Our Response: We understand that the MI DNR receives several calls each year reporting an eastern massasauga rattlesnake in or near a human dwelling and requesting assistance to remove it. A 4(d) rule, however, is not necessary to provide for the relocation of snakes from areas where people may be at risk of bodily harm. Such an action, if done on a good faith belief to protect a person from bodily harm, is already provided for under the Act without a 4(d) rule; see 16 U.S.C. 1540(a)(3) and 1540(b)(3). This provision of the Act applies to all listed species.

We also note that non-harmful actions to encourage eastern massasauga rattlesnakes to leave, stay off, or keep out of areas with frequent human use, including a residence, yard, structure, sidewalk, road, trail, foot path, or campground, would not result in take and thus will not be prohibited. For example, homeowners may use a broom or pole to move an eastern massasauga rattlesnake away from their property. When circumstances create an imminent threat to human safety, all forms of take of listed species (including harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect) are allowed to safeguard human safety. The Act's implementing regulations (50 CFR part 17) include a take exemption pursuant to the defense of human life (for threatened species, see 50 CFR 17.31, which incorporates provisions set forth at 50 CFR 17.21(c)(2)): "any person may take endangered [or threatened] wildlife in defense of his own life or the lives of others.") The regulations at 50 CFR 17.21(c)(4) require that any person taking, including killing, listed wildlife in defense of human life under this exception must notify our headquarters Office of Law Enforcement, at the address provided at 50 CFR 2.1(b), in writing, within 5 days. In addition, section 11 of the Act enumerates the penalties and enforcement of the Act. In regard to civil penalties, section 11(a)(3) of the Act states, "Notwithstanding any other provision of this [Act], no civil penalty shall be imposed if it can be shown by a preponderance of the evidence that the defendant committed an act based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered or threatened species" (16 U.S.C. 1540(a)(3)). Section 11(b)(3) of the Act contains similar language in regard to criminal violations (see 16 U.S.C. 1540(b)(3)).

Eastern massasauga rattlesnakes generally hibernate in wetlands, rather than in places occupied by people. However, in areas near wetlands or uplands with natural habitat, eastern massasauga rattlesnakes occasionally find their way into areas of high human use (for example, human-made structures, backyards, or campgrounds). If an eastern massasauga rattlesnake is encountered, it is best to not disturb it and to walk away from it. However, in areas of high human use, other responses may be necessary to protect people from bodily harm. Eastern massasauga rattlesnakes observed in areas of human use may subsequently conceal themselves as a natural defense mechanism and then later be unexpectedly encountered at close range, presenting the possibility of bodily harm. Short-distance translocation (moving from one location to another) of venomous snakes is a common method used to reduce or mitigate snake-human conflicts. In one recent study, eastern massasauga rattlesnakes relocated 200 meters (656 feet) from the capture point did not exhibit abnormal movement or basking behavior and did not return to the capture site (Harvey *et al.* 2014). Because the eastern massasauga rattlesnake is a venomous species, we advise due caution and encourage anyone wishing to move a snake to contact an appropriate State or local agency for professional expertise in handling rattlesnakes. In addition, the State or local landowner may have other legal requirements that apply to handling wildlife. Therefore, when on public lands, we encourage contacting the land manager to address the situation whenever feasible. However, anyone may take necessary action at any time to protect one's self or another person from bodily harm.

(14) Comment: MI DNR provided a Michigan Natural Features Inventory (MNFI) report with the most current eastern massasauga rattlesnake data for the State.

Our Response: We thank MI DNR and MNFI for compiling and providing this additional information. MNFI is the organization responsible for maintaining the Michigan Natural Heritage Database, which includes known historical records for species of concern, including the eastern massasauga rattlesnake, in Michigan. The database includes records for populations of extirpated, likely extirpated, unknown, and extant status. During preparation of the SSA report, the Service worked closely with MNFI to ensure that the most current, available information from the Michigan Natural Heritage Database on the status of the eastern massasauga rattlesnake in Michigan was included in our analyses. This included new records that the MNFI provided to us as late as September 2015, after we had developed the proposed listing rule. The report compiled by MNFI was added to our records and used to further document our decision.

(15) Comment: MI DNR noted, as was mentioned in the SSA report, that they are in the final stages of completing a CCAA for the eastern massasauga rattlesnake on MI DNR lands. They requested that the Service consider how Michigan's CCAA will address threats to the eastern massasauga on MI DNR lands in the final listing determination.

Our Response: A CCAA is a formal agreement between the Service and one or more parties to address the conservation needs of proposed or candidate species, or species likely to become candidates, before they become listed as endangered or threatened. Landowners voluntarily commit to conservation actions that will help stabilize or restore the species with the goal that if all other necessary landowners did the same, listing would become unnecessary. These agreements encourage conservation actions for species that are candidates for listing or are likely to become candidates. Although a single property owner's activities may not eliminate the need to list, conservation, if conducted by enough property owners throughout the species' range, can eliminate the need to list. The agreements provide landowners with assurances that their conservation efforts will not result in future regulatory obligations in excess of those they agree to at the time they enter into the agreement.

After publication of the proposed rule to list the eastern massasauga rattlesnake as a threatened species, the State of Michigan submitted to the Service a CCAA that would provide for management of eastern massasauga rattlesnakes on State-owned lands. The term of the CCAA and permit is 25 years. The CCAA includes management strategies with conservation measures designed to benefit eastern massasauga rattlesnakes; these management strategies will be implemented on approximately 136,311 acres (55,263 hectares) of State-owned land.

Management strategies beneficial to eastern massasauga rattlesnakes are currently being implemented on many sites on State-owned lands in Michigan, and are ongoing. The CCAA describes a program of continuing existing management strategies beneficial to eastern massasauga rattlesnakes and reflects the current conditions analyzed in the SSA. Existing conservation on State-owned lands in Michigan was accounted for in the SSA; the CCAA does not provide detailed site-specific information to alter that analysis. Thus, the CCAA does not alter the SSA results or projected population trends. While the actions in the CCAA are expected to address some of the stressors on many sites on State-owned lands in Michigan, the CCAA only covers a small part of the species' range; therefore, the conservation measures did not affect the overall biological status of the species.

(16) Comment: MI DNR questioned the Service's use of three analysis units to assess the species' current conditions in the SSA, and how use of those three units will affect recovery planning and, ultimately, delisting. MI DNR expressed their opinion that recovery planning be

based on the species' range and not the three analysis units.

Our Response: We identified and delineated the analysis units to assess the historical, current, and future representation of the species. Representation is an indicator of the ability of the species to respond to physical (for example, habitat, climate) and biological (for example, new diseases, predators, competitors) changes in its environment. The intent of the analysis units is to capture the breadth of adaptive diversity (genotypic (genetic makeup) and phenotypic (physical traits) diversity of the species). We evaluated available genetic and ecological information to identify areas of unique or differing genotypic and phenotypic diversity. We did not find any compelling ecological differences, but did find strong evidence of genetic variation across the range. Data indicate that the eastern massasauga rattlesnake shows high levels of genetic variation (populations can be genetically distinguished from each other) at regional and local scales. The synthesis of this genetic data supports delineating, on the basis of genetic differentiation, the three broad regions identified by Ray *et al.* (2013, entire). Although several studies showed detectable genetic differences among populations within these three broad areas, we did not have sufficient information to delineate smaller-scale units. Thus, we assessed the distribution among and within these three geographic units to evaluate changes in eastern massasauga rattlesnake representation from historical condition to the present and future. These analysis units were identified for purposes of evaluating representation in the SSA, and are not, at this point, intended to represent recovery units as might be identified during recovery planning. Any future recovery planning effort will use the best available information to promote the conservation and survival of the species.

(17) Comment: The New York Department of Environmental Conservation (NYDEC) commented that the species is listed as State endangered in New York, and that due to the limited range and vulnerability of populations, the State does not anticipate delisting the species at any point in the future.

Our Response: We considered the current status of the eastern massasauga rattlesnake in New York, as well as other States in the range of the eastern massasauga rattlesnake, in the SSA. We agree that the best available information indicates that only two populations of this species occur in New York State, and thus its conservation status is of concern there.

(18) Comment: NYDEC stated that the two populations in the State occur on lands under conservation protection: One is owned by a private conservation organization, and the other is a State Wildlife Management Area. NYDEC further commented that it has been successful at managing for eastern massasauga rattlesnakes at the State-owned site, and believes that under continued management, the species will continue to thrive at that site. Thus, NYDEC encourages the Service to endorse active habitat management practices that promote habitat for the species.

Our Response: The efforts of States and other partners to benefit the eastern massasauga rattlesnake are important, and we agree that habitat management activities to maintain appropriate vegetative structure for the eastern massasauga rattlesnake are crucial to its continued survival. However, certain management activities (for example, prescribed fire) are also known to be important stressors to the species, especially where population sizes are small or when timing of the management action increases risk (for example, just after snakes emerge from hibernation). We will continue to work closely with our partners in State and local agencies, NGOs, and any other parties interested in conserving this species to investigate best management practices and the tradeoffs between management and potential mortality to the rattlesnakes.

(19) Comment: NYDEC requested that the Service include a 4(d) rule to exempt some habitat management practices, such as woody vegetation removal, when conducted at a time and scale that makes adverse impacts to the eastern massasauga rattlesnake unlikely.

Our Response: We agree that active habitat management for the eastern massasauga rattlesnake will be crucial to long-term maintenance and recovery of existing populations. However, we believe issuance of a 4(d) rule would not be required to allow such management activities for two reasons. First, management actions may take place on a case-by-case basis, and we would like to learn more about how to lessen the risk of eastern massasauga rattlesnake mortality while still allowing appropriate habitat management to occur. Second, vegetation management actions that take place at certain times of the year when the snakes are not active (for example, during winter when snakes are hibernating underground) would not affect the species and, thus, do not require a 4(d) rule. The Act allows flexibility for us to consider a range of recovery actions following listing, and we will work with local and State partners to determine and implement actions that have the most benefit to the species.

Public Comments

(20) Comment: An NGO (the Western Pennsylvania Conservancy (WPC)) commented that they continue to work closely with PBFC on eastern massasauga rattlesnake conservation efforts, including implementation of the Eastern Massasauga Species Action Plan. In 2009–2010, habitat management plans were developed for eight private landowners in areas where eastern massasauga rattlesnakes are known to occur. WPC has implemented some of the management plans with the help of PBFC, the Pennsylvania Wildlife Commission, and the Pennsylvania Department of Conservation and Natural Resources, including habitat restoration activities funded by small foundation grants over the past 5 years.

Our Response: Following listing (see **DATES**, above), we will continue to work with our partners in State agencies as well as with local agencies, NGOs, and other interested parties to implement conservation measures for this species. Existing efforts to conserve the species or local planning documents, like those mentioned by the commenter, will be valuable in developing regional or rangewide recovery efforts.

(21) Comment: One commenter stated that it is difficult to achieve on-the-ground conservation and restoration for the eastern massasauga rattlesnake and that land protection efforts are slow and opportunities are limited.

Our Response: Limited resources are often a challenge in conservation. Following listing (see **DATES**, above), we will continue to explore opportunities to partner with State and local conservation agencies, NGOs, and other interested parties to leverage resources and find cooperative solutions to such challenges for the eastern massasauga rattlesnake.

(22) Comment: One commenter stated that not all factors that may contribute to the decline of the species were fully explored in the SSA. In particular, the commenter noted that, while the proposed rule acknowledged climate change as a factor exacerbating the threats to this species, it did not provide a quantitative analysis of the impacts nor fully account for such uncertainty.

Our Response: A recently published climate change vulnerability analysis for the eastern massasauga rattlesnake (Pomara *et al.* 2015, entire) suggests that populations in the southwestern parts of the species' range are extremely vulnerable to climate change through increasing intensity of winter drought and increasing risks of summer floods. Populations in the eastern and central parts of the species' range are vulnerable to climate variables, but to a lesser extent than the southwestern populations, and the northeastern populations are least vulnerable to climate change.

We acknowledged in the SSA report that we believe our results underestimate the risks associated with climate change, especially in Indiana and Michigan. As we move forward with recovery for the eastern massasauga rattlesnake, we will more fully investigate the effects of climate change and work towards buffering vulnerable populations.

(23) Comment: Several commenters supported listing the eastern massasauga rattlesnake. The comments included statements such as:

- Resource development (natural gas extraction and open pit mining for limestone, coal, and gravel) is a significant threat to the species;
- Significant ongoing decline and multiple continuing threats throughout the species' range support listing;
- Only small, isolated populations of the eastern massasauga rattlesnake remain, and the species should be protected before further losses occur; and
- It is important to preserve biodiversity, so this species should be protected.

Our Response: We thank these commenters for their statements. When Congress passed the Act in 1973, it recognized that our rich natural heritage is of ''aesthetic, ecological, educational, recreational, and scientific value to our Nation and its people.'' It further expressed concern that many of our nation's native plants and animals were in danger of becoming extinct. The purpose of the Act is to protect and recover imperiled species and the ecosystems upon which they depend, and thus plays a role in preserving biodiversity.

(24) Comment: One commenter stated that, as an alternative to designating critical habitat, species protection could be improved by strengthening environmental review for the eastern massasauga rattlesnake by providing more information and adding more stringent requirements on those conducting permitted activities. This commenter recommended close coordination between Federal and State agencies to achieve the appropriate level of environmental review and management to conserve the species.

Our Response: Following listing of the eastern massasauga rattlesnake (see **DATES**, above), regulatory provisions of the Act will take effect. For example, the actions of Federal agencies that may affect the species will be subject to consultation with the Service as required under section 7(a)(2) of the Act. In doing so, the Service works with the action agencies to avoid or minimize adverse effects to the species to ensure that the continued existence of the species is not jeopardized. Also following listing, we will work closely with our partners in Federal, State, and local units of government, as well as NGOs and others with an interest in the species, to identify and implement proactive measures to conserve and recover the species.

(25) Comment: Several commenters stated that critical habitat should be designated for the eastern massasauga rattlesnake. One of these commenters added that habitat is ''critical to the species' survival'' and habitat loss and degradation is the most significant threat to the species, and provided information arguing that although human persecution is a threat, and human disturbance of the snakes did change the snakes' behavior, no long-term effects were observed. They further commented that increased risk of illegal collection or persecution could be addressed through education efforts.

Our Response: We agree that outreach efforts will be important in addressing many topics related to conserving the eastern massasauga rattlesnake. However, we determined that designation of critical habitat would increase persecution, unauthorized collection, and trade threats to the eastern massasauga rattlesnake. The eastern massasauga rattlesnake is highly valued in the pet trade, and that value is likely to increase as the species becomes rarer. In addition, as a venomous species, it also is the target of persecution. Furthermore, States and other land managers have taken measures to control and restrict information on the locations of the eastern massasauga rattlesnake and to no longer make location and survey information readily available to the public. We have, therefore, determined in accordance with 50 CFR 424.12(a)(1) that it is not prudent to designate critical habitat for the eastern massasauga rattlesnake (see Critical Habitat, below, for a full discussion).

(26) Comment: One commenter stated that a rattlesnake does not contribute meaningfully to its ecosystem; thus, the Service should focus on more important and less loathsome species.

Our Response: While the eastern massasauga rattlesnake is a venomous species, and we are aware that this is a reason some people may fear it, the species is considered to be among the more shy and docile species of North American rattlesnakes. Eastern massasauga rattlesnakes are known to eat voles, mice, other small mammals, small birds, amphibians, and even other species of snakes. Predatory birds (such as hawks) and mammals (such as raccoons) are also known to prey on eastern massasauga rattlesnakes. Thus, they do have a function within ecosystems where they occur. Finally, there are no provisions in the Act that allow us to distinguish between species that are popular and those that are disliked. We used the best available scientific and commercial data to determine that the eastern massasauga rattlesnake warrants listing as a threatened species.

(27) Comment: One commenter stated that public education will be an important component of conservation for the eastern massasauga rattlesnake.

Our Response: We thank the commenter and agree with this statement. We are aware that, under rare circumstances, bites from a venomous snake, such as the eastern massasauga rattlesnake, could present some risk to human health and safety. We are also aware that this is a reason why some people fear the eastern massasauga rattlesnake. Since the species became a candidate for listing in 1999, the Service has worked closely with our partners to provide outreach through producing or funding print and digital outreach materials, providing staff as speakers, and also responding to questions from the media pertaining to this species. Following listing (see **DATES**, above), this need will not change, and it is our intent to continue to work with partners to ensure that current information on the role played by this species is available to the public.

(28) Comment: The Illinois Farm Bureau expressed concern that ''certain pesticide use'' was included in the proposed rule as an activity that may ''result in a violation of section 9 of the Act.'' They stated that the SSA report does not provide supporting evidence that pesticides are a stressor. They requested that ''certain pesticide use'' be removed from the list of activities that may result in a violation of section 9.

Our Response: Based on this comment, we took a closer look at the risk to the species associated with pesticide use and have removed ''certain pesticide use'' from the list of activities that may result in a violation of section 9 of the Act under the

Available Conservation Measures section of this final rule. We included pesticide use in the original list of potential threats due to the potential for impacts to populations of burrowing crayfishes upon which the eastern massasauga rattlesnake relies (by hibernating in the burrows of these crayfish); however, this link is not strongly substantiated. If additional supporting information is found that pesticides may pose a threat to the burrowing crayfishes and the eastern massasauga rattlesnake, we may again recognize this in the future. We note that any determination of whether an activity results in prohibited "take" of an eastern massasauga rattlesnake is case-specific and independent of our discussion in the proposed or final listing rules.

(29) Comment: The Illinois Farm Bureau requested that, as an important stakeholder, they should be involved in a "robust stakeholder engagement process" to develop best management practices (BMPs) and avoidance measures that protect the eastern massasauga rattlesnake.

Our Response: Extant populations of the eastern massasauga rattlesnake are now extremely rare in Illinois (perhaps fewer than six populations remaining), and occur primarily on public conservation lands. This, in turn, makes encounters with this species in Illinois very rare. However, several core areas occupied by the remaining Illinois populations are adjacent to private lands that are in agricultural use. Because of this, we believe it is important to remaining engaged with the Illinois Farm Bureau and potentially affected private landowners as stakeholders. We will also work closely to follow the lead of the Illinois Department of Natural Resources, which has a successful track record of working with private land owners (including farmers) in areas where eastern massasauga rattlesnakes occur to increase awareness of the conservation challenges faced by this species.

(30) Comment: FirstEnergy commented that the eastern massasauga rattlesnake is of interest to its 10 operating companies, as populations occur in their service area. They further commented that they use integrated vegetation management (IVM) to maintain grassland habitats within and along transmission corridors, thus providing ideal habitat for species like the eastern massasauga rattlesnake. They claimed that listing the eastern massasauga rattlesnake could have significant impacts on their operations in Pennsylvania and Ohio, from affecting new transmission line construction to routine transmission corridor maintenance, which could affect their ability to provide essential services to millions of people. They requested that, because maintenance and expansion of transmission corridors is beneficial to the conservation of the eastern massasauga rattlesnake (by managing succession), the Service consider a 4(d) rule specific to transmission corridors.

Our Response: While a number of populations of the eastern massasauga rattlesnake are considered to be extant in Pennsylvania and Ohio, many of those populations occur in scattered locations. While the limits of the species' range depicted on the map (see Figure 1, above) give the appearance that this species is widespread, many actions that would be expected to affect the species where it does occur may, in reality, take place in areas where it does not. In cases where proximity to a known location is uncertain, the commenter, or similar entities, can contact the Service's Ecological Services field offices for clarification and to address specific issues related to their needs. Also, in cases where an action is regulated or permitted by another Federal agency (for example the Federal Energy Regulatory Commission (FERC)), consultation with the Service under section 7(a)(2) of the Act would also provide opportunities to determine best management practices in the event that the action may affect the species. There are other provisions of the Act that allow for the consideration of such management actions on a case-by-case basis; thus issuance of a species-specific 4(d) rule is not appropriate.

(31) Comment: A county government agency (Forest Preserve District of Will County, Illinois) stated that their land holdings include a now-extirpated population of eastern massasauga rattlesnake and provided supporting information. They also stated that they hoped listing would allow additional conservation efforts and possible reintroduction into previously occupied lands.

Our Response: We considered the best available data, including historical occurrences and the knowledge of local species experts, in conducting our SSA, and we also considered the population in Will County, Illinois, to be extirpated. We thank the commenter for providing additional information specific to surveys that led to this location being considered extirpated. We have incorporated that additional information into our revised SSA report. We will consider a range of recovery actions following listing and will work with local and State partners to determine and implement actions that would have the most benefit to the species.

(32) Comment: An individual reports having seen two eastern massasauga rattlesnakes in New Brunswick, Canada, but the commenter did not provide any documentation or supporting evidence.

Our Response: We considered the best available data, including historical occurrences and the knowledge of local species experts, in this listing determination. Because the eastern massasauga rattlesnake also occurs in Canada, we coordinated with colleagues from the responsible Federal (Parks Canada) and Provincial (Ontario Ministry of Resources and Forestry) governments in Canada in compiling records used in our SSA. We are aware of no documented records of the eastern massasauga rattlesnake in New Brunswick, and, as such, we do not consider this area to be part of the species' historical range. If, however, the species is documented from localities outside of the range as we currently understand it, we will update our records accordingly.

(33) Comment: One industry group urged the Service to endorse the integrated vegetation management (IVM) BMPs they implement, and expressed their strong belief that through close coordination between the Service and pipelines and utility companies utilizing IVM BMPs, they can help be part of the solution towards restoring populations of eastern massasauga rattlesnake.

Our Response: We thank the commenter for their suggestion and look forward to working collaboratively with landowners and managers from the public, private, and industry sectors following listing. Also, while the eastern massasauga rattlesnake has a broad geographic range, in many cases extant populations occur in widely scattered locations. Thus, instances where populations actually do occur close to certain project areas may actually be fairly limited. In cases where proximity to a known location is uncertain, the commenter, or similar entities, can contact the Service's Ecological Services field offices for clarification and to proactively address specific issues related to their needs. Also, in cases where an action is authorized, funded, or carried out by another Federal agency (for example, FERC), consultation with the Service under section 7(a)(2) of the Act would also provide opportunities to determine best management practices in the event that the action may affect the species.

(34) Comment: One commenter stated that fire management is an important component of maintaining habitat for

the eastern massasauga rattlesnake. They further commented that prairie species, like the eastern massasauga rattlesnake, are adapted to fire; thus, if fire is used appropriately, individuals can easily move to safety and very few will be killed.

Our Response: As stated in our response to Comment 1, above, we agree that the eastern massasauga rattlesnake is a species that occurs primarily within habitats that are dependent on periodic fires to maintain appropriate vegetative structure. Suppression of wildfires following European settlement has allowed degradation of many such plant communities through succession by woody vegetation, and land managers often use prescribed fire as a management technique to maintain these communities so that woody canopies are not established. However, because many of the remaining populations of the eastern massasauga rattlesnake are already small, and vulnerable to loss of individuals (Faust *et al.* 2011, pp. 59–60; Seigel and Shiel 1999, pp. 19–20), mortality resulting from prescribed fire was one of the most prominent stressors identified by Faust *et al.* (2011, pp. 12–16) and in the SSA. Please refer to our response to Comment 1, above, for more details regarding the use of prescribed fire.

(35) Comment: One commenter recommended that the Service not issue any rules that would impinge upon the private property rights of individual citizens on non-public lands. They further stated that there is no need to set aside specific lands or take private property to benefit this species, and that private landowners should only be required to participate on a voluntary basis.

Our Response: The Service works proactively with private landowners who want to voluntarily take measures to help conserve listed species on their property. We do not take private lands to benefit listed species. In cases where we acquire lands (for example, through fee-simple purchase, or through providing funding to our partners in State and local government, or to NGOs) to benefit listed species, it is the Service's policy that purchases be made from willing sellers, and that fair market price be paid. In cases where private landowners propose legal activities or uses of their lands that may lead to incidental take of listed species, the Act provides for mechanisms (such as habitat conservation plans) that allow interested parties to find collaborative ways to minimize and mitigate impacts to the species while still allowing them to proceed with their proposed activities. Similarly, if proposed land uses require actions (for example issuance of Federal permits) by other Federal agencies, section 7(a)(2) of the Act allows the action agency to consult with the Service to ensure that the action will not jeopardize listed species.

(36) Comment: One commenter specified that it is imperative to keep people safe on public lands. Thus, they recommended that the State natural resource agencies have the clear ability to remove snakes from areas where there is a high likelihood the snakes will come into contact with people. Another commenter stated that the eastern massasauga rattlesnake poses a risk to livestock and pets in the summer months when the snakes are sunning themselves on roads, field edges, lawns, and rock piles. A third commenter added that listing the eastern massasauga rattlesnake will not protect it, as people who feel threatened by the snakes will continue to kill them and will not report it.

Our Response: The Act includes provisions to allow flexibility to remove individual snakes from situations where they present a risk to human health or safety. These provisions include the potential for both lethal and nonlethal take, and the situations in which these options are permissible are discussed above under our response to Comment 13. We also note that non-harmful actions to encourage eastern massasauga rattlesnakes to leave, stay off, or keep out of areas with frequent human use, including a residence, yard, structure, sidewalk, road, trail, foot path, or campground, would not result in take and thus are not prohibited. For example, maintenance of mowed lawn in areas of regular human use to discourage eastern massasauga rattlesnakes from entering these areas is acceptable.

(37) Comment: One commenter stated that *Sistrurus catenatus* populations east of the Mississippi are divided into two genetic units: a "western" unit consisting of individuals from populations in Illinois and Wisconsin and an "eastern" unit consisting of all other populations. The commenter stated that these populations are weakly phylogenetically distinct from each other and historical modeling suggests that eastern populations are derived from western populations through a post-glacial colonization process. The "western" unit is roughly comparable to the "western" unit proposed by Ray *et al.* (2013, entire), while the "eastern" unit is consistent with the "central and eastern" units proposed by Ray *et al.* (2013, entire). The same commenter provided data based on genetic analysis of tissue samples from eastern massasauga rattlesnakes from northeast Iowa, indicating that snakes in the sampled population are genetically distinct from other eastern massasauga rattlesnake populations. Those data indicate that snakes in this population are of hybrid origin consisting of a mixture of approximately 80 percent genetic markers specific to the eastern massasauga rattlesnake and 20 percent genetic markers specific to the western massasauga rattlesnake (*Sistrurus tergeminus*). The commenter further stated that modeling indicates that they originated through a historical hybridization event between these species within the last 10,000 years, likely as a result of shifting species distributions due to post-glacial environmental effects. The commenter stated that the conservation status of these northeast Iowa populations should be assessed.

Our Response: We appreciate the information provided on the emerging science on genetics and taxonomy of eastern massasauga rattlesnakes. We hope to continue the close working relationship with the commenter as the science advances. The data on genetic haplotypes described by Ray *et al.* (2013, entire) have been peer-reviewed and published. Furthermore, these haplotypes are current recognized by the American Zoological Association in managing their captive populations. Thus, we used the genetic haplotypes of Ray *et al.* (2013, entire) to delineate our analysis units into a western analysis unit, a central analysis unit, and an eastern analysis unit. We understand that the commenter is also researching this topic and has stated intent to publish it in a peer-reviewed journal. The Act requires us to use the best available data in decision making, and we hope to continue the close working relationship with the commenter as the genetic science on the species advances.

With regard to the detection of possible past hybridization in the Iowa population, we thank this commenter for providing new information. Since this comment was submitted, we have discussed this topic further with the commenter. Because the population in question is comprised primarily of genetic markers of the eastern massasauga rattlesnake, we still consider the northeast Iowa individuals to be eastern massasauga rattlesnakes.

(38) Comment: The Nature Conservancy's Indiana Office provided an overview of the status of eastern massasauga rattlesnake populations at sites they own in Indiana and that historically supported the species.

Our Response: We thank the commenter for providing additional information on the historical occurrence of the eastern massasauga rattlesnake on their land holdings, and we have added it to information gathered from the Natural Heritage Database as provided by the Indiana Department of Natural Resources so that it may augment our data on the species.

(39) Comment: One commenter stated that there is no evidence that the eastern massasauga rattlesnake existed in Missouri, and that populations in eastern Missouri should be considered as western massasauga rattlesnakes, a different species. The commenter stated that populations of the eastern massasauga rattlesnakes occurring east of the Mississippi River warrant protection.

Our Response: In evaluating the taxonomy and distribution of the eastern massasauga rattlesnake, we considered the best available scientific information (see pages 8–9 of the SSA report). While recent genetic studies showed that extant populations in central and northwestern Missouri belong to the western massasauga rattlesnake (*Sistrurus tergeminus*), no useful tissues from snakes in extreme eastern Missouri (St. Louis and Warren Counties) were available to the researchers for inclusion in the genetic studies because those populations are likely extirpated. This was confirmed during coordination between the Service and the responsible State fish and wildlife management agency (Missouri Department of Conservation). However, published studies on phenotypic variation (especially color pattern) of massasauga rattlesnakes from throughout Missouri—including the historical, but now likely extirpated populations in extreme eastern Missouri—indicate that the latter populations could be phenotypically included within the eastern massasauga rattlesnake. Recently extirpated, historical populations of the eastern massasauga rattlesnake were known from the adjacent part of Illinois, less than 19 miles (30 kilometers) from the historical eastern Missouri populations. In addition, genetic studies of massasauga rattlesnakes in Iowa indicate that the eastern massasauga genotype is present there (though these are also of likely past hybridization), well west of the Mississippi River. In the absence of better information on the taxonomic identity of the likely extirpated massasauga populations in extreme eastern Missouri, we have included those populations within the historical range of the eastern massasauga rattlesnake.

(40) Comment: One commenter stated that the eastern massasauga rattlesnake is more prevalent than MI DNR or the Service estimate and that the species is common in northern Michigan.

Our Response: It is widely recognized that Michigan still harbors a greater number of extant populations of the eastern massasauga rattlesnake than any of the other nine States and the one Canadian Province where the species occurred historically. We coordinated with our partner State fish and wildlife agencies, consulted the most current information from Natural Heritage Databases, and solicited information from species experts for each State and for Ontario to compile the most current data on the species. In addition to these scientific sources, we sought out public comment and data through the proposed listing rule's public comment period. In Michigan specifically, MNFI houses the Natural Heritage Database; they, among others, provided input on the Michigan populations. Based on these data, historically and currently, Michigan harbors a greater number of extant populations than any of the other nine States and Ontario. There are 259 known populations of eastern massasauga rattlesnake in Michigan; this is 46 percent of all known populations rangewide. Of these, 158 (61 percent) are believed to persist today and another 47 have unknown status; the Michigan populations represent 59 percent of all known extant populations rangewide. Thus, compared to other localities, the eastern massasauga rattlesnake was historically and continues to be more prevalent in Michigan than in any other State. We acknowledge that there may still be some undocumented populations remaining, especially in Michigan. We recommend that individuals with specific knowledge of populations contact MNFI to ensure the locations of eastern massasauga rattlesnake are known.

(41) Comment: Several commenters stated that the species should be listed as endangered rather than threatened, but did not provide further rationale or new evidence in support of this recommendation.

Our Response: For reasons discussed in the Determination section of this final rule, the Service has determined that the eastern massasauga rattlesnake meets the Act's definition of a threatened species, rather than an endangered species.

Determination

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species based on: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination.

We have carefully assessed the best scientific and commercial data available regarding the past, present, and predicted future condition of the eastern massasauga rattlesnake and how threats are affecting the species now and into the future. The species faces an array of threats that have and will likely continue (often increasingly) to contribute to declines at all levels (individual, population, and species). The loss of habitat was historically, and continues to be, the threat with greatest impact to the species (Factor A), either through development or through changes in habitat structure due to vegetative succession. Disease, new or increasingly prevalent, is another emerging and potentially catastrophic threat to eastern massasauga rattlesnake populations (Factor C) that is likely to affect the species in the foreseeable future. As population sizes decrease, localized impacts, such as collection and persecution of individuals, also increases the risk of extinction (Factor B). These stressors are chronic and are expected to continue with a similar magnitude of impact into the future. Additionally, this species is vulnerable to the effects of climate change through increasing intensity of winter droughts and increasing risk of summer floods (Factor E), particularly in the southwestern part of its range (Pomera *et al.* undated, unpaginated; Pomera *et al.* 2014, pp. 95–97).

Some conservation actions (for example, management of invasive species and woody plant encroachment, timing prescribed fires to avoid the active season) are currently in place, and provide protection and enhancement to some eastern massasauga rattlesnake populations (see pp. 43–45 in the SSA report for a full discussion). However, our analysis projects that eastern massasauga rattlesnake populations will continue to decline even if current conservation measures are continued into the future. As a result of these factors, the number and health of eastern massasauga rattlesnake populations are anticipated to decline across the species' range, particularly in the southwestern portions of the range, where large losses relative to historical conditions have already occurred.

Further, the reductions in eastern massasauga rattlesnake population numbers, distribution, and health forecast in the SSA report likely represent an overly optimistic scenario for the species, and future outcomes may be worse than predicted. Because of the type of information available to us, the quantitative analysis assumes that threat magnitude and pervasiveness remain constant into the future, but it is more likely that the magnitude of threats will increase into the future throughout the range of the species (for example, the frequency of drought and flooding events are likely to increase) or that novel threats (for example, new pathogens) may arise. In addition, some currently identified threats are not included in the quantitative analysis (for example, disease, road mortality, persecution/collection, and impacts from climate change), because we lack specific, quantitative information on how these factors may affect the species in the future. These factors and their potential effects on the eastern massasauga rattlesnake were discussed and considered qualitatively as part of the determination.

The species' viability is also affected by losses of populations from historical portions of its range, which may have represented unique genetic and ecological diversity. The species is extirpated from Minnesota and Missouri, and many populations have been lost in the western part of the species' range. Rangewide, the extent of occurrence is predicted to decline by 80 percent by year 50. Actual losses in extent of occurrence will likely be greater than estimated because of the methodology used in our analysis, as discussed above.

The Act defines an endangered species as any species that is "in danger of extinction throughout all or a significant portion of its range" and a threatened species as any species that is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." A key statutory difference between an endangered species and a threatened species is the timing of when a species may be in danger of extinction, either now (endangered species) or in the foreseeable future (threatened species). Based on the biology of the eastern massasauga rattlesnake and the degree of uncertainty of future predictions, we find that the "foreseeable future" for the species is best defined as 50 years. Forecasting to 50 years, the current threats are still reliably foreseeable at the end of that time span based on models, available information on threats impacting the species, and other analyses; however, we cannot reasonably predict future conditions for the species beyond 50 years. Our uncertainty in forecasting the status of the species beyond 50 years is also increased by our methodology of extrapolating from a subset of modeled populations to all extant or potentially extant populations.

We find that the eastern massasauga rattlesnake is likely to become endangered throughout its entire range within the foreseeable future based on the severity and pervasiveness of threats currently impacting the species, the projected loss of populations rangewide (loss of resiliency and redundancy), and the projected loss of its distribution within large portions of its range. This loss in distribution could represent a loss of genetic and ecological adaptive diversity, as well as a loss of populations from parts of the range that may provide future refugia in a changing climate. Furthermore, many of the currently extant populations are experiencing high magnitude threats. Although these high magnitude threats are not currently pervasive rangewide, they are likely to become pervasive in the foreseeable future as they expand and impact additional populations throughout the species' range. Therefore, on the basis of the best available scientific and commercial data, we determine that the eastern massasauga rattlesnake is likely to become an endangered species within the foreseeable future throughout all of its range, and, thus, we are listing it as a threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

We find that an endangered species status is not appropriate for the eastern massasauga rattlesnake. In assessing whether the species is in danger of extinction, we used the plain language understanding of this phrase as meaning "presently in danger of extinction." We considered whether extinction is a plausible condition as the result of the established, present condition of the eastern massasauga rattlesnake. Based on the species' present condition, we find that the species is not currently in danger of extinction. The timeframe for conditions that render the species to be in danger of extinction is beyond the present. While the magnitude of threats affecting populations is high, threats are not acting at all sites at a sufficient magnitude to result in the species presently being in danger of extinction. Additionally, some robust populations still exist, and we anticipate they will remain self-sustaining.

The SSA results likely represent an overly optimistic scenario for this species (see pp. 87–88 of the SSA report for a list of assumptions and their expected effect). For example, the analysis treated populations of unknown status as if they were all extant, likely resulting in an overestimate of species' viability. Thus, we considered whether treating the populations with an "unknown" status as currently extant in the analysis had an effect on the status determination. We examined whether the number of self-sustaining populations would change significantly over time if we instead assumed that all populations with an "unknown" status were extirpated. The results are a more severe projected decline in the eastern massasauga rattlesnake's status than our analysis projects when we assign the unknown status populations to the "extant" category, but not to the extent that we would determine the species to be currently in danger of extinction.

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or is likely to become so throughout all or a significant portion of its range. Because we have determined that the eastern massasauga rattlesnake is likely to become in danger of extinction within the foreseeable future throughout all of its range, no portion of its range can be "significant" for purposes of the definitions of "endangered species" and "threatened species." See the Final Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species" (79 FR 37578; July 1, 2014).

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features:

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as: An area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.*, range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (for example, migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use, and the use of, all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Critical habitat designation does not allow the government or public to access private lands, nor does it require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act, but even if consultation leads to a finding that the action would likely cause destruction or adverse modification of critical habitat, the resulting obligation of the Federal action agency and the landowner is not to restore or recover the species, but rather to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features, we focus on the specific features that support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed if we determine that such areas are essential for the conservation of the species. We will determine whether unoccupied areas are essential for the conservation of the species by considering the life-history, status, and conservation needs of the species. This will be further informed by any generalized conservation strategy, criteria, or outline that may have been developed for the species to provide a substantive foundation for identifying which features and specific areas are essential to the conservation of the species and, as a result, the development of the critical habitat designation. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential to the conservation of the species and may be included in the critical habitat designation.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. For example, they require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species, the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) section 9 of the Act's prohibitions on taking any individual of the species, including taking caused by actions that affect habitat. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, we designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the designation of critical habitat is not prudent when one or both of the following situations exist:

(1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or

(2) Such designation of critical habitat would not be beneficial to the species.

In determining whether a designation would not be beneficial, the factors the Service may consider include but are not limited to: Whether the present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or whether any areas meet the definition of "critical habitat." In our proposed listing rule, we determined that both of the above circumstances applied to the eastern massasauga rattlesnake. However, under our updated critical habitat regulations at 50 CFR 424.12 (81 FR 7414; February 11, 2016), we cannot conclude that critical habitat designation would not be beneficial to the species because we have found that there are threats to the species' habitat (the present or threatened destruction, modification, or curtailment of its habitat or range (Factor A) is a threat to the species). However, we still find that designation of critical habitat is not prudent under the first circumstance because we have determined that the eastern massasauga rattlesnake is threatened by taking or other human activity and that identification of critical habitat can be expected to increase the degree of threat to the species.

Overutilization in the form of poaching and unauthorized collection (Factor B) of the eastern massasauga rattlesnake for the pet trade is a factor contributing to declines, and remains a threat with significant impact to this species, which has high black market value. For example, an investigation into reptile trafficking reports documented 35 eastern massasauga rattlesnakes (representing nearly one entire wild source population) collected in Canada and smuggled into the United States, most destined for the pet trade (Thomas 2010, unpaginated). Snakes in general are known to be feared and persecuted by people, and venomous species even more so (Ohman and Mineka 2003, p. 7; Whitaker and Shine 2000, p. 121). As a venomous snake, the eastern massasauga rattlesnake is no exception, with examples of roundups or bounties for them persisting through the mid-1900s (Bushey 1985, p. 10; Vogt 1981; Wheeling, IL, Historical Society Web site accessed 2015), and more recent examples of persecution in Pennsylvania (Jellen 2005, p. 11) and Michigan (Baily *et al.* 2011, p. 171). The process of designating critical habitat would increase human threats to the eastern massasauga rattlesnake by increasing the vulnerability of this species to unauthorized collection and trade, or to persecution, through public disclosure of its locations. Designation of critical habitat requires the publication of maps and a specific narrative description of critical habitat in the **Federal Register**. The degree of detail in those maps and boundary descriptions is far greater than the general location descriptions provided in this final rule to list the species as a threatened species. Furthermore, a critical habitat designation normally results in the news media publishing articles in local newspapers and special interest Web sites, usually with maps of the critical habitat. We have determined that the publication of maps and descriptions outlining the locations of this species would further facilitate unauthorized collection and trade, as collectors would know the exact locations where eastern massasauga rattlesnakes occur. While eastern massasauga rattlesnakes are cryptic in coloration, they can still be collected in high numbers during certain parts of their active seasons (for example, spring egress from hibernation or summer gestation). Also, individuals of this species are often slow-moving and have small home ranges. Therefore, publishing specific location information would provide a high level of assurance that any person going to a specific location would be able to successfully locate and collect specimens, given the species' site fidelity and ease of capture once located. Due to the threat of unauthorized collection and trade, a number of biologists working for State and local conservation agencies that manage populations of eastern massasauga rattlesnakes have expressed to the Service serious concerns with publishing maps and boundary descriptions of occupied habitat areas that could be associated with critical habitat designation (Redmer 2015, pers. comm.). Designating critical habitat could negate the efforts of State and local conservation agencies to restrict access to location information that could significantly affect future efforts to control the threat of unauthorized collection and trade and persecution of eastern massasauga rattlesnakes.

Summary of Prudency Determination

We have determined that designating critical habitat for the eastern massasauga rattlesnake is not prudent. Designation of critical habitat would increase the threats to the eastern massasauga rattlesnake from persecution and unauthorized collection and trade. A limited number of U.S. species listed under the Act have commercial value in trade. The eastern massasauga rattlesnake is one of them. Due to the market demand and willingness of individuals to collect eastern massasauga rattlesnakes without authorization, and the willingness of others to kill them out of fear or wanton dislike, we have determined that any action that publicly discloses the location of eastern massasauga rattlesnakes (such as critical habitat) puts the species in further peril. Many populations of the eastern massasauga rattlesnake are small, and the life history of the species makes it vulnerable to additive loss of individuals (for example, loss of reproductive adults in numbers that would exceed those caused by predation and other non-catastrophic natural factors), requiring a focused and comprehensive approach to reducing threats. One of the basic measures to protect eastern massasauga rattlesnakes from unauthorized collection and trade is restricting access to information pertaining to the location of the species' populations. Publishing maps and narrative descriptions of eastern massasauga rattlesnake critical habitat would significantly affect our ability to reduce the threat of persecution, as well as unauthorized collection and trade. We have, therefore, determined in accordance with 50 CFR 424.12(a)(1) that it is not prudent to designate critical habitat for the eastern massasauga rattlesnake.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. The recognition of a species, through listing, results in public awareness, and conservation by Federal, State, Tribal, and local agencies; private organizations; and individuals. The Act encourages cooperation with the States and other countries and requires that recovery actions be carried out for all listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to address the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a draft and final recovery plan. The recovery plan also identifies recovery criteria for review of when a species may be ready for downlisting or delisting, and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. When completed, the draft recovery plan and the final recovery plan will be available on our Web site (*http://www.fws.gov/endangered*), or from our Chicago Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (for example, restoration of native vegetation) and management, research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

Following publication of this final rule, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the States of Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, New York, Ohio, Pennsylvania, and Wisconsin will be eligible for Federal funds to implement management actions that promote the protection or recovery of the eastern massasauga rattlesnake. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants.*

Please let us know if you are interested in participating in recovery efforts for the eastern massasauga rattlesnake. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Federal agency actions within the species' habitat that may require conference or consultation or both as described in the preceding paragraph include management and any other landscape-altering activities on Federal lands administered by the Service (Upper Mississippi National Wildlife and Fish Refuge, Wisconsin), U.S. Forest Service (Huron-Manistee National Forest, Michigan), National Park Service (Indiana Dunes National Lakeshore, Indiana), or military lands administered by branches of the Department of Defense (Fort Grayling, Michigan); flood control projects (Lake Carlyle, Illinois) and issuance of section 404 Clean Water Act (33 U.S.C. 1251 *et seq.*) permits by the U.S. Army Corps of Engineers; construction and maintenance of roads or highways by the Federal Highway Administration; and construction and maintenance of pipelines or rights-of-way for transmission of electricity, and other energy related projects permitted or administered by the Federal Energy Regulatory Commission.

Under section 4(d) of the Act, the Service has discretion to issue regulations that we find necessary and advisable to provide for the conservation of threatened species. The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to threatened wildlife. The prohibitions of section 9(a)(1) of the Act, as applied to threatened wildlife and codified at 50 CFR 17.31, make it illegal for any person subject to the jurisdiction of the United States to take (including harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these) threatened wildlife within the United States or on the high seas. In addition, it is unlawful to import; export; deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity; or sell or offer for sale in interstate or foreign commerce any listed species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to employees of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving threatened wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.32. With regard to threatened wildlife, a permit may be issued for the following purposes: For scientific purposes, to enhance the propagation or survival of the species, for economic hardship, for zoological exhibition, for educational purposes, and for incidental take in connection with otherwise lawful activities. There are also certain statutory exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a final listing on proposed and ongoing activities within the range of the listed species. Based on the best available information, the following activities may potentially result in a violation of section 9 of the Act; this list is not comprehensive:

(1) Development of land or the conversion of native land to agricultural land, including the construction of any related infrastructure (for example, roads, bridges, railroads, pipelines, utilities) in occupied eastern massasauga rattlesnake habitat;

(2) Certain dam construction: In an area where the dam alters the habitat from native land types (for example, grassland, swamp, fen, bog, wet prairie, sedge meadow, marshland, peatland, floodplain forest, coniferous forest) causing changes in hydrology at hibernacula or where the dam causes fragmentation that separates snakes from hibernacula or gestational sites;

(3) Post-emergent prescribed fire: Prescribed burns to control vegetation that are conducted after snakes have emerged from their hibernacula and are thus exposed to the fire;

(4) Post-emergent mowing for habitat management: Mowing of vegetation after snakes have emerged from hibernacula can cause direct mortality by contact with blades or being run over by tires on mower;

(5) Water level manipulation: Flooding or hydrologic drawdown affecting eastern massasauga rattlesnake individuals or habitat, particularly hibernacula;

(6) Certain research activities: Collection and handling of eastern massasauga rattlesnake individuals for research that may result in displacement or death of the individuals; and

(7) Poaching, collecting, or persecuting individuals.

Based on the best available information, the following actions are unlikely to result in a violation of section 9 of the Act, if these activities are carried out in accordance with existing regulations and permit requirements; this list is not comprehensive:

(1) Pre-emergent fire: Prescribed burns to control vegetation occurring prior to eastern massasauga rattlesnake emergence from hibernacula (typically in late March to early April); and

(2) Pre-emergent mowing or other mechanical vegetation removal: Mowing or cutting of vegetation prior to eastern massasauga rattlesnake emergence from hibernacula.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Chicago Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Required Determinations

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with listing a species as an endangered or threatened species under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* and upon request from the Chicago Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this final rule are staff members of the Midwest Regional Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.11(h) by adding an entry for "Rattlesnake, eastern massasauga" to the List of Endangered and Threatened Wildlife in alphabetical order under REPTILES to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
* *	* *	*	*	*
REPTILES				
* *	* *	*	*	*
Rattlesnake, eastern massasauga	*Sistrurus catenatus*	Wherever found	T	[*Insert **Federal Register** citation*]; 9/30/16.
* *	* *	*	*	*

Dated: September 21, 2016.

Stephen Guertin,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2016–23538 Filed 9–29–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 100812345–2142–03]

RIN 0648–XE896

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; 2016 Commercial Accountability Measures and Closure for South Atlantic Greater Amberjack

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS implements accountability measures (AMs) for commercial greater amberjack in the exclusive economic zone (EEZ) of the South Atlantic. NMFS projects commercial landings of greater amberjack will reach the commercial annual catch limit (ACL) by October 4, 2016. Therefore, NMFS closes the commercial sector for greater amberjack in the South Atlantic EEZ on October 4, 2016, and it will remain closed until the start of the next fishing year on March 1, 2017. This closure is necessary to protect the greater amberjack resource.

DATES: This rule is effective at 12:01 a.m., local time, October 4, 2016, until 12:01 a.m., local time, March 1, 2017.

FOR FURTHER INFORMATION CONTACT: Mary Vara, NMFS Southeast Regional Office, telephone: 727–824–5305, email: *mary.vara@noaa.gov*.

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic includes greater amberjack and is managed under the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP). The FMP was prepared by the South Atlantic Fishery Management Council and is implemented by NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

The commercial ACL for greater amberjack is equivalent to the commercial quota. The commercial quota for greater amberjack in the South Atlantic is 769,388 lb (348,989 kg), gutted weight, as specified in 50 CFR 622.190(a)(3).

Under 50 CFR 622.193(k)(1), NMFS is required to close the commercial sector for greater amberjack when the commercial ACL (commercial quota) is reached, or is projected to be reached, by filing a notification to that effect with the Office of the Federal Register. NMFS projects that commercial landings of South Atlantic greater amberjack will reach the commercial ACL by October 4, 2016. Accordingly, the commercial sector for South Atlantic greater amberjack is closed effective at 12:01 a.m., local time, October 4, 2016, until 12:01 a.m., local time, March 1, 2017.

The operator of a vessel with a valid Federal commercial vessel permit for South Atlantic snapper-grouper with greater amberjack on board must have landed and bartered, traded, or sold such greater amberjack prior to 12:01 a.m., local time, October 4, 2016. During the commercial closure, harvest and possession of greater amberjack in or from the South Atlantic EEZ is limited to the bag and possession limits, as specified in § 622.187(b)(1) and (c)(1). Also during the commercial closure, the sale or purchase of greater amberjack taken from the South Atlantic EEZ is prohibited. The prohibition on sale or purchase does not apply to the sale or purchase of greater amberjack that were harvested, landed ashore, and sold prior to 12:01 a.m., local time, October 4, 2016, and were held in cold storage by a dealer or processor, as specified in § 622.190(c)(1)(i).

For a person on board a vessel issued a valid Federal commercial or charter vessel/headboat permit for the South Atlantic snapper-grouper fishery, the bag and possession limits and the sale and purchase provisions of the commercial closure for greater amberjack apply regardless of whether the fish are harvested in state or Federal waters, as specified in 50 CFR 622.190(c)(1)(ii).

Classification

The Regional Administrator, Southeast Region, NMFS, has determined this temporary rule is necessary for the conservation and management of greater amberjack and the South Atlantic snapper-grouper fishery and is consistent with the Magnuson-Stevens Act and other applicable laws.

This action is taken under 50 CFR 622.193(k)(1) and is exempt from review under Executive Order 12866.

These measures are exempt from the procedures of the Regulatory Flexibility Act, because the temporary rule is issued without opportunity for prior notice and comment.

This action responds to the best scientific information available. The Assistant Administrator for NOAA Fisheries (AA) finds that the need to immediately implement this action to close the commercial sector for greater amberjack constitutes good cause to waive the requirements to provide prior notice and opportunity for public comment pursuant to the authority set forth in 5 U.S.C. 553(b)(B), as such procedures would be unnecessary and contrary to the public interest. Such procedures are unnecessary because the AMs have already been subject to notice and comment, and all that remains is to notify the public of the closure. Such procedures are contrary to the public interest because of the need to immediately implement this action to protect greater amberjack since the capacity of the fishing fleet allows for rapid harvest of the commercial ACL (commercial quota). Prior notice and opportunity for public comment would require time and would potentially result in a harvest well in excess of the established commercial ACL (commercial quota).

For the aforementioned reasons, the AA also finds good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

Authority: 16 U.S.C. 1801 *et seq.*

Dated: September 26, 2016.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–23587 Filed 9–29–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 150818742–6210–02]

RIN 0648–XE922

Fisheries of the Exclusive Economic Zone Off Alaska; Big Skate in the Central Regulatory Area of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting retention of big skate in the Central Regulatory Area of the Gulf of Alaska (GOA). This action is necessary because the 2016 total allowable catch of big skate in the Central Regulatory Area of the GOA will be reached.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), September 29, 2016, through 2400 hours, A.l.t., December 31, 2016.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2016 total allowable catch (TAC) of big skate in the Central Regulatory Area of the GOA is 1,850 metric tons (mt) as established by the final 2016 and 2017 harvest specifications for groundfish of the GOA (81 FR 14740, March 18, 2016).

In accordance with § 679.20(d)(2), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2016 TAC of big skate in the Central Regulatory Area of the GOA will be reached. Therefore, NMFS is requiring that big skate in the Central Regulatory Area of the GOA be treated as prohibited species in accordance with § 679.21(b).

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay prohibiting the retention of big skate in the Central Regulatory Area of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of September 27, 2016.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and § 679.21 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: September 28, 2016.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–23830 Filed 9–28–16; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 81, No. 190
Friday, September 30, 2016

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF LABOR

2 CFR Part 2998

29 CFR Parts 95 and 98

RIN 1291–AA38

Department of Labor Implementation of OMB Guidance on Nonprocurement Debarment and Suspension; Withdrawal

AGENCY: Office of the Assistant Secretary for Administration and Management, Department of Labor (OASAM), Department of Labor.

ACTION: Withdrawal of proposed rule.

SUMMARY: On April 29, 2016, the Department of Labor, Office of the Assistant Secretary for Administration and Management (OASAM) simultaneously published in the **Federal Register** a notice of proposed rulemaking and a direct final rule to implement OMB Guidance on Nonprocurement Debarment and Suspension. The comment period for both the proposed rule and direct final rule ended on May 31, 2016, with no comments received. For this reason, OASAM is withdrawing the proposed rule.

DATES: The proposed rule that was published on April 29, 2016 (81 FR 25620) is withdrawn as of September 30, 2016.

ADDRESSES: Electronic copies of this **Federal Register** notice are available at *http://www.regulation.gov.*

FOR FURTHER INFORMATION CONTACT: Duyen Tran Ritchie, Office of the Chief Procurement Officer, (202) 693–7277 [Note: This is not a toll-free telephone number]; or by email at *Ritchie.duyen.t@dol.gov.*

SUPPLEMENTARY INFORMATION: On April 29, 2016 (81 FR 25620), OASAM published a proposed rule in the **Federal Register** to implement OMB Guidance on Nonprocurement Debarment and Suspension. The proposed rule is withdrawn as of September 30, 2016.

List of Subjects

2 CFR Part 2998

Administrative practice and procedure, Government procurement, Grant programs, Grants administration, Reporting and recordkeeping requirements.

29 CFR Part 95

Foreign governments, Grants and agreements with institutions of higher education, hospitals, and other non-profit organizations, and with commercial organizations, Organizations under the jurisdiction of foreign governments, and International organizations.

29 CFR Part 98

Governmentwide debarment and suspension (nonprocurement).

Authority and Signature

T. Michael Kerr, Assistant Secretary of Labor for Administration and Management, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, authorized the preparation of this withdrawal of the proposed rule.

Dated: September 16, 2016.

T. Michael Kerr,

Assistant Secretary for Administration and Management.

[FR Doc. 2016–23427 Filed 9–29–16; 8:45 am]

BILLING CODE 4510–7B–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 982

[Docket No. AO–SC–16–0136; AMS–SC–16–0074; SC16–982–1]

Hazelnuts Grown in Oregon and Washington; Hearing on Proposed Amendment of Marketing Order No. 982

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of hearing on proposed rulemaking.

SUMMARY: Notice is hereby given of a public hearing to receive evidence on proposed amendments to Marketing Order No. 982 (order), which regulates the handling of hazelnuts grown in Oregon and Washington. Two amendments are proposed by the Hazelnut Marketing Board (Board), which is responsible for local administration of the order. The proposed amendments would add both the authority to regulate quality and the authority to establish different regulations for different markets. In addition, the Agricultural Marketing Service (AMS) proposes to make any such changes as may be necessary to the order to conform to any amendment that may result from the hearing. The proposals are intended to aid in pathogen reduction and meet the needs of different market destinations.

DATES: The hearing date is October 18, 2016, 8:30 a.m. to 5:00 p.m.

ADDRESSES: The hearing will be held at the Holiday Inn, 25425 SW. 95th Ave., Wilsonville, Oregon 97070.

FOR FURTHER INFORMATION CONTACT: Melissa Schmaedick, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, Post Office Box 952, Moab, UT 84532; Telephone: (202) 557–4783, Fax: (435) 259–1502, or Michelle Sharrow, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., Stop 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Melissa.Schmaedick@ams.usda.gov* or *Michelle.Sharrow@ams.usda.gov.*

Small businesses may request information on this proceeding by contacting Richard E. Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., Stop 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Richard.Lower@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This administrative action is instituted pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act." This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866, 13563 and 13175. Notice of this rulemaking action was provided to tribal governments through USDA's Office of Tribal Relations.

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) seeks to ensure that within the statutory authority of a program, the regulatory and informational requirements are tailored to the size and nature of small businesses. Interested persons are invited to present evidence at the hearing on the possible regulatory and informational impacts of the proposals on small businesses.

The amendments proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review the USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

The hearing is called pursuant to the provisions of the Act and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900).

The proposed amendments were recommended by the Board and submitted to USDA on May 16, 2016. After reviewing the proposals and other information submitted by the Board, USDA made a determination to schedule this matter for hearing.

The proposed amendments to the order recommended by the Board are summarized as follows:

1. Amend the order to add authority to regulate quality. This would include: Adding a new § 982.45(c); adding a new § 982.46(d); and revising §§ 982.12 and 982.40. Corresponding changes would also revise the subheading "Grade and Size Regulation" prior to § 982.45 and the section heading for § 982.45 "Establishment of grade and size regulations." to include quality.

2. Amend the order by adding § 982.45(d) to add authority to establish different outgoing quality regulations for different markets.

The Board works with USDA in administering the order. The proposals submitted by the Board have not received the approval of USDA. The proposed changes would add authority to regulate quality to aid in pathogen reduction and establish different outgoing quality regulations for different market destinations. The proposed amendments are intended to aid in the marketing of hazelnuts and improve the operation and administration of the order.

In addition to the proposed amendments to the order submitted by the Board, AMS proposes to make any such changes as may be necessary to the order to conform to any amendment that may result from the hearing, or to correct minor inconsistencies and typographical errors.

The public hearing is held for the purpose of: (i) Receiving evidence about the economic and marketing conditions which relate to the proposed amendments of the order; (ii) determining whether there is a need for the proposed amendments to the order; and (iii) determining whether the proposed amendments or appropriate modifications thereof will tend to effectuate the declared policy of the Act.

Testimony is invited at the hearing on all the proposals and recommendations contained in this notice, as well as any appropriate modifications or alternatives.

All persons wishing to submit written material as evidence at the hearing should be prepared to submit four copies of such material at the hearing. Four copies of prepared testimony for presentation at the hearing should also be made available. To the extent practicable, eight additional copies of evidentiary exhibits and testimony prepared as an exhibit should be made available to USDA representatives on the day of appearance at the hearing. Any requests for preparation of USDA data for this rulemaking hearing should be made at least 10 days prior to the beginning of the hearing.

From the time the notice of hearing is issued and until the issuance of a final decision in this proceeding, USDA employees involved in the decisional process are prohibited from discussing the merits of the hearing issues on an *ex parte* basis with any person having an interest in the proceeding. The prohibition applies to employees in the following organizational units: Office of the Secretary of Agriculture; Office of the Administrator, AMS; Office of the General Counsel; and the Specialty Crops Program, AMS.

Procedural matters are not subject to the above prohibition and may be discussed at any time.

List of Subjects in 7 CFR Part 982

Hazelnuts, Marketing agreements, Nuts, Reporting and recordkeeping requirements.

PART 982—HAZELNUTS GROWN IN OREGON AND WASHINGTON

■ 1. The authority citation for 7 CFR part 982 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Testimony is invited on the following proposals or appropriate alternatives or modifications to such proposals.

Proposals submitted by the Hazelnut Marketing Board:

Proposal Number 1

■ 3. Revise § 982.12 to read as follows:

§ 982.12 Merchantable hazelnuts.

Merchantable hazelnuts means inshell hazelnuts that meet the grade, size, and quality regulations in effect pursuant to § 982.45 and are likely to be available for handling as inshell hazelnuts.

■ 4. Amend § 982.40 by revising paragraph (d) to read as follows:

§ 982.40 Marketing policy and volume regulation.

* * * * *

(d) *Grade, size, and quality regulations.* Prior to September 20, the Board may consider grade, size, and quality regulations in effect and may recommend modifications thereof to the Secretary.

* * * * *

■ 5. In § 982.45:

■ a. Revise the heading prior to this section;

■ b. Revise the section heading; and

■ c. Add paragraph (c).

The revisions and addition read as follows:

Grade, Size, and Quality Regulation

§ 982.45 Establishment of grade, size, and quality regulations.

* * * * *

(c) *Quality regulations.* For any marketing year, the Board may establish, with the approval of the Secretary, such minimum quality and inspection requirements, to facilitate the reduction of pathogens, applicable to hazelnuts, as will contribute to orderly marketing or be in the public interest. In such marketing year, no handler shall handle hazelnuts unless they meet applicable minimum quality and inspection requirements as evidenced by certification acceptable to the Board.

■ 6. Revise § 982.46 by adding paragraph (d):

§ 982.46 Inspection and certification.

* * * * *

(d) Whenever quality regulations are in effect pursuant to § 982.45, each handler shall certify that all product to be handled or credited in satisfaction of a restricted obligation meets the quality regulations as prescribed.

Proposal Number 2

■ 7. Amend § 982.45 by adding paragraph (d) to read as follows:

§ 982.45 Establishment of grade, size, and quality regulations.

* * * * *

(d) *Different regulations for different markets.* The Board may, with the approval of the Secretary, recommend different outgoing quality requirements for different markets. The Board, with the approval of the Secretary, may establish rules and regulations necessary and incidental to the administration of this provision.

Proposal submitted by USDA:

Proposal Number 3

Make other such changes as may be necessary to the order to conform with any amendment thereto that may result from the hearing, or to correct minor inconsistencies and typographical errors.

Dated: September 27, 2016.

Elanor Starmer,

Administrator, Agricultural Marketing Service.

[FR Doc. 2016–23669 Filed 9–29–16; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket No. EERE–2014–BT–STD–0005]

RIN 1904–AD15

Energy Conservation Program: Energy Conservation Standards for Residential Conventional Cooking Products; Supplemental Notice of Proposed Rulemaking

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Extension of public comment period.

SUMMARY: On September 2, 2016, the U.S. Department of Energy (DOE) published a supplemental notice of proposed rulemaking (SNOPR) pertaining to proposed energy conservation standards for conventional cooking products. The notice provided an opportunity for submitting written comments, data, and information by October 3, 2016. This document announces an extension of the public comment period for submitting comments and data on the SNOPR or any other aspect of the rulemaking for conventional cooking products. The comment period is extended to November 2, 2016.

DATES: DOE will accept comments, data, and information regarding this rulemaking received no later than November 2, 2016.

ADDRESSES: *Instructions:* Any comments submitted must identify the SNOPR for Energy Conservation Standards for residential conventional cooking products, and provide docket number EERE–2014–BT–STD–0005 and/or regulatory information number (RIN) 1904–AD15. Comments may be submitted using any of the following methods: Interested persons may submit comments, identified by docket number EERE–2014–BT–STD–0005 and/or regulatory information number (RIN) 1904–AD15, by any of the following methods:

(1) *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.

(2) *Email: ConventionalCookingProducts2014STD0005@ee.doe.gov* Include the docket number and/or RIN in the subject line of the message. Submit electronic comments in WordPerfect, Microsoft Word, PDF, or ASCII file format, and avoid the use of special characters or any form of encryption.

(3) *Postal Mail:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, 1000 Independence Avenue SW., Washington, DC 20585–0121. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.

(4) *Hand Delivery/Courier:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW., 6th Floor, Washington, DC 20024. Telephone: (202) 586–6636. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

Docket: The docket, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at *www.regulations.gov.* All documents in the docket are listed in the *www.regulations.gov* index. However, some documents listed in the index may not be publicly available, such as those containing information that is exempt from public disclosure.

The docket Web page can be found at: *https://www.regulations.gov/docket?D=EERE-2014-BT-STD-0005.* The docket Web page contains simple instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT:

Mr. John Cymbalsky, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 287–1692. Email: *kitchen_ranges_and_ovens@ee.doe.gov.*

Ms. Celia Sher, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 287–6122. Email: *Celia.Sher@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: On September 2, 2016, DOE published in the **Federal Register** a supplemental notice of proposed rulemaking (the September 2016 SNOPR) pertaining to proposed energy conservation standards for conventional cooking products. In that notice, DOE proposed new or amended energy conservation standards for conventional cooking products and solicited comment and data from the public on the proposed standards, associated analyses, and results. DOE identified several key issues associated with the proposed standards on which DOE was particularly interested in receiving comment. 81 FR 60784. The SNOPR provided for the written submission of comments by October 3, 2016. The Association of Home Appliance Manufacturers (AHAM) has requested an extension of the comment period to allow additional time for manufacturers to conduct testing to evaluate the proposed energy conservation standards, based on the test procedure proposed in SNOPR that published in the **Federal Register** on August 22, 2016 (the August 2016 TP SNOPR) 81 FR 57374. AHAM stated that manufacturers do not currently conduct energy tests on conventional cooking products, and thus more time is needed to conduct testing on their product lines to evaluate the proposed test procedures and provide substantive comments on the proposed standards. (AHAM, No. 53, at pp. 2–5) An extension of the comment period would allow additional time for AHAM and its members and other interested parties to test existing models to the proposed SNOPR test procedure to gather any additional data and information to address the proposed standards for cooking products, and submit comments to DOE.

In view of the request for a comment period extension for the September 2016 SNOPR, DOE has determined that a 30-day extension of the public comment period for the September 2016 SNOPR is appropriate. The comment period is extended until November 2, 2016. DOE further notes that any submissions of comments or other information submitted between the original comment end date and the extension of the comment period will be deemed timely filed.

DOE also notes that, in response to the August 2016 TP SNOPR, it received a number of comments pertaining to the test procedure that impact the proposed standard levels from the September 2016 SNOPR.[1] Based on these comments and the extension of the comment period, DOE has identified additional information and data it is seeking that would be beneficial for the analysis in support of the standards rulemaking.

Sub-Zero Group, Inc. commented that the proposed test procedure and standards do not take into account design features associated with commercial-style gas cooking tops that impact efficiency, including:

- High input rate burners with large diameters and high controllability of the flame, for quicker heat-up times as well as the ability to simmer foods such as chocolates and sauces;
- Heavy cast iron grates for better heat distribution and strength to support large loads;
- Greater distance from the burner to the grate for heat distribution and reduction of carbon monoxide; and
- Larger open area for primary and secondary air for combustion and exhaust of combustion byproducts.

DOE welcomes data showing how these design factors affect the measured annual energy consumption relative to the proposed standard levels. As noted in the September 2016 SNOPR, DOE selected the proposed standard level for gas cooking tops to maintain the full functionality of cooking tops marketed as commercial-style and noted that commercial-style gas cooking tops are available on the market that meet the proposed efficiency level. 81 FR 60784, 60817, 60865. As a result, DOE is also seeking data specifically on the efficiency of commercial-style products relative to the proposed standard level and the design changes that would be needed if these products cannot meet the proposed standard levels. DOE is also seeking test data showing how the design differences for commercial-style cooking tops impact cooking performance relative to residential-style products.

AHAM and GE Appliances, a Haier Company (GE) also objected to the proposed test method for determining the standby power consumption of combined cooking products (*i.e.,* household cooking appliances that combines a conventional cooking top and/or conventional oven with other appliance functionality, which may or may not include another cooking product). GE urged DOE to consider adopting for conventional cooking tops the same prescriptive design requirement for the power supply that was proposed for conventional ovens. DOE welcomes comments on the merits of the approach of adopting a prescriptive standard for the power supply for conventional cooking tops, including data on combined cooking products.

AHAM and GE also expressed concern regarding the proposed requirement to test each unique size setting of multi-ring surface units. AHAM and GE stated that multi-ring elements provide consumers the ability to adjust the element size to the size of the cookware, which in turn saves energy. AHAM and GE noted that because the inner elements of multi-ring surface units operate at lower efficiency, the proposed test procedure could result in the elimination of multi-ring elements. DOE welcomes data comparing available surface element diameters and cooking top energy use for cooking tops with multi-ring surface units and those that do not have this feature.

Issued in Washington, DC, on September 23, 2016.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

[FR Doc. 2016–23660 Filed 9–29–16; 8:45 am]

BILLING CODE 6450–01–P

---

[1] These comments are available in the conventional cooking products test procedure docket at *https://www.regulations.gov/docket?D=EERE-2012-BT-TP-0013.*

FEDERAL RESERVE SYSTEM

12 CFR Parts 217 and 225

[Docket No. R–1547]

RIN 7100 AE–58

Regulations Q and Y; Risk-Based Capital and Other Regulatory Requirements for Activities of Financial Holding Companies Related to Physical Commodities and Risk-Based Capital Requirements for Merchant Banking Investments

AGENCY: Board of Governors of the Federal Reserve System (Board).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Board is seeking comment on a proposal to adopt additional limitations on physical commodity trading activities conducted by financial holding companies under complementary authority granted pursuant to section 4(k) of the Bank Holding Company Act and clarify certain existing limitations on those activities; amend the Board's risk-based capital requirements to better reflect the risks associated with a financial holding company's physical commodity activities; rescind the findings underlying the Board orders authorizing certain financial holding companies to engage in energy management services and energy tolling; remove copper from the list of metals that bank holding companies are permitted to own and store as an activity closely related to banking; and increase transparency regarding physical commodity activities of financial holding companies through more comprehensive regulatory reporting.

DATES: Comments must be received on or before December 22, 2016.

ADDRESSES: You may submit comments, identified by Docket No. R–1547 and RIN 7100 AE–58 by any of the following methods:

- *Agency Web site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.aspx.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: regs.comments@federalreserve.gov.* Include the docket number and RIN number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and

Constitution Avenue NW., Washington, DC 20551.

All public comments will be made available on the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.aspx* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room 3515, 1801 K Street NW. (between 18th and 19th Streets NW.), Washington, DC 20006 between 9:00 a.m. and 5:00 p.m. on weekdays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

FOR FURTHER INFORMATION CONTACT: *Board:* Constance M. Horsley, Assistant Director, (202) 452–5239, Elizabeth MacDonald, Manager, (202) 475–6316, Kevin Tran, Supervisory Financial Analyst, (202) 452–2309, or Vanessa Davis, Supervisory Financial Analyst, (202) 475–6674, Division of Banking Supervision and Regulation; or Laurie Schaffer, Associate General Counsel, (202) 452–2277, Michael Waldron, Special Counsel, (202) 452–2798, Will Giles, Counsel, (202) 452–3351, or Mary Watkins, Attorney, (202) 452–3722, Legal Division, Board of Governors of the Federal Reserve System, 20th and C Streets NW., Washington, DC 20551. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), (202) 263–4869.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
  A. Background
  B. Risks Associated With Physical Commodity Activities
  C. Limitations on Physical Commodity Activities
  D. Summary of the Advance Notice of Proposed Rulemaking (ANPR) and Comments on the ANPR
II. Description of Proposed Rule
  A. Scope of Permissible Physical Commodity Activities
  1. Level of Complementary Commodity Activities Permitted
  2. Clarification of Prohibitions on Certain Operations
  B. Risk-Based Capital Requirements for Covered Physical Commodities
  1. Overview
  2. Calculation of Exposure Amount for Covered Physical Commodities
  3. Impact Analysis of Proposed Capital Requirements
  C. The Scope of Permitted Complementary Commodity Activities
  1. Background
  a. Physical Commodity Trading
  b. Energy Management Services and Energy Tolling
  2. Reconsideration of the Approval of Energy Management and Tolling as Complementary Activities
  3. Conformance Period
  E. Reclassification of Copper as an Industrial Metal
  F. New Financial Reporting Data on Physical Commodity Activities
  1. General
  2. Schedule HC–W
  3. Schedule HC–R Modifications
  4. Public Disclosure
III. Regulatory Analysis
  A. Regulatory Flexibility Act Analysis
  B. Paperwork Reduction Act
  C. Solicitation of Comments on Use of Plain Language

I. Introduction

A. Background

Bank holding companies (BHCs) and their subsidiaries engage in certain types of physical commodity activities under a variety of authorities. Pursuant to the Bank Holding Company Act (BHC Act), BHCs may engage in activities that are "so closely related to banking as to be a proper incident thereto." [1] This authority allows BHCs to buy, sell, or hold precious metals, such as gold, silver, platinum, and palladium; participate as a principal in cash-settled derivative contracts based on commodities; and trade in commodity derivatives that allow for physical settlement under certain circumstances.

In the Gramm-Leach-Bliley Act (GLB Act) enacted in 1999, Congress expanded the activities in which a BHC may engage.[2] The GLB Act permits BHCs that are well capitalized and well managed to elect to become financial holding companies (FHCs) and engage in a broader range of activities than permitted for BHCs that are not FHCs. Three provisions of the GLB Act permit FHCs to conduct a broader range of physical commodity activities and investments than are otherwise permitted for BHCs. First, the GLB Act permits FHCs to engage in any activity that the Board (in its sole discretion) determines is complementary to a financial activity and does not pose a substantial risk to the safety and soundness of depository institutions or the financial system generally.[3] Pursuant to this authority, the Board has authorized certain FHCs to engage in physical commodity trading as well as energy management services and energy tolling. The GLB Act also added a grandfather provision that permits certain FHCs to continue to engage in a broad range of physical commodity activities.[4] Finally, the GLB Act authorizes FHCs to make merchant banking investments in any type of nonfinancial company, including a company engaged in activities involving physical commodities.[5]

B. Risks Associated With Physical Commodity Activities

There are a number of potential legal, reputational and financial risks associated with the conduct of physical commodity trading activities. Over the past decade, monetary damages associated with an environmental catastrophe involving physical commodities have ranged from hundreds of millions to tens of billions of dollars. These damages can exceed the market value of the physical commodity involved in the catastrophic event, and can exceed the committed capital and insurance policies of the organization. Certain federal environmental laws, including the Oil Pollution Act of 1990 (OPA),[6] the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[7] and the Clean Water Act (CWA),[8] generally impose liability on owners and operators of facilities and vessels for the release of physical commodities, such as oil, distillate fuel oil, jet fuel, liquefied petroleum gas, gasoline, fertilizer, natural gas, and propylene.[9] Consequently, a company that directly owns an oil tanker or petroleum refinery that releases crude oil in a navigable waterway or adjoining shoreline in the United States may be liable for removal costs and damages for that release under the OPA.[10]

---

[1] *See* 12 U.S.C. 1843(c)(8). In addition, national banks owned by BHCs may engage in certain limited types of physical commodity activities pursuant to authority granted under the National Bank Act. State-chartered banks also may be authorized to engage in the same activities under state statutes.

[2] Public Law 106–102, 113 Stat. 1338 (1999).

[3] *See* Gramm-Leach-Bliley Act § 103, 12 U.S.C. 1843(k)(1)(B).

[4] 12 U.S.C. 1843(o).

[5] 12 U.S.C. 1843(k)(4)(H).

[6] *See* 33 U.S.C. 2701–02.

[7] *See* 42 U.S.C. 9607.

[8] *See* 33 U.S.C. 1321. In general, liability under the OPA, CWA, and CERCLA is subject to limited defenses, including releases caused by an act of God. *See, e.g.,* 33 U.S.C. 2703; 42 U.S.C. 9607.

[9] *See* 33 U.S.C. 1321, 2701 (defining "oil"), 42 U.S.C. 7412, 9601 (defining "hazardous air pollutant" and "hazardous substance," respectively).

[10] *See* 33 U.S.C. 2702. The OPA generally limits liability for spills from facilities to $350,000,000 and liability from spills from vessels to the greater of $1,900 per gross ton or $22,000,000. *Id.* at 2704.

Continued

In addition to Federal environmental law, state environmental laws separately impose liability for the harmful or unauthorized release of an environmentally sensitive commodity.[11] Like Federal environmental law, many states impose strict liability for damages from the unauthorized release of specified harmful substances on the owners and operators of the facility or vessel from which the discharge occurred. Many states also impose liability based on the causal connection between a party's actions and the prohibited release.[12] Some state statutes also impose strict liability directly on owners of the covered substance for damages caused by, and/or cleanup and removal costs incurred as a result of, the release of the substance.[13] State common law tort doctrines may also provide additional bases for liability for environmental harm, such as negligence, trespass, and nuisance.[14]

State laws also allow for the assignment of the liability of one company to its parent and/or another affiliated company even if the affiliated company did not directly participate in the wrongdoing. This concept of "piercing the corporate veil" is an exception to the general rule in corporate law that a parent company is not liable for the acts of its subsidiaries, and may be applied when the affiliated entity exercises a high degree of control over the liable company.[15] Courts typically require multiple indicia of control before assigning liability to the parent or affiliated company.[16] Common indicia include managing day-to-day operations, undercapitalizing subsidiaries, and commingling of assets, employees, legal advice, accounting, or office space.[17] Courts have also used the concept of veil piercing to assign liability under Federal environmental law.[18]

Further, even if a parent company is not assigned liability through a veil piercing action, the parent company may provide support to affiliated entities involved in an environmental catastrophe to limit reputational damage or as a condition to a settlement agreement. For example, BP p.l.c., the ultimate parent company of BP Exploration & Production, Inc. and BP Corporation North America, Inc., guaranteed the payment of more than $20 billion as part of a consent decree resolving claims against its subsidiaries resulting from the Deepwater Horizon oil spill.[19]

C. Limitations on Physical Commodity Activities

To help address these risks, the Board placed a number of limitations, discussed below, on the physical commodity activities it has authorized under the GLB Act.

Section 4(k)(1)(B) Complementary Authority. The GLB Act added section 4(k)(1)(B) to the BHC Act to permit an FHC to engage in activities that the Board determines to be complementary to a financial activity (complementary authority). The provision's purpose was to allow the Board to permit FHCs to engage in an activity that appears to be commercial rather than financial in nature, but that is meaningfully connected to a financial activity such that it complements the financial activity.[20] When determining that an activity is complementary to a financial activity for an FHC, the Board must find that the activity does not pose a substantial risk to the safety and soundness of depository institution subsidiaries of the FHC or the financial system generally.[21] In addition, the Board is required to consider whether performance of the activity can reasonably be expected to produce benefits to the public—such as greater convenience, increased competition, or gains in efficiency—that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices.[22]

Under this authority, the Board has approved the requests of a limited number of FHCs to engage in three complementary activities related to physical commodities: (1) Physical commodity trading involving the purchase and sale of commodities in the spot market, and taking and making delivery of physical commodities to settle commodity derivatives (physical commodity trading); [23] (2) providing transactions and advisory services to power plant owners (energy

---

However, the OPA liability cap will not apply if the party engaged in certain types of misconduct (*e.g.*, willful misconduct, gross negligence, violation of Federal safety regulation, failure to report incident). *Id.*

[11] The OPA, CERCLA, and CWA explicitly state that the statutes do not preempt state laws imposing additional liability or requirements with respect to the discharge of hazardous substances. 33 U.S.C. 1312(o), 2718(a); 42 U.S.C. 9614(a).

[12] N.J. Admin. Code tit. 7, section 1E:1.6; *State* v. *Montayne,* 604 N.Y.S.2d 978 (N.Y. App. Div. 1993) (finding an oil broker liable under New York Navigation Law section 181 because the broker was contractually obligated to provide the oil and specify the means of its delivery even though the broker did not own the oil and had used third parties to move and store the oil). *See also N.J. Dep't of Envtl. Prot.* v. *Dimant,* 212 N.J. 153, 177, 51 A.3d 816 (2012) (summarizing prior state cases to require some connection between the discharge complained of and the alleged discharger); *Authority of New Brunswick* v. *Suydam Investors,* 826 A.2d 673, 683 (N.J. 2003) (suggesting that such causal liability under New Jersey law should be read to impose liability on persons responsible for the discharge of the substance).

[13] *See, e.g.,* Alaska Stat. section 46.03.822; Cal. Gov't Code §§ 8670.3, 8670.56.5; Fla. Stat. section 376.12 (imposing liability for cleanup costs on the owner of the covered substance but only if the owner and operator of the facility or vessel do not pay such costs and such parties were not in compliance with the financial security requirements of the statute at the time of the release); Md. Envir. Code Ann. § 4–401; Or. Rev. Stat. § 468B.310; Wash. Rev. Code Ann. section 90.56.370.

[14] Restatement (Second) of Torts sections 158, 165, 390, 822, 825, 826.

[15] *See, e.g., See William Passalacqua Builders, Inc.,* v. *Resnick Developers South, Inc.,* 933 F.2d 131, 137–141 (2d Cir. 1991); *Berkey* v. *Third Avenue Ry. Co.,* 244 N.Y. 84, 155 NE. 58 (1926), (holding that "domination must be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent . . ."); Fletcher Cyclopedia of the Law of Corporations 41.30–.60 (rev. ed. 2006). *See also* Letter from the Securities Industry and Financial Markets Association et al., dated April 16, 2014, Appendix B, pg. 41 (SIFMA Comment Letter). Other courts have articulated the first prong of this inquiry—whether there was domination—as an inquiry into whether the two companies operated as a single economic unit or alter ego. *See Fletcher* v. *Atex, Inc.,* 68 F.3d 1451, 1457 (1995); *NetJets Aviation, Inc.* v. *LHC Communications, LLC,* 537 F.3d 168, 176 (2d Cir. 2008).

[16] *See William Passalacqua Builders, Inc.,* v. *Resnick Developers South, Inc.,* 933 F.2d 131, 137–141 (2d Cir. 1991); *United States* v. *Golden Acres, Inc.,* 702 F. Supp. 1097, 1104 (D. Del. 1988) aff'd 879 F.2d 860, 1104 (3d Cir. 1989). *See also Harco Nat. Ins. Co.* v. *Green Farms, Inc.,* 15 Del. J. Corp. L. 1030, 1038–1040 (Del. Ch. 1989).

[17] *See, e.g., United States* v. *Golden Acres, Inc.,* 702 F. Supp. at 1104; *New York State Elec. and Gas Corp.* v. *First Energy Corp.,* 766 F.3d 212, 224–227 (2nd Cir. 2014); *William Passalacqua Builders, Inc.,* v. *Resnick Developers South, Inc.,* 933 F.2d 131, 137–141 (2d Cir. 1991).

[18] *See, e.g., United States* v. *Bestfoods,* 524 U.S.C. 51, 63–64 (1998); *AT&T Global Info. Solutions Co.* v. *Union Tank Car Co.,* 29 F.Supp.2d 857, 869 (S.D. Oh. 1998).

[19] *U.S.* v. *BP Exploration & Production Inc., et al.,* No. 10–4536 in MDL 2179 (E.D. La.) Consent Decree among defendant BP Exploration & Production Inc., The United States of America, and the States of Alabama, Florida, Louisiana, Mississippi, and Texas, Document 16093, Appendix 9, available at *http://www.laed.uscourts.gov/sites/default/files/OilSpill/4042016ConsentDecree_0.pdf. See also https://www.justice.gov/enrd/deepwater-horizon.*

[20] *Citigroup Inc.,* 89 Fed. Res. Bull. 508 (2003), note 8 and related text ("2003 Citi Order").

[21] 12 U.S.C. 1843(k)(1)(B).

[22] 12 U.S.C. 1843(j)(2).

[23] *See* Board orders regarding *Citigroup Inc.,* 89 Fed. Res. Bull. 508 (2003); *Fortis S.A./N.V.,* 94 Fed. Res. Bull. C20 (2008); *Société Générale,* 92 Fed. Res. Bull. C113 (2006); *Deutsche Bank AG,* 91 Fed. Res. Bull. C54 (2005); *JPMorgan Chase & Co.,* 91 Fed. Res. Bull. C57 (2005); *Barclays Bank PLC,* 90 Fed. Res. Bull. 511 (2004); *UBS AG,* 90 Fed. Res. Bull. 215 (2004); and *The Royal Bank of Scotland Group plc,* 94 Fed. Res. Bull. C60 (2008). *See also* Board letters regarding Bank of America Corporation (April 24, 2007), BNP Paribas (August 31, 2007), Credit Suisse Group (March 27, 2007), Fortis S.A./N.V. (September 29, 2006), Wachovia Corporation (April 13, 2006), Bank of Nova Scotia (February 17, 2011).

management services);[24] and (3) paying a power plant owner fixed periodic payments that compensate the owner for its fixed costs in exchange for the right to all or part of the plant's power output (energy tolling).[25] Together, these three activities are referred to as complementary commodity activities.

The Board placed certain restrictions on each complementary commodity activity to protect against the risks the activity could pose to the safety and soundness of the FHC, any of its insured depository institution (IDI) subsidiaries, and the U.S. financial system. For example, the Board limited the size of these activities by imposing limits on the amount of assets or revenue that an FHC could have committed to complementary commodity activities. Specifically, the aggregate market value of commodities held under physical commodity trading and energy tolling may represent no more than 5 percent of the tier 1 capital of the FHC. The Board also imposed a cap on energy management services of no more than 5 percent of an FHC's consolidated operating revenues. To help protect against dealing in illiquid commodities, the Board also limited the physical commodity trading authority to only physical commodities approved by the Commodity Futures Trading Commission (CFTC) for trading on a U.S. futures exchange (unless specifically excluded by the Board) or commodities the Board otherwise approves.[26]

The Board also prohibited FHCs from owning, operating, or investing in facilities that extract, transport, store, or alter commodities under complementary authority. FHCs also are required to ensure that the third-party contractors hired to store, transport, and otherwise handle the physical commodities of the FHC are reputable.

Section 4(o) Grandfather Authority. In the GLB Act, Congress amended the BHC Act to allow certain companies to continue to engage in a broad range of activities involving physical commodities if these companies subsequently became FHCs.[27] Under section 4(o) of the BHC Act, a company that was not a BHC prior to and becomes an FHC after November 12, 1999, may continue to engage in activities related to the trading, sale, or investment in commodities that were not permissible for BHCs as of September 30, 1997, if the company was engaged in the United States in any of such activities as of September 30, 1997 (section 4(o) grandfather authority).[28]

Section 4(o) grandfathered firms are permitted by statute to engage in a broader range of activities than firms that are limited to conducting physical commodity activities under complementary authority. This broader range of activities includes storing, transporting, extracting, and altering commodities. Section 4(o) imposes only two conditions on the conduct of activities: (i) The activities are limited to no more than 5 percent of the total consolidated assets of the FHC, and (ii) the FHC is prohibited from cross-marketing the services of its subsidiary depository institution(s) and subsidiary(ies) engaged in activities under the section 4(o) grandfather authority. The 5 percent of assets limit permits section 4(o) grandfathered FHCs to hold significantly larger amounts of a wider range of commodity-related assets than those FHCs that conduct commodities activities under complementary authority, which does not permit storage, transport, extraction or similar activities and imposes a stricter limit of 5 percent of tier 1 capital on the more limited class of commodity holdings that are permitted under complementary authority.

Merchant Banking Authority. The GLB Act also amended the BHC Act to allow FHCs to engage in merchant banking activities. Under section 4(k)(4)(H) of the BHC Act, FHCs may invest in nonfinancial companies as part of a bona fide securities underwriting or merchant or investment banking activity (merchant banking authority).[29] These investments may be made in any type of ownership interest and in any type of nonfinancial company (portfolio company). The GLB Act imposes conditions on the merchant banking investment activities of FHCs. First, the investment must be part of "a bona fide underwriting or merchant or investment banking activity" and may not be held by an IDI or subsidiary of an IDI.[30] Second, an FHC making merchant banking investments must own or control a securities affiliate or a registered investment adviser that advises an affiliated insurance company.[31] Third, merchant banking investments must be held only "for a period of time to enable the sale or disposition thereof on a reasonable basis consistent with the financial viability of the activities." [32] Finally, an FHC may not routinely manage or operate the portfolio company "except as may be necessary or required to obtain a reasonable return on investment upon resale or disposition." [33]

The Board's rules contain limitations that implement these statutory requirements. For example, Regulation Y prohibits FHCs in most cases from holding merchant banking investments for more than 10 years (or for more than 15 years for investments held in a qualifying private equity fund).[34] Further, Regulation Y limits the duration of routine management to the period necessary to address the cause of the FHC's involvement, to obtain suitable alternative management arrangements, to dispose of the investment, or to otherwise obtain a reasonable return upon the resale or disposition of the investment.[35] Additionally, an FHC must establish risk-management policies and procedures for its merchant banking activities, and policies and procedures that maintain corporate separateness between the FHC and its portfolio companies. Maintaining corporate separateness protects the FHC and its subsidiary IDIs from potential legal liability associated with the operations and financial obligations of the FHC's portfolio companies and private equity funds.[36] The Board's regulatory capital rule (Regulation Q) addresses merchant banking investments through risk-weighting in the equity framework.[37]

---

[24] *See, e.g., The Royal Bank of Scotland Group plc,* 94 Fed. Res. Bull. C60 (2008) (2008 RBS Order), and *Fortis S.A./N.V.,* 94 Fed. Res. Bull. C20 (2008) (2007 Fortis Order).

[25] Under energy tolling, the toller provides (or pays for) the fuel needed to produce the power that it directs the owner to produce. *See, e.g.,* 2008 RBS Order. The agreements also generally provide that the owner will receive a marginal payment for each megawatt hour produced by the plant to cover the owner's variable costs plus a profit margin. *Id.* The plant owner, however, retains control over the day-to-day operations of the plant and physical plant assets at all times. *Id.*

[26] *See* 2003 Citi Order. In limited cases, the Board has permitted FHCs to take and make physical delivery of a non-CFTC-approved commodity if the FHC demonstrated that there is a market in financially-settled contracts on that commodity, the commodity is fungible, the commodity is liquid, and the FHC has in place trading limits that address concentration risk and overall exposure. *See, e.g.,* 2008 RBS Order.

[27] *See* 12 U.S.C. 1843(o).

[28] 12 U.S.C. 1843(o). Two firms are authorized to engage in these activities: The Goldman Sachs Group, Inc. and Morgan Stanley, both of which became bank holding companies in 2008 and made successful elections to become financial holding companies at that time.

[29] *Id.* The statute grants similar authority to insurance companies that are FHCs or subsidiaries of FHCs. *Id.* at 1843(k)(4)(I).

[30] 12 U.S.C. 1843(k)(4)(H)(i), (ii).

[31] *Id.* at 1843(k)(4)(H)(ii).

[32] *Id.* at 1843(k)(4)(H)(iii).

[33] 12 U.S.C. 1843(k)(4)(H)(iv).

[34] *See* 12 CFR 225.172-.173.

[35] 12 CFR 225.171(e). Regulation Y also imposes documentation requirements on these extraordinary management activities. *Id.*

[36] *See also id.* at 225.175(b).

[37] 12 CFR 217.52–.53 and 217.153–.154.

D. Summary of the Advance Notice of Proposed Rulemaking (ANPR) and Comments on the ANPR

Over the last 15 years, a number of FHCs have engaged in physical commodity activities pursuant to these authorities and the Federal Reserve has gained supervisory experience with the implementation of these restrictions. In addition, the Federal Reserve has monitored the connection between authorized physical commodity activities and financial activities, including derivative trading and hedging activities. The Board notes that after an initial growth of physical commodity activities of FHCs, the level of physical commodity activities at FHCs has generally declined.

In January 2014, as part of an ongoing review of the commodities activities of FHCs, the Board sought public comment on a variety of issues related to the unique and significant risks of physical commodity activities through an ANPR.[38] In the ANPR, the Board invited comment on whether additional prudential restrictions or limitations on commodities-related activities were appropriate to further mitigate the risks of those activities.

In light of the potential risks associated with physical commodity activities, the ANPR queried whether the current capital and insurance requirements adequately account for the degree and types of liabilities that would result from physical commodities in the event of an environmental catastrophe. The ANPR also sought comment on whether FHCs' vendor-approval processes and current industry safety policies and procedures are adequate in light of recent environmental disasters.[39]

Apart from direct and indirect financial liability, the ANPR observed that the public confidence in a holding company that was engaged in a physical commodity activity could suddenly and severely be undermined by an environmental disaster, as could the confidence in the company's subsidiary IDI or their access to funding markets. Financial companies, and in particular holding companies of IDIs, are particularly vulnerable to reputational damage in their banking operations. As a result, a catastrophic event involving an FHC could undermine confidence in the FHC's subsidiary bank or may limit its access to funding markets until the extent of the FHC's liability is assessed.

The Board received more than 180 unique comments and more than 16,900 form letters in response to the ANPR from end users of commodities (*e.g.*, non-financial entities that use commodities in their operations or businesses), trade associations, public interest groups, academics, members of Congress, and other individuals. In general, comments from individuals, members of Congress and public interest groups opposed FHC involvement in physical commodity activities or supported additional restrictions on FHC involvement in physical commodities. In contrast, comments from end users, FHCs, and banking trade organizations were generally supportive of FHC involvement in physical commodity activities or opposed additional restrictions on these activities. Comments from insurance companies urged the Board to consider the differences between insurance companies and FHCs in terms of their business models, risks, and regulations.

Risks of FHC participation in physical commodity activities. Commenters that opposed FHC participation in physical commodity markets or that favored additional limitations on these activities argued that these activities pose risks to FHCs individually and to the financial system generally. These commenters generally described risks associated with physical commodity activities, including environmental risks, catastrophic risks, geopolitical risks (*e.g.*, commodities activities conducted in regions experiencing political turmoil), compliance risks (*e.g.*, bribery, environmental risks), and supply chain issues. Some of these commenters recommended that the Board prohibit trading in or ownership of commodities associated with catastrophic risk, strengthen prudential safeguards, or require additional capital in connection with such activities.

Many of these commenters expressed concern regarding the ability of FHCs to monitor these risks and questioned the ability of FHCs to insure or hedge against these risks. Some commenters argued that FHCs face a challenge in monitoring commodities risks because of the diverse nature of commodities activities and the number of federal agencies involved in commodities regulation. Some commenters contended that regulators face these same challenges in monitoring commodities risks. Those opposed to FHC participation in physical commodity markets expressed concern that excessive speculation in commodities markets, which they attributed in part to FHC involvement in these markets, causes market distortions.

Commenters that opposed FHCs engaging in physical commodity activities or that favored additional limitations on such activities expressed concern that FHCs have conflicts of interest in dealing with customers and enjoy an unfair competitive advantage. These commenters cited news articles alleging market manipulation by certain FHCs in the aluminum and copper markets. Some commenters also argued that the ability of FHCs to make proprietary trades and purchases of physical commodities may conflict with the interests of their customers. These commenters argued that FHCs may provide less favorable terms on products and services to customers when those customers compete with FHCs in the physical commodity markets. Finally, some commenters stated that the ability of FHCs to trade in physical commodity markets and own physical commodities provides an opportunity for FHCs to use information gleaned from their trading activities to manipulate financial markets.

Commenters in favor of FHC participation in the physical commodity markets or opposed to additional restrictions on these activities argued that FHC participation in these markets provides valuable and hard-to-replace services to end users of commodities. Some commented that FHCs were desirable counterparties in these markets because FHCs are well capitalized, well regulated, and familiar with their customers' businesses. Commenters commonly argued that the ability of FHCs to offer bespoke hedging arrangements to customers would not be possible without their participation in physical commodity activities. Commenters also cautioned that costs for end users would increase if FHCs exited physical commodity markets, including costs to municipalities and retail purchasers of commodities.

Some commenters contended that FHC involvement in physical commodity activities enhances liquidity and efficiency in physical commodity markets. Multiple commenters cited a correlation between recent reductions in wholesale power sales in California with the exit of certain FHCs from those markets. Commenters supportive of FHC participation in physical commodity activities stated that there was not sufficient evidence to substantiate the risks described in the ANPR. They responded by distinguishing events cited in the ANPR, like the Deepwater Horizon oil spill, from the exposures commonly faced by commodity traders both in terms of the extent of potential damages from an incident and the potential to be held financially responsible for such incidents. More specifically, these commenters expressed confidence that adequate insurance generally was available or that the FHC corporate structure offered adequate protection against legal liability. Many FHCs and banking trade organizations argued that FHCs could manage risks arising from physical commodity activities through a robust risk-management framework that is tailored to specific categories of risk. Finally, commenters in favor of FHC participation in these activities regarded the reputational risks associated with physical commodities as being either not substantial or not unique to commodities.

---

[38] *See* 79 FR 3329 (Jan. 21, 2014).

[39] *See* 79 FR 3329, 3332 (Jan. 21, 2014).

Complementarity of Complementary Commodity Activities. Multiple commenters argued that physical commodity activities conducted in connection with derivatives activities are complementary to financial activities for the reasons cited in the Board's orders. For example, commenters argued that physical commodity activities conducted pursuant to the complementary authority better enable FHCs to fulfill their obligations under commodity derivatives contracts and to net physical and financial contracts by allowing physical settlement.[40]

Other commenters believed that physical commodity activities are not complementary to financial activities. These commenters argued that the scope of complementary commodity activities exceeds Congress's intent for complementary authority, which they assert envisioned low-risk activities such as publishing travel magazines. Some commenters argued that FHCs should only be permitted to engage in banking activities.

Merchant Banking Authority. Some commenters supported imposing additional restrictions on merchant banking activities, including expanding the range of actions that would constitute routine management and shortening investment holding periods. Commenters supportive of additional restrictions on merchant banking activities argued that these activities pose many of the same risks to safety and soundness and financial stability that are posed by complementary commodity activities and section 4(o) grandfather authority, such as environmental risks, reputational risks, geopolitical risks, compliance risks, and supply chain issues.

In contrast, other commenters urged the Board not to place additional restrictions on merchant banking investments for several reasons. First, they argued that merchant banking authority reflects a considered Congressional determination that accounted for both the benefits and the risks of these activities and determined the appropriate balance of restrictions on merchant banking activities. Commenters contended that additional restrictions on merchant banking investments would undermine the benefits of merchant banking activities and hamper economic growth by, for example, reducing access to seed capital for some small-to-medium-sized businesses. Some commenters maintained that current regulatory and risk-management safeguards are adequate to prevent or limit risks of merchant banking activities to financial institutions. In support of this position, some pointed to the lack of significant liability resulting from past merchant banking activities. Some commenters argued that imposing further restrictions on merchant banking could increase risks to FHCs by preventing FHCs from taking over routine management functions when necessary to avoid significant loss, and by preventing FHCs from diversifying their investment portfolios through merchant banking investments. Other commenters argued that if FHCs are given an insufficient investment horizon there is a greater likelihood that they will be forced to exit their investments at a loss in order to comply with holding period requirements.

II. Description of Proposed Rule

Based on its review of comments and additional analysis, the Board invites public comment on a proposal to (i) adopt additional limitations on physical commodity activities conducted pursuant to the complementary activity authority in section 4(k)(1)(B) and clarify certain existing limitations on those activities to reduce potential risks these activities may pose to the safety and soundness of FHCs and their depository institutions; (ii) amend the Board's risk-based capital requirements to increase the requirements associated with physical commodity activities and merchant banking investments in companies engaged in physical commodity activities to better reflect the potential risks of legal liability associated with a catastrophic event involving these physical commodity activities; (iii) rescind the findings underlying the Board orders authorizing certain FHCs to engage in energy management services and energy tolling under complementary authority and provide firms currently authorized to conduct these activities a transition period to unwind or divest these activities; (iv) remove copper from the list of metals that BHCs are permitted to own and store as an activity closely related to banking under section 4(c)(8) of the BHC Act and Regulation Y; and (v) increase transparency regarding the physical commodity activities of FHCs through more comprehensive regulatory reporting. The Board invites public comment on all aspects of this proposal, including in particular the issues identified below.

A. Scope of Permissible Physical Commodity Activities

1. Level of Complementary Commodity Activities Permitted

As a condition of approving notices filed by FHCs to engage in physical commodity trading, the Board limited the market value of the commodities an FHC could hold under complementary authority to an aggregate of 5 percent of the FHC's consolidated tier 1 capital. The Board imposed this limit to reduce the safety and soundness risks of holding physical commodities, which include unique risks such as legal and environmental risks described above as well as operational risks associated with the storage and transportation of physical products (*e.g.*, delay of delivery, loss of product).

In addition to complementary authority, FHCs and their subsidiaries may hold physical commodities under other authorities. For example, the Office of the Comptroller of the Currency (OCC) has permitted certain national banks to hold physical commodities to hedge customer driven, bank-permissible derivative transactions[41] and BHCs may take possession of physical commodities provided as collateral in satisfaction of debts previously contracted in good faith.[42] As some commenters argued, holding physical commodities presents unique safety and soundness risks to a banking organization regardless of the authority under which the commodity is held or the entity within the organization that holds the commodities.[43]

---

[40] SIFMA Comment Letter at 28–30.

[41] *See* 12 U.S.C. 24(7); *see, e.g.*, OCC Interpretive Letter No. 935 (May 14, 2002).

[42] 12 U.S.C. 1843(c)(2); 12 CFR 225.22(d)(1).

[43] Letter from Senator Carl Levin dated April 16, 2014; Senate Permanent Subcommittee on Investigations, *Wall Street Bank Involvement with Physical Commodities*, 10, 390–396 (Nov. 20, 2014) (PSI Report); *see also* OCC Banking Circular 277 at 24 (noting the potential additional risks associated with physical hedging activities). In a comment letter on the ANPR dated December 17, 2014, Senator Carl Levin, then-Chairman of the Subcommittee, requested that the PSI Report be added to the administrative record for the ANPR.

To address the potential that the Board's 5 percent limit may be of limited value in addressing the level and risks of physical commodity activities of FHCs because FHCs also rely on other authorities to conduct these activities, the Board is proposing to account for physical commodities held by the consolidated banking organization under a broader range of authorities within the 5 percent limit on physical commodity trading that an FHC may conduct under complementary authority. The proposed tighter limit would better account for the risks that activities involving physical commodities pose to the consolidated organization.[44]

Specifically, the proposal would prohibit an FHC from purchasing, selling, or delivering physical commodities pursuant to its authority to engage in physical commodity trading under section 4(c)(8) or 4(k)(1)(B) if the market value of physical commodities owned by the FHC and its subsidiaries under any authority, other than authority to engage in merchant banking activities, similar investment authority for insurance companies, or authority to acquire assets or voting securities held in satisfaction of debts previously contracted, exceeds 5 percent of the consolidated tier 1 capital of the FHC.[45] The proposal would provide FHCs with two years from the effective date of this rule to conform to the revised 5 percent cap.

Under the proposal, the cap on an FHC's physical commodity trading activities would be calculated based on physical commodities the FHC holds on a consolidated basis. While it would not restrict the ability of a subsidiary to engage in a physical commodity activity pursuant to any authority other than complementary authority, it would limit the authority of the FHC to expand its physical commodity trading activities based on complementary authority if the FHC already engages in a substantial amount of physical commodity activities under other authorities. The proposal would exclude from the calculation of the cap physical commodity activities of portfolio companies held under merchant banking authority or related to satisfaction of debts previously contracted because activities under these authorities are temporary and, because of other restrictions, may be difficult for an FHC to monitor and control. Finally, because insurance company investments are regulated under state insurance law, companies held under section 4(k)(4)(I) are not a part of the Board's current proposal.[46]

2. Clarification of Prohibitions on Certain Operations

As explainedabove, owners and operators of facilities and vessels that extract, process, store or transport certain physical commodities may be liable for damages and cleanup costs associated with a release of the physical commodity. Because this liability can be substantial, the Board prohibited FHCs from owning, operating, or investing in facilities for the extraction, transportation, storage, or distribution of commodities as part of complementary authority.[47]

The proposal would codify in Regulation Y this limitation and strengthen restrictions designed to ensure that FHCs are not found to "operate" an entity engaged in physical commodity activities for purposes of Federal and state environmental laws. These restrictions prohibit (1) participation in the day-to-day management or operations of the facility, (2) participation in management and operational decisions that occur in the ordinary course of the business of the facility, and (3) managing, directing, conducting or providing advice regarding operations having to do with the leakage or disposal of a physical commodity or hazardous waste or involvement in decisions related to the facility's compliance with environmental statutes or regulations, including any law or regulation referenced in the proposed definition of covered physical commodity (discussed below). The proposed list of actions is not meant to be exhaustive; an FHC is expected to take other steps as appropriate to limit the types of actions that potentially could impose environmental liability on the FHC or otherwise suggest that the FHC is unduly involved in the activities of third parties.

Question 1. *Does the scope of the proposed list of prohibited actions appropriately protect against an FHC being found to "operate" a facility or vessel under Federal and state environmental law? Please explain your answer. Would it be more or less appropriate for the regulation instead to prohibit any FHC involvement that could subject the FHC to any such liability as operator under environmental law without describing what types of actions could lead to the liability, and why?*

B. Risk-Based Capital Requirements for Covered Physical Commodities

1. Overview

The Board is proposing to amend its risk-based capital rule to better reflect the risk of legal liability that an FHC may incur as a result of its physical commodity activities. The resulting increase in capital requirements would be reflected in both the standardized approach and the advanced approaches risk-based capital ratios, and would be in addition to any existing capital requirements relating to market risk or operational risk applicable to the assets associated with physical commodity activities of an FHC or relating to existing counterparty credit risk applicable to financial transactions associated with such activities.

As described in more detail below, covered physical commodities are those with the highest likelihood of exposing an FHC to legal liability under Federal or state environmental laws. The proposal would not change the risk-based capital treatment of other physical commodities. It would moderately increase the risk weight for covered physical commodities that are held as part of a commodity trading activity that would be permissible under section 4(k) of the BHC Act, and would significantly increase the risk weight for covered physical commodities that an FHC owns as part of an activity authorized solely under section 4(o) of the BHC Act. The Board is proposing a higher risk weight for activities permitted to be conducted solely under section 4(o) because these activities contain the highest legal liability and reputational risks (*e.g.,* storing, refining, extracting, transporting or altering). The proposed risk weight for a merchant banking investment in a company engaged in covered physical commodity activities would depend on the nature of those activities.

---

[44] An increase in the commodity derivatives business of a national bank that is a subsidiary of an FHC may increase the amount of physical commodities the national bank is able to hold as part of its commodity hedging activities as well as the capital requirements of the bank and FHC. *See* OCC Bulletin 2015–35 (Aug. 4, 2015) (limiting physical hedging activities to 5 percent of the notional value of the bank's derivatives that are in that same particular commodity and allow for physical settlement within 30 days). By including the amount of physical commodities held at the national bank within the proposed 5 percent limit, the proposed limit also would ensure that the amount of physical commodities the FHC is able to hold under complementary authority does not increase along with any increase in the amount of physical commodities held at the national bank.

[45] Consistent with the existing notice requirements of FHCs engaging in physical commodity trading, the proposal also would require an FHC to notify the Board if, on a consolidated basis, the market value of physical commodities owned by the FHC exceeds 4 percent of the consolidated tier 1 capital of the FHC. *See, e.g.,* 2003 Citi Order.

[46] *Accord* Letter from Teachers Insurance and Annuity Association of America dated April 16, 2014; letter from the American Council of Life Insurers dated April 16, 2014.

[54] For example, an FHC may face liability under certain states' environmental laws based on its ownership of the hazardous substance or on hiring third parties to deliver the substance. *See supra* notes 12–17 and corresponding text.

[47] *See, e.g.,* 2003 Citi Order. The Board's orders also prohibit the FHC from processing, refining, or otherwise altering commodities, and clarify that in conducting its physical commodity trading, the FHC will be expected to use appropriate storage and transportation facilities owned and operated by third parties.

The proposed capital requirements would apply only to activities in physical commodities that are substances covered under Federal or relevant state environmental law (covered physical commodities). These physical commodities carry the greatest potential liability under relevant environmental laws. The proposed definition specifically identifies the Federal environmental laws—CERCLA, OPA, CAA, and CWA—likely to impose such liability.[48] However, the proposed definition does not name individual state environmental laws. Rather, an FHC would be required to identify on a state-by-state basis the physical commodities it owns that are not covered substances under the enumerated Federal laws. It would then be required to determine whether the physical commodities it owns in a particular state are subject to liability under that state's environmental laws. This approach is intended to limit an FHC's compliance burden to only those commodities and jurisdictions relevant to the activities actually conducted by the FHC, while helping to ensure the FHC understands the range of its riskiest physical commodity activities and the breadth of state environmental laws to which the FHC may be subject.

FHCs may be subject to legal liability in an amount much greater than the value of the physical commodities they own. An environmental catastrophe linked to an FHC's physical commodity activities could suddenly and severely undermine public confidence in the FHC and any of its subsidiary IDIs, limiting its access to funding markets until the market assesses the extent of the FHC's liability. Both environmental risks and reputational risks are higher for activities permissible only under section 4(o) grandfather authority than for activities permissible as part of physical commodity trading under complementary authority.[49] As noted above, section 4(o) grandfather authority permits direct ownership or operation of facilities that manage, refine, store, extract, transport, or alter covered physical commodities. These activities increase the potential that an FHC will be held liable for damages from an environmental catastrophe involving covered physical commodities. To help address these risks, as well as the inherent uncertainty in valuing the potential damages associated with a catastrophe, the proposal assigns a 1,250 percent risk weight—the highest risk weight currently specified by the Board under the standardized approach[50]—to the market value of all covered physical commodities permitted to be owned only under section 4(o) grandfather authority.[51] The proposal also assigns a 1,250 percent risk weight to the original cost basis (*i.e.,* cost basis gross of accumulated depreciation and asset impairment) of section 4(o) infrastructure assets, which are any non-commodity on-balance-sheet assets owned pursuant to section 4(o) grandfather authority (*e.g.,* pipelines, refineries). The proposal bases the capital requirement on the original cost basis of a 4(o) infrastructure asset rather than its carrying value because the risk of legal liability does not decline over the life of the infrastructure asset. The proposed capital requirement for 4(o) infrastructure assets is intended to address the risk of legal liability resulting from the unauthorized discharge of a covered substance in connection with the infrastructure asset. The proposed 1,250 percent risk weight is not intended to require capital against the full amount of legal liability and reputational harm that might result from a catastrophic event, which can vary significantly depending on the nature and extent of the environmental disaster and could be extremely large. Rather, the risk weight is intended to reflect the higher risks of physical commodity activities permissible only under section 4(o) grandfather authority without also making the activities prohibitively costly by attempting to capture the risks of the largest environmental catastrophes.

The proposal would assign a risk weight of 300 percent to covered commodities held pursuant to section 4(k) permissible physical commodity trading.[52] The proposed 300 percent risk weight is designed to help ensure that FHCs engaged in commodity trading have a level of capitalization for such activities that is roughly comparable to that of nonbank commodities trading firms. Because the risks of an activity generally are independent of the authority under which an FHC conducts the activity, the proposal would also assign a 300 percent risk weight to physical commodity activities conducted under section 4(o) grandfather authority that would be permissible physical commodity trading under complementary authority.

As part of the conditions for an amount of a covered physical commodity owned by an FHC engaged in physical commodity activities under section 4(o) grandfather authority to be assigned a 300 percent risk weight, the market value of the amount, when aggregated with the market value of almost all of the physical commodities owned by the FHC that the proposal would not already subject to a 1,250 percent risk weight, must not exceed 5 percent of the consolidated tier 1 capital of the FHC. The proposal refers to this aggregate amount as the "section 4(k) cap parity amount" and, like the proposal's modifications to the 5 percent cap on physical commodity trading, the section 4(k) cap parity amount would exclude amounts of physical commodities owned pursuant to merchant banking authority, similar insurance company investment authority, and authority to acquire assets and voting securities in satisfaction of debts previously contracted. The proposal would assign a 1,250 percent risk weight to this excess amount of section 4(k) permissible commodities for the reasons the Board is proposing to tighten the 5 percent of tier 1 capital limit on physical commodity trading conducted under complementary authority. Physical commodities that are not covered physical commodities or that are held under authorities other than section 4(o) grandfather authority would not receive additional capital requirements.[53]

---

[48] A physical commodity would be a covered physical commodity under the proposed definition if the commodity is a covered substance under the identified Federal environmental laws regardless of whether the commodity is held in the United States. Applying the Federal environmental law framework to all physical commodities held outside the United States acknowledges the risk that FHCs may be held liable under similar laws for damages or cleanup costs associated with an environmental catastrophe that occurs outside of the United States without requiring FHCs to identify the physical commodities and activities for which any foreign jurisdiction may impose liability.

[49] The proposal references activities engaged in by the FHC under section 4(o) grandfather authority, including activities of the FHC's subsidiaries. An FHC owning a covered physical commodity under section 4(o) grandfather authority may treat the commodity as a section 4(k) permissible commodity and apply a 300 percent risk weight if it meets certain requirements described below.

[50] *See, e.g.,* 12 CFR 217.38, .41(c)(1), and .42(a)(1).

[51] The Board's regulatory capital rule applies a 1,250 percent risk weight to certain exposures that pose a high degree of risk to the banking organization and regarding which the banking organization may have difficulty determining the extent of the losses. For example, it applies a 1,250 percent risk weight to securitization exposures that raise supervisory concerns with the subjectivity involved in valuation of the exposure and in instances where the institution is not able to demonstrate a comprehensive understanding of the potential losses that could result from a default or partial default of the exposure. Similarly, the proposed 1,250 percent risk weight for section 4(o) permissible commodities and section 4(o) infrastructure assets is intended to address both the risk of those activities and the difficulties in determining the legal liability exposure to an FHC from its section 4(o) permissible commodities. *See* 12 CFR 217.41(c)(1) and .42(a)(1); *see also* 78 FR 62018, 62113 and 62117 (Oct. 11, 2013).

[52] *Cf.* 12 CFR 217.52(b)(5).

Question 2. *To the extent the Board's proposed approach to the section 4(k) cap parity amount creates incentives for an FHC to conduct physical commodity activities under authorities that would result in lower capital requirements, should the Board require that an FHC include physical commodity activities conducted under authorities that receive less than a 300 percent risk weight first for purposes of determining the excess amount over the 4(k) cap parity amount?*

FHCs may also own companies under merchant banking authority that are engaged in physical commodity activities, including activities that involve physical commodity trading, storage, transportation, and refining. The proposal refers to investments in portfolio companies engaged in activities involving covered physical commodities as covered commodity merchant banking investments. Because these companies may be subject to similar types and amounts of liability as FHCs engaging in these activities directly, the proposal generally would apply the same risk weights to covered commodity merchant banking investments as the proposal would apply to covered physical commodities used in physical commodity activities under complementary authority and section 4(o) grandfather authority, respectively. Moreover, the proposal would not permit covered commodity merchant banking investments to receive the 100 percent risk weight assigned to non-significant equity exposures.[54]

Accordingly, the proposal would apply a 1,250 percent risk weight to an FHC's covered commodity merchant banking investment unless all of the physical commodity activities of the portfolio company are physical commodity trading activities permissible under complementary authority (commodity trading portfolio company).[55] If all of the physical commodity activities of the portfolio company are permissible under complementary authority and the securities of the portfolio company are publicly traded, a 300 percent risk weight would be applied to the FHC's covered commodity merchant banking investment in the commodity trading portfolio company. Consistent with the standardized approach to equity investments not subject to a 100 percent risk weight, the proposal would assign a 400 percent risk weight to equity investments in commodity trading portfolio companies that are not publicly traded. If an FHC engages in any other physical commodity activity, including those that would be permissible only under the authority provided in section 4(o), the FHC must apply the 1,250 percent risk weight to that merchant banking investment.

These risk weights are designed to address the risks associated with merchant banking investments generally, the potential reputational risks associated with the investment, and the possibility that the corporate veil may be pierced and the FHC held liable for environmental damage caused by the portfolio company. (A somewhat higher risk weight would be assigned to privately traded portfolio companies in recognition of the risk that an FHC may not be able to gain access to markets for a privately held portfolio company after an environmental catastrophe involving the portfolio company).

However, nonfinancial companies use covered physical commodities to operate businesses otherwise unrelated to physical commodities. For example, grocery stores purchase gasoline to transport produce and a business or a warehouse may purchase oil for heating. To ensure the proposal would not apply to all merchant banking investments that own physical commodities but that are not engaged in a physical commodities business, the proposal would attempt to define and exempt activities of commodity end users from physical commodity activities. Under the proposal, a portfolio company would not be subject to these additional capital requirements as a covered commodity merchant banking investment solely because the portfolio company owns or operates a facility or vessel that purchases, stores, or transports a covered physical commodity only as necessary to power or support the facility or vessel. For example, an investment in a company that engages only in one physical commodity activity—oil storage—and does so solely for the purpose of heating its facility and operating machines within the facility would not be a covered commodity merchant banking investment. The Board is seeking comment on whether the proposed exclusion and its scope are appropriate and, if so, whether the proposed definition of the exclusion is workable.

Question 3. *Should investments in certain portfolio companies, such as end users of covered physical commodities, be exempted from additional capital requirements as a covered commodity merchant banking investment? If an exemption is appropriate, what should be the scope of the exemption?*

The Board is also considering the appropriate risk-based capital treatment for all merchant banking investments. For example, the Board is considering whether to continue to include merchant banking investments as "non-significant equity exposures" under the Board's standardized approach to risk-based capital rules.

Question 4. *How are the risks associated with merchant banking investments in companies involved in physical commodity activities different from or similar to other merchant banking investments? Do the Board's current capital requirements adequately capture the risks of merchant banking investments not covered under the proposal? If not, what additional capital requirements should be applied to merchant banking investments*

---

[53] In addition, in order for an amount of a covered physical commodity owned under section 4(o) grandfather authority to be considered an amount of section 4(k) permissible commodities, the commodity must be one for which a derivative contract has been authorized for trading on a U.S. futures exchange by the CFTC (unless specifically excluded by the Board) or another commodity that has been specifically authorized by the Board under complementary authority (approved physical commodity). The FHC also must have purchased the amount of the commodity in the spot market or own the amount for the purpose of taking or making physical delivery of the commodity to settle a forward, option, swap, or similar contract. Finally, the FHC must have not stored, extracted, produced, transported, or altered that amount while the FHC owned the commodity but instead must have hired reputable third parties to do so.

[54] Under the Board's current standardized approach, merchant banking investments and certain other types of equity exposures must be assigned a 100 percent risk weight to the extent that the aggregate carrying value of the equity exposures does not exceed 10 percent of the Board-regulated institution's total capital. 12 CFR 217.52(b)(3).

[55] Similar to the proposed restrictions on the 300 percent risk weight for covered physical commodities held under section 4(o) authority, a company would be considered a physical commodity trading company if its activities involving covered physical commodities consisted only of purchasing covered physical commodities (that are approved physical commodities) in the spot market and/or taking or making physical delivery of such commodities to settle forwards, options, swaps, or similar contracts. However, a portfolio company would be considered a commodity trading portfolio company regardless of the amount of covered physical commodities it held; as discussed above, obtaining daily information on the amounts of a portfolio company's commodities holdings or placing limits on the commodities activities of the company may be inconsistent with the more limited, generally-permissible involvement of an FHC in its portfolio companies.

generally? For example, is it appropriate to continue to include merchant banking investments as "non-significant equity exposures" under the Board's risk-based capital rules?

2. Calculation of Exposure Amount for Covered Physical Commodities

Under the proposal, the proposed risk weights would be multiplied by (1) the market value of all section 4(o) permissible commodities; (2) the original cost basis of section 4(o) infrastructure assets; (3) the market value of section 4(k) permissible commodities; and (4) the carrying value of an FHC's equity investment in companies that engage in covered physical commodity activities to determine an FHC's risk-based capital requirements for covered physical commodity activities.

An FHC would be required to calculate the market value of its covered physical commodities based on the quantity of each covered physical commodity multiplied by the market price of the covered physical commodity.[56] The proposed measure of exposure is designed to reflect an FHC's ongoing level of involvement in covered physical commodity activities, and to be relatively stable in the face of market price movements and individual holding amounts, as explained below. The quantity of a covered physical commodity would be measured as a daily average of the amount of each covered physical commodity held by an FHC over the previous calendar quarter.[57] A measurement based on an average should reduce the potential for variations in capital requirements that could result from using a point-in-time measurement. Furthermore, use of a daily, as opposed to a weekly or monthly, average should mitigate fluctuations in the quantities of covered physical commodities held by an FHC that could misrepresent the FHC's holdings over a longer period.

The calculation of the market price of a covered physical commodity would be determined as a rolling average of the month-end, end-of-day spot prices for the covered physical commodity over the previous 60-month period. If the market price of a covered physical commodity (*e.g.*, oil) varies based on type, grade, and/or classification, the FHC would calculate the average market price for each classification as a distinct covered physical commodity. The Board notes that FHCs should have mechanisms in place to monitor the prices of the commodities held under complementary authority and grandfather authority.[58]

3. Impact Analysis of Proposed Capital Requirements

The proposal would not amend the scope of application of the Board's capital rules. Therefore, only FHCs conducting complementary, section 4(o) grandfather, or merchant banking activities would be subject to the proposal. Foreign banking organizations conducting such activities in the United States would be subject to the proposal only to the extent the Board's capital rules apply to the organizations.

The Board conducted an analysis of the impact of the proposed capital requirements on FHCs and physical commodities markets. In doing so, the Board considered the extent of FHC activity in the physical commodity markets, the share of exposure and revenue that physical commodity activities represent at FHCs, and the impact of the proposed capital requirements on an FHC's physical commodity activities relative to the existing risk-based capital requirements applicable to FHCs.

The Board estimates that, across all FHCs that engage in physical commodity activities, the proposed capital requirements could increase risk-weighted assets as much as $34.0 billion. Assuming an average risk-based capital ratio of 12 percent, the proposal could increase the amount of capital required to be held to meet regulatory requirements by FHCs that engage in physical commodity activities under any authority by approximately $4.1 billion in the aggregate. These figures are based on (i) FHC-provided categorizations of their physical commodity holdings; (ii) FHC-provided estimates of their physical commodity holdings that are related to activities permitted solely under section 4(o) grandfather authority; and (iii) Board estimates of the amount of physical commodity holdings of an FHC that would be considered a covered physical commodity under this proposal. This estimate assumes that all physical commodities of FHCs would be covered physical commodities and therefore subject to the proposed additional risk weights.[59]

The estimated increase in risk-weighted assets resulting from the proposal would be insignificant (0.7 percent) relative to the total risk-weighted assets among FHCs that engage in physical commodity activities. The estimated increase relative to market-risk-weighted assets of these FHCs (that is, risk-weighted assets attributed to trading business) is 7.1 percent. This increase in risk weighting would not cause any FHC to breach the minimum capital requirements, and FHCs could likely absorb the increase in required capital at the firm level if they determine that physical commodity activities are important to the firm's overall strategy. However, if FHCs consider their physical commodity trading on a standalone basis, the proposed increases in capital requirements could make this activity significantly less attractive based on its return on capital, and could result in decreased activity. Such a reduction in activity is not expected to have a material impact on the broader physical commodity markets.

Information on physical commodity markets, in particular those covered by this proposal, is relatively scarce. Nonetheless, it appears that the bulk of activity and inventory is conducted and held by non-Board-regulated entities (such as energy firms and end users of physical commodities) rather than FHCs. Information available to the Board supports this view, with market participants asserting that, in general, FHCs' market shares in physical commodity markets are quite low and typically represent less than 1 percent of the market.

FHCs play a larger, but still limited, role in commodity derivatives trading, and a significant portion of FHCs' physical commodity activity is related to their commodity derivative trading activity. Based on the CFTC Bank Participation Report, the market share of U.S. banks in derivative contracts involving physical commodities typically ranges from 2 percent to 15 percent.[60] Derivatives activity related to non-bank subsidiaries of FHCs is estimated to be similar or slightly larger.[61] Thus, any reduction in activity related to financial contracts that may arise from the proposal should not materially impact the overall market for financial commodity contracts.

---

[56] An FHC that owns section 4(k) permissible commodities pursuant to section 4(o) grandfather authority would also be required to calculate the market value of other physical commodities as part of the proposed section 4(k) cap parity amount.

[57] To calculate the quantity of a covered physical commodity, an FHC would be required to apply the appropriate unit of measurement customarily used for each covered physical commodity. Customary units of measurement generally are reflected through industry convention and the actions of market participants. For example, physical commodity activities involving oil and oil products typically use barrels as the unit of measurement; transactions involving liquid natural gas would measure quantity in metric tons or gallons.

[58] FHCs engaging in physical commodity trading currently must ensure the market value of commodities held under complementary authority does not exceed 5 percent of the FHC's consolidated tier 1 capital. FHCs engaging in activities under section 4(o) grandfather authority must ensure that attributed aggregate consolidated assets of the companies held by the FHC pursuant to section 4(o) grandfather authority are not more than 5 percent of the total consolidated assets of the FHC. 12 U.S.C. 1843(o)(2).

[59] The impact on capital would be less to the extent that physical commodities of FHCs would not be covered physical commodities under the proposal.

With respect to FHCs' merchant banking investment activities, the estimated impact of the proposed increased capital requirements appears insignificant. The aggregate value of merchant banking investments among FHCs is approximately $29 billion.[62] More granular information regarding the proportion of merchant banking investment activity attributable to portfolio companies that engage in physical commodity activities is not available. Nevertheless, given the small market share of FHCs in the physical commodity markets, the Board expects that the value of FHC equity investments in portfolio companies that engage in physical commodity activities would be significantly less than the estimated $29 billion. Accordingly, the proposed increase in capital requirements for an FHC's merchant banking investment activity would not be expected to have a material impact.

Question 5. *Does the proposed definition of "covered physical commodity" sufficiently cover the commodities that pose the greatest legal, reputational, and financial risks to an FHC? If not, please describe those high-risk commodities that would fall outside the scope of the definition.*

Question 6. *What, if any, other criteria should the Board consider when determining whether a physical commodity poses a risk that the FHC would be liable for a catastrophe involving its physical commodity activities?*

Question 7. *How appropriate are the proposed risk weights for covered physical commodities owned as part of an FHC's physical commodity trading activities or held by FHCs conducting activities solely permitted by section 4(o) grandfather authority and for merchant banking portfolio companies engaged in such activities? If not appropriately calibrated, what are the shortcomings of the capital requirement in capturing catastrophic risk and what other factors should the Board consider to calibrate the capital requirements?*

Question 8. *What are the operational or practical challenges that implementing the proposed formulations for calculating the capital requirement would impose?*

Question 9. *What, if any, alternative methodologies for calculating the quantity of the covered physical commodity should the Board consider?*

Question 10. *Would the proposed capital requirements provide foreign banking organizations engaging in physical commodity activities, to the extend these organizations are not already subject to the Board's capital rules, with a competitive advantage over FHCs organized in the United States that engage in physical commodity activities? If so, what are the nature and amount of the competitive advantages?*

Question 11. *What additional considerations or data should the Board consider to calculate the estimated impact of the proposal?*

D. The Scope of Permitted Complementary Commodity Activities

1. Background

In addition to considering whether conduct of the activities by an FHC poses a substantial risk to the safety and soundness of depository institution subsidiaries of the FHC or the financial system generally, in approving each complementary commodity activity, the Board considered whether each activity is "meaningfully connected" to a financial activity such that it complements the financial activity.[63] Currently, twelve FHCs possess authority to engage in physical commodity trading, and five of those FHCs also have authority to engage in energy management services and energy tolling. For the reasons described below, the Board is proposing to rescind the authorization for FHCs to engage in energy tolling and energy management services.

a. Physical Commodity Trading

In 2003, the Board determined that physical commodity trading—the purchasing and selling of physical commodities in the spot market and the taking and making delivery of physical commodities to settle derivatives that BHCs were authorized to trade (commodity derivatives)—was so meaningfully connected to a financial activity that it complemented the financial activity. The Board cited a number of reasons for its determination. The Board observed that physical commodity trading activities "flow from the existing financial activities of FHCs"—specifically, commodity derivatives activities, which are permissible financial activities. Permissible financial commodity derivatives trading activities involved derivatives that the FHC could terminate, assign, or cash-settle without taking delivery of the underlying physical commodity.[64] Complementary physical commodity trading allows an FHC to physically settle the derivatives contract.

The Board found physical commodity trading to be a complementary activity to financial commodities derivatives trading for a number of reasons. Physical commodity trading activities would flow from existing commodity derivatives activities. Physical commodity trading would enhance the ability of FHCs to efficiently provide a full range of commodity-related services to their customers; enable FHCs to transact more efficiently with customers in a wider variety of commodity markets and transaction formats; and enable FHCs to acquire more experience in the physical commodity markets and, in turn, improve their understanding of, and profitability in, the commodity derivatives markets. The Board also noted that diversified financial companies that were not at that time BHCs conducted physical commodity trading in connection with their commodity derivatives business. For these reasons, the Board believed that physical commodity trading was complementary to commodity derivatives activities.[65]

The Board has not changed its view on the complementarity of these trading activities. However, as discussed above, the Board believes added limits are appropriate to reduce potential risks to depository institution subsidiaries of FHCs or the financial system generally.

b. Energy Management Services and Energy Tolling

Following a number of changes to the energy industry, the Board determined that certain activities involving power plants—energy management services and energy tolling—were complementary to a financial activity.[66] The Board permitted six FHCs to engage in one or both of these activities between December 2007 and June 2010.[67]

---

[60] *See Bank Participation Reports*, available *at www.cftc.gov/MarketReports/BankParticipationReports.*

[61] *See* CFTC Commitments of Traders Report, *available at www.cftc.gov/Marketreports/CommitmentsofTraders/index.htm.*

[62] Data obtained from top-tier domestic holding companies that file the FR Y–12 reporting form.

[63] *See, e.g.,* 2003 Citi Order.

[64] *See* 12 CFR 225.28(b)(8)(ii)(B)(3)–(4); 2003 Citi Order.

[65] *See* 2003 Citi Order. Commenters to the ANPR also provided an additional example of the complementarity of physical commodity trading—the ability to net physical and financial contracts under the same master agreement and the ability to take physical delivery of futures to match financial options. SIFMA Comment Letter at 29–30.

In January 2014, the ANPR noted that three FHCs that engage in physical commodity activities had announced plans to decrease or discontinue their involvement in the activities.[68] These developments, although potentially caused by a variety of factors,[69] led the Board to reconsider whether complementary commodity activities continued to be so meaningfully connected to a financial activity so as to complement the financial activity. Subsequent to the ANPR, many of these plans were realized and discontinuance of physical commodity activities became more pronounced for FHCs engaging in energy tolling and energy management activities.[70] Of the five FHCs that currently have the authority to engage in either energy management services or energy tolling, at least four have discontinued these activities in the U.S.[71]

Energy management services. Under an energy management agreement, an FHC acts as an energy manager that provides transactional, advisory and administrative services to a power plant owner.[72] An energy manager may also provide financial intermediation services. An energy manager performs administrative tasks related to the sale of power and the delivery of fuel to run the plant, and may enter into fuel and power contracts for the owner that satisfy the owner's criteria, including by purchasing fuel from a third party in order to resell it to the power plant owner and by purchasing the energy output of the power plant for release in the market. An FHC, as energy manager, also may enter into hedging transactions with the owner to manage fuel costs and energy prices. The energy manager generally is compensated based on a percentage of the difference between the delivered fuel prices and the realized power revenues (the "spark spread") with a guaranteed minimum compensation amount.

In seeking approval to conduct energy management services, FHCs argued that these services may help a power plant owner develop and refine the power plant's risk-management policies and optimize the plant owner's decisions about when to operate, which are heavily influenced by fuel costs, power prices, and the financing available. FHCs also argued that these activities would improve the FHCs' understanding of energy markets and their ability to serve as an effective competitor in the derivatives markets.

Energy Tolling. The FHCs that currently engage in energy management services also engage in energy tolling. A primary difference between energy tolling and energy management is that the former permits the "toller" to act as principal for its own account rather than act as the agent, or otherwise for the benefit, of the power plant owner. Under both energy management and tolling, an FHC generally is responsible for monitoring day-to-day market conditions to determine when to operate the plant and when to provide the necessary fuel. Unlike the typical energy management agreements, pursuant to a tolling agreement, an FHC may direct—rather than advise—the owner to operate the plant so that the toller—rather than the owner—may capture the spark spread.[73] The compensation structure of a tolling agreement reflects the FHC's role as principal: The toller pays the owner a fixed periodic payment in exchange for the right to all or part of the plant's power output and provides the owner with a marginal payment based on the amount of energy produced to compensate for the costs of running the plant.

2. Reconsideration of the Approval of Energy Management and Tolling as Complementary Activities

The Board is reconsidering whether energy management services and energy tolling activities are complementary to a financial activity. Over time, these two activities have not appeared to be as directly or meaningfully connected to a financial activity as is physical commodity trading.

Physical commodity trading provides FHCs with an alternative method of settling BHC-permissible commodity derivatives.[74] Unlike physical commodity trading, energy management services and energy tolling do not directly support and are not directly related to engaging in otherwise BHC-permissible commodity derivatives activities or other financial activities.

Moreover, the expected benefits of permitting these activities do not appear to have been realized over time. For example, it was originally expected that allowing FHCs to conduct energy management services and energy tolling activities would allow FHCs to gain additional information to help manage commodity-related risks.[75] It is not clear that energy management services or energy tolling significantly improve an FHC's understanding of commodity derivatives markets since—in order to engage in energy management services or energy tolling—an FHC must already have a thorough understanding of commodity derivatives markets. Moreover, FHCs that have divested their physical commodity business lines continue to engage in commodity derivatives trading and termination of their energy management and energy tolling activities is not expected to negatively impact their ability to provide commodity derivative services.

---

[66] The approvals to engage in these activities occurred after Federal and state deregulation of the energy industry, the energy crisis in the western United States, the growth of independent power producers, and the enactment of the Energy Policy Act of 2005, which encouraged investment in electricity energy infrastructure. *See* Public Law 109–58 (Aug. 8, 2005); Timothy P. Duane, *Regulation's Rationale: Learning from the California Energy Crisis,* 19 Yale J. on Reg. 471 (2002).

[67] Only five FHCs are currently permitted to engage in energy management services or energy tolling in the United States. One of the FHCs approved to engage in energy management services and energy tolling—Fortis—was acquired by another FHC after the Board's approvals. *See* Board letter to Robert L. Tortoriello (Dec. 5, 2008).

[68] 79 FR 3329, 3334 (Jan. 21, 2014).

[69] *See id.;* SIFMA Comment Letter at 29.

[70] *See, e.g.,* Mercuria Closes Acquisition of J.P. Morgan Chase Physical Commodities Business, Mercuria (March 10, 2014), *available at http://www.mercuria.com/media-room/business-news/mercuria-closes-acquisition-jp-morgan-chase-physical-commodities-business;* Morgan Stanley Completes Sale of Global Oil Merchanting Business to Castleton Commodities International LLC, Morgan Stanley (November 2, 2015), *available at https://www.morganstanley.com/press-releases/21e458d2-0231-493b-a95a-5084c3b4c701.*

[71] *See, e.g.,* Ron Bousson, Timeline: Deutsche Bank's Commodities Operations, Reuters (December 5, 2013), *available at http://www.reuters.com/article/us-deutsche-commodities-timeline-idUSBRE9B40UZ20131205?mod=related&channelName=PersonalFinance;* Sempra Energy, RBS Complete Sale of Commodities Joint Venture North American Assets to JP Morgan Unit, Sempra Energy (December 1, 2010), *available at http://investor.shareholder.com/sre/releasedetail.cfm?ReleaseID=534828;* Martin Arnold & Daniel Schafer, Barclays to Wind Down Commodities Trading, Financial Times (April 20, 2014), *available at http://www.ft.com/cms/s/0/5761ec06-c707-11e3-aa73-00144feabdc0.html;* Mercuria Closes Acquisition of J.P. Morgan Chase Physical Commodities Business, Mercuria (March 10, 2014), *available at http://www.mercuria.com/media-room/business-news/mercuria-closes-acquisition-jp-morgan-chase-physical-commodities-business.*"

[72] These services are typically outlines in an energy management plan and risk-management policy that governs how the power plant should be operated. *E.g.,* 2007 Fortis Order.

[73] The Board compared a tolling agreement to a call option with the strike price being the cost of producing that amount of power. *See* 2008 RBS Order. A tolling agreement also has been compared to an operating lease agreement because it allows the toller the exclusive right to use the plant during the term of the agreement and the benefits of ownership without the capital investment. *See* Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48207, 48242 (Aug. 13, 2012) (citing the letter from Mary Anne Mason, HoganLovells LLP on behalf of Southern California Edison Company, Pacific Gas and Electric Company and San Diego Gas and Electric Company, dated July 22, 2011 (2011 CA Utilities Letter); Regulating Financial Holding Companies and Physical Commodities: Hearing Before the S. Subcomm. in Fin. Insts. and Consumer Prot. (Jan. 15, 2014) (testimony of Norman Bay, Director, Office of Enforcement, Federal Energy Regulatory Commission at 15), *available at http://www.banking.senate.gov/public/index.cfm/2014/1/regulating-financial-holding-companies-and-physical-commodities.*

[74] *See* 2003 Citi Order.

[75] *See* 2007 Fortis Order.

The authorizations for energy management services and energy tolling also noted that unregulated financial competitors of FHCs engaged in these activities. However, it is unclear over time what, if any, advantages those financial firms gain from conducting energy management or energy tolling activities over FHCs in the conduct of derivatives and other FHC-permissible physical commodity activities.

Energy tolling was permitted in part to allow an FHC to hedge its own, or to assist its client to hedge, positions in energy.[76] However, there are other effective ways for an FHC to hedge its positions, and an FHC may assist clients to hedge their positions without the FHC engaging in energy tolling.

The proposal would not appear to eliminate the benefits commenters, including energy companies, commonly noted in letters responding to the ANPR.[77] The proposal would affect the actual activity of only one firm and the theoretical authority of five FHCs to engage in complementary commodity activities and would directly limit only certain types of agreements (*i.e.*, energy tolling and energy management services agreements) between FHCs and power plant owners. In addition, the proposal would not affect the authority of FHCs to provide derivatives and related financial products and services to power plants or engage in physical commodities trading. Permissible activities may include providing inventory and project finance arrangements involving physical commodities,[78] financially- and physically-settled derivatives to hedge fuel costs and energy prices,[79] buying and selling certain physical commodities in the spot market,[80] and derivatives advisory services.[81]

3. Conformance Period

The proposal would provide FHCs with a two-year transition period to conform their energy management services and energy tolling agreements following the effective date of the final rule if adopted. This conformance period is intended to reduce the burdens associated with applying the proposal to existing agreements. As noted, the Board invites comments on all aspects of the proposal, including specific questions regarding the appropriate conformance period.

Question 12. *Are there reasons that support determining energy management services or energy tolling are complementary to a financial activity that are not discussed above? If so, what are those reasons?*

Question 13. *Are there any potential effects on the safety and soundness of FHCs engaged in energy management services and energy tolling of rescinding such authorities? How would the potential effects differ if only one or the other activity was rescinded?*

Question 14. *What are the average lengths of an energy management services agreement and an energy tolling agreement? Under what circumstances may such agreements be terminated early and what are the contractual consequences of doing so? Are there challenges other than termination of such agreements associated with conformance to the proposed rescission of energy management services and energy tolling orders? To what extent may a conformance period alleviate those challenges? What is an appropriate conformance period for this aspect of the proposal and why?*

E. Reclassification of Copper as an Industrial Metal

In 1997, the Board amended Regulation Y to provide that BHCs could own and store copper, and engage in related incidental activities, as an activity so closely related to banking as to be proper incident thereto.[82] The Board has previously permitted BHCs to buy, sell, and store gold, silver, platinum and palladium bullion, coins, bars and rounds for their own accounts and the accounts of others. The list of precious metals was expanded to include copper, a metal used in minting coins, after trading in copper became permissible for national banks.[83]

Over time, copper has become most commonly used as a base or industrial metal, and not as a store of value in the same way as gold, silver, platinum and palladium.[84] While gold, silver, platinum and palladium have industrial uses as well, these precious metals have traditionally been traded internationally primarily for their exchange value rather than for industrial uses.[85] Copper, while it has been used in coins, has never been traded as a precious metal and has always been classified and traded as a "base" or "industrial" metal.[86] The most significant uses of copper are for industrial purposes, rather than as a store of value.[87] Further, the OCC has recently proposed a similar reclassification of copper under the National Bank Act.[88]

---

[76] Physical commodity trading also may be used to hedge positions in energy of FHCs and their clients.

[77] Commenters focused on the benefits of FHC involvement in physical commodity trading activities, rather than the benefits of energy management services or energy tolling. For example, NRG Energy, Inc., a leading competitive power company and major electricity provider, noted a number of activities that would not appear to be affected by the proposed elimination of energy management services or energy tolling, including providing first-lien hedging arrangements, project financing, market making, "customized hedging and risk management solutions like working capital/inventory intermediation facilities and volumetric production payment structures," and long-term physical commodity transactions. Letter from NRG Energy, Inc. dated April 15, 2014. *See also* Letter from American Gas Association et al., dated March 31, 2014 (discussing the importance of the ability of FHCs to physically-settle derivatives transactions); Letter from Electric Power Supply Association dated April 16, 2014 (discussing the importance of FHC's ability to hedge physical power producers' prices and revenues as well as engage in market making and credit intermediation activities); SIFMA Letter, Appendix G (discussing market making and the provision of market liquidity, efficient price formation, risk-management solutions, project finance, credit extension, and greater competition).

[78] *See, e.g.*, 12 CFR 225.28(b)(1); *Chemical New York Corp.*, 59 Fed. Res. Bull. 698 (1973) (approving as a permissible lending activity for BHCs an arrangement under which a BHC would finance a utility's coal purchases by purchasing from a third party, and taking title to, a quantity of coal on a monthly basis at the direction of the utility customer); Letter to Mr. Lustgarten dated May 15, 2006 (finding certain commodity purchase and forward sale transactions entered to finance commodity inventories of an FHC's customers to be a permissible lending activity of the FHC); Letter to Ms. Davy dated May 15, 2006 (finding certain volumetric production payments to be a permissible lending activity).

[79] *See* 12 CFR 225.28(b)(8) and the Board's approvals to engage in physical commodity trading.

[80] *See, e.g.*, 2003 Citi Order.

[81] 12 CFR 225.28(b)(6).

[82] 62 FR 9290, 9336 (Feb. 28, 1997). The authorization also included "any other metal approved by the Board." No other metals have been approved by the Board under this authority.

[83] *Id.* at 9311.

[84] PSI Report.

[85] PSI Report at 353.

[86] *Id.* The most common benchmark price for copper is the copper futures price established on the London Metals Exchange (LME), the largest financial market for metals. PSI Report at 351. The LME identifies four categories of metals; copper is included in the "non-ferrous" or "base" metal category, which also includes aluminum, nickel, and zinc, rather than the "precious metals" category that includes gold, silver, platinum and palladium. *Id.* at 352. Since the publication of the PSI Report, the LME has ceased certain activities with respect to gold and silver and has initiated activities with respect to platinum and palladium. *See https://www.lme.com/metals/precious-metals/*. COMEX, a division of the New York Mercantile Exchange, also classifies copper as a base metal and gold, silver, platinum and palladium as precious metals. *See, e.g., http://www.cmegroup.com/trading/metals/base.html*. Moreover, standardized copper futures contracts involve large amounts of copper, comparable to the amounts for futures contracts for base metals such as aluminum, lead and zinc. *See https://www.lme.com/metals/non-ferrous/copper/contract-specifications/futures/* (LME copper futures contract specification 25 metric tons); *https://www.lme.com/metals/non-ferrous/aluminium/contract-specifications/futures/* (LME aluminum futures contract specification 25 metric tons); *https://www.lme.com/metals/non-ferrous/lead/contract-specifications/futures/* (LME lead futures contract specification 25 metric tons); *https://www.lme.com/metals/non-ferrous/lead/contract-specifications/futures/; https://www.lme.com/metals/non-ferrous/zinc/contract-*

For these reasons, the Board proposes to treat the purchase and sale of copper in the same manner as the purchase and sale of other non-precious metals; specifically, as an activity requiring FHC status and complementary authority and subject to the restrictions and limitations (including the 5 percent of tier 1 capital cap) imposed on FHCs engaged in complementary commodity activities. Under the proposal, copper would be removed from the list of metals BHCs are permitted to own and store without limit as an activity closely related to banking under section 4(c)(8) of the BHC Act and Regulation Y.

The Board proposes not to authorize services such as arranging for storage, safe custody, assaying, and shipment of copper. The Board is also proposing to make a corresponding change in the language of section 225.28(b)(8)(ii)(B) of Regulation Y to remove copper from the list of metals on which a BHC may enter derivatives contracts that require taking delivery of the underlying metal as principal. Removing copper from this list will ensure that the metals specifically listed as financial assets for purposes of derivatives trading activities remain consistent with the metals permitted to be bought, sold and stored by BHCs.[89]

The proposal would take effect one year after the rule is finalized to provide BHCs time to conform to this change.

Question 15. *What is the cumulative impact on BHCs of the proposed limitation on physical copper trading authority combined with the proposed additional restrictions on complementary physical commodities trading? What is the cumulative impact of these proposals on copper markets?*

Question 16. *Is a one-year transition period during which BHCs currently engaged in buying, selling, and storing copper would be permitted to wind down their activities with respect to copper under this authority sufficient or appropriate? If not, what is the appropriate transition period and why? What is the appropriate scope of BHCs that should benefit from such a transition period? Should the scope, for example, be limited to BHCs that own copper as of the date of this proposal or BHCs that do not have separate complementary authority to hold copper?*

F. New Financial Reporting Data on Physical Commodity Activities

1. General

The Board is proposing to modify the Consolidated Financial Statements for Holding Companies (FR Y–9C) to (i) create a new Schedule HC–W, Physical Commodities and Related Activities, and (ii) add data items to Schedule HC–R, Part II, Risk-Weighted Assets. Schedule HC–W would collect more specific information on the covered physical commodities holdings and activities of FHCs, and the modifications to HC–R, Part II would report the risk-weighted asset amounts associated with an FHC's engagement in activities that involve (1) covered physical commodities, (2) section 4(o) infrastructure assets, or (3) investments in covered commodity merchant banking investments. The proposed reporting requirements would become effective on the same date as the proposed risk-weighted asset requirements.

2. Schedule HC–W

Part A. Currently, BHCs report the gross (total) fair value of all physical commodities on Schedule HC–D to the FR Y–9C. On Part A of the proposed new Schedule HC–W, FHCs would be required to report the total fair value of categories of physical commodities held in inventory as follows:

(1) Petroleum and petroleum products;
(2) Natural gas;
(3) Natural gas liquids;
(4) Fertilizer;
(5) Propylene;
(6) Coal and coal products;
(7) Uranium; uranium products;
(8) Other covered physical commodities; and
(9) All other physical commodities.

The sum of the total fair values of commodities reported on Part A as proposed would continue to be reported as the gross fair value of physical commodities held in inventory in item 9 of Schedule HC–D.

The categories of physical commodities listed in items (1)–(8) above are proposed to be defined in a manner consistent with the proposed definition of "covered physical commodities." Categories (1)–(7) generally include those covered substances under Federal environmental law. The item "other covered physical commodities" would include all other covered physical commodities held in inventory that would not be included in items (1)–(7) described above and therefore would reflect those covered substances under relevant state environmental law.

Part B. On Part B of the proposed new Schedule HC–W, FHCs would be required to indicate affirmatively or negatively whether they are engaged in particular aspects of physical commodity-related activities. Specifically, FHCs would indicate whether they own any covered physical commodities, any section 4(o) infrastructure assets, or investments in covered commodity merchant banking investments. FHCs also would indicate whether they are engaged in the exploration, extraction, production, or refining of physical commodities. FHCs also would indicate whether they own facilities, vessels or conveyances for the storage or transportation of covered physical commodities. Further, FHCs would be required to report (i) the total fair value of section 4(k) permissible commodities and section 4(o) permissible commodities owned; (ii) the original cost basis of any section 4(o) infrastructure assets owned; and (iii) the carrying value of their investments in covered commodity merchant banking investments.

3. Schedule HC–R Modifications

The Board is also proposing to modify Schedule HC–R, Part II to include new

---

specifications/futures/ (LME zinc futures contract specification 25 metric tons); *http://www.cmegroup.com/trading/metals/base/copper_contractSpecs_futures.html* (COMEX copper futures contract specification 25,000 pounds); *http://www.cmegroup.com/trading/metals/base/aluminum-mw-us-transaction-premium-platts-swap-futures_contractSpecs_futures.html* (COMEX aluminum MW US transaction premium plats futures contract specification 25 metric tons). Precious metals futures contracts, by contrast, involve much smaller amounts. *See, e.g., http://www.cmegroup.com/trading/metals/precious/gold_contractSpecs_futures.html* (COMEX gold futures contract specification 100 troy ounces); *http://www.cmegroup.com/trading/metals/precious/silver_contractSpecs_futures.html* (COMEX silver futures contract specification 5,000 troy ounces); *http://www.cmegroup.com/trading/metals/precious/platinum_contractSpecs_futures.html* (COMEX platinum futures contract specification 50 troy ounces); *http://www.cmegroup.com/trading/metals/precious/palladium_contractSpecs_futures.html* (COMEX palladium futures contract specification 100 troy ounces).

[87] *See, e.g., http://minerals.usgs.gov/minerals/pubs/commodity/copper/,* "Copper Statistics and Information," (building construction is the single largest market for copper, followed by electronics and electronic products, transportation, industrial machinery, and consumer and general products), *compare http://minerals.usgs.gov/minerals/pubs/commodity/gold/,* "Gold Statistics and Information," ("Although gold is important to industry and the arts, it also retains a unique status among all commodities as a long-term store of value"); *http://minerals.usgs.gov/minerals/pubs/commodity/silver/,* "Silver Statistics and Information," ("Silver has been used for thousands of years as ornaments and utensils, for trade, and as the basis for many monetary systems").

[88] *Available at http://occ.gov/news-issuances/news-releases/2016/nr-occ-2016-108.html.*

[89] Copper would be treated as a non-financial asset for purposes of 12 CFR 225.28(b)(8)(ii)(B).

items related to the proposed capital requirement described in this proposal for a firm's physical commodity activities conducted under any of the commodity authorities and that involve covered physical commodities. New line items would be added to Column A of Schedule HC–R, Part II to report (1) the market value of an FHC's covered physical commodity activities involving covered physical commodities (calculated as described in this proposal) conducted under section 4(k)(1)(B) of the Bank Holding Company Act or section 4(o) of the Bank Holding Company Act (as applicable); (2) the original cost basis of section 4(o) infrastructure assets owned pursuant to section 4(o) of the Bank Holding Company Act; and (3) the carrying value of an FHC's investments in covered commodity merchant banking investments made under section 4(k)(4)(H) of the BHC Act. Specifically, the following modifications are being proposed:

- New line items would be added to Column L to allocate a 300 percent risk weight to (A) the market value of an FHC's physical commodity activities involving section 4(k) permissible commodities and (B) the carrying value of investments in covered commodity merchant banking investments that are publicly traded commodity trading portfolio companies to the 300 percent risk weight category;
- New line items would be added to Column M to allocate a 400 percent risk weight to the carrying value of investments in covered commodity merchant banking investments that are commodity trading portfolio companies and are not publicly traded to the 400 percent risk weight category; and
- New line items would be added to Column Q to allocate a 1,250 percent risk weight to the (A) the market value of physical commodity activities involving section 4(o) permissible commodities (including section 4(k) permissible commodities in excess of the section 4(k) cap parity amount); (B) the original cost basis of section 4(o) infrastructure assets owned pursuant to section 4(o) of the BHC Act; and (C) the carrying value of investments in covered commodity merchant banking investments that are not commodity trading portfolio companies.

4. Public Disclosure

The Board proposes to make the information reported as described above available to the public. The Board has long supported meaningful public disclosure by banking organizations with the objective of improving market discipline and encouraging sound risk-management practices. The Board believes that the information that would be collected in Part A of proposed Schedule HR–W would provide the public with important information on the degree to which FHCs are involved in trading covered physical commodities, improving market discipline, and enhancing understanding of the role FHCs play in these markets through their nonfinancial activities. Public disclosure of the new reporting items would also facilitate supervisory monitoring of commodity activities that present particular risks to safety and soundness, as discussed in this proposal. The Board proposes to make the disclosures in Part B of the new proposed Schedule HC–W public for similar reasons. Additionally, the Board believes that public disclosure of the information in Part B will provide market participants, end users, and supervisors with important information that is not captured in inventory reporting about the nature and extent of FHC presence in the physical commodities markets over time. This information would provide additional insight into the potential risks FHCs may bear as part of their commodities activities as well as a more complete picture of their role in the commodity markets.

The proposed reporting requirements in Schedule HC–W, Part B and proposed modifications to Schedule HC–R, Part II are consistent with other public capital reporting requirements. The Board notes that public disclosure of these proposed items would also be consistent with the international standards regarding public disclosure of regulatory capital under Pillar 3 of the Basel Accord. Such disclosure is designed to complement the minimum capital requirements and the supervisory review process by encouraging market discipline through enhanced and meaningful public disclosure.

For the reasons discussed above, the Board is proposing that the proposed new reporting requirements be released to the public. However, a reporting FHC may request confidential treatment for the proposed reporting items if the company believes that, based on its particular individual circumstances, disclosure of specific commercial or financial information in the report would likely result in substantial harm to its competitive position or that disclosure of the submitted information would result in unwarranted invasion of personal privacy.

Question 17. *To what extent do the proposed regulatory reporting requirements improve transparency of physical commodity activities of FHCs and provide supporting data for assessing the capital requirement?*

Question 18. *How well do the proposed reporting requirements physical commodity activities (both Part A and Part B) capture FHCs' physical commodity activities? What other categorizations should the Board consider for these proposed reporting requirements?*

Question 19. *What other information, if any, should the Board consider collecting from FHCs for public reporting purposes in order to enhance market discipline and public understanding of FHCs' physical commodities or merchant banking activities?*

III. Regulatory Analysis

A. Regulatory Flexibility Act Analysis

The Board is providing an initial regulatory flexibility analysis with respect to this proposed rule. The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), generally requires an agency to assess the impact a rule is expected to have on small entities. The RFA requires an agency either to provide an initial regulatory flexibility analysis with a proposed rule for which a general notice of proposed rulemaking is required or to certify that the proposed rule will not have a significant impact on a substantial number of small entities. Based on its analysis and for the reasons stated below, the Board believes that this proposed rule will not have a significant economic impact on a substantial number of small entities. A final regulatory flexibility analysis will be conducted after comments received during the public comment period have been considered.

Under regulations issued by the Small Business Administration, a small entity includes a depository institution, bank holding company, or savings and loan holding company with total assets of $550 million or less. As of June 30, 2016, there were approximately 3,203 small bank holding companies and approximately 162 small savings and loan holding companies. As described above, the Board is proposing to apply risk-based capital and other regulatory requirements for certain physical commodities and merchant banking investment activities conducted by banking organizations. This proposed rule is expected only to apply to banking organizations that (i) conduct physical commodity activities under complementary authority with the Board's approval; (ii) conduct physical commodity activities under section 4(o) grandfather authority; or (iii) engage in merchant banking investment activities related to physical commodities. Small entities generally will not fall into any of these categories. To date, the Board has granted approvals to 12 FHCs to conduct physical commodity activities under complementary authority, meanwhile, there are two banking organizations that are presently conducting physical commodity activities under section 4(o) grandfather authority. In both cases, the banking organizations all hold total consolidated assets greater than $50 billion. Further, of the approximately $29 billion in total merchant banking investment activity engaged in by banking organizations, approximately 99 percent of this activity is conducted by banking organizations with total consolidated assets greater than $50 billion.

The Board is aware of no other Federal rules that duplicate, overlap, or conflict with this proposal. The Board believes that this proposal will not have a significant economic impact on small banking organizations supervised by the Board and therefore believes that there are no significant alternatives to this proposal that would reduce the economic impact on small banking organizations supervised by the Board.

B. Paperwork Reduction Act

Request for Comment on Proposed Information Collection

In accordance with section 3512 of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) (PRA), the Board may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The Board reviewed the proposed rule under the authority delegated to the Board by OMB.

The proposed rule contains requirements subject to the PRA. The reporting requirements are found in section II.F. To implement the reporting requirement set forth in F, the Board proposes to revise the Consolidated Financial Statements for Holding Companies (FR Y–9C; OMB No. 7100–0128) to create a new Schedule HC–W, Physical Commodities and Related Activities and to add data items to Schedule HC–R, Part II, Risk-Weighted Assets.

Comments are invited on:

(a) Whether the proposed collections of information are necessary for the proper performance of the Board's functions, including whether the information has practical utility;

(b) The accuracy of the estimates of the burden of the proposed information collections, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments on aspects of this proposed rule that may affect reporting, recordkeeping, or disclosure requirements and burden estimates should be sent to Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551. A copy of the comments may also be submitted to the OMB desk officer by mail to the Office of Information and Regulatory Affairs, U.S. Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW., Washington, DC 20503 or by facsimile to 202–395–6974.

Proposed Revision, Without Extension, of the Following Information Collection

Title of Information Collection: Consolidated Financial Statements for Holding Companies, Parent Company Only Financial Statements for Large Holding Companies, Parent Company Only Financial Statements for Small Holding Companies, Financial Statement for Employee Stock Ownership Plan Holding Companies, and the Supplemental to the Consolidated Financial Statements for Holding Companies.

OMB Control Number: 7100–0128.

Agency Form Number: FR Y–9C, FR Y–9LP, FR Y–9SP, FR Y–9ES, and FR Y–9CS.

Frequency of Response: Quarterly, semiannually, and annually.

Affected Public: Businesses or other for-profit.

Respondents: Bank holding companies (BHCs), savings and loan holding companies (SLHCs), securities holding companies (SHCs), and U.S. Intermediate Holding Companies (IHCs) (collectively, holding companies (HCs)).

Abstract: The FR Y–9 family of reporting forms continues to be the primary source of financial data on holding companies that examiners rely on in the intervals between on-site inspections. Financial data from these reporting forms are used to detect emerging financial problems, to review performance and conduct preinspection analysis, to monitor and evaluate capital adequacy, to evaluate holding company mergers and acquisitions, and to analyze a holding company's overall financial condition to ensure the safety and soundness of its operations. The FR Y–9C serves as standardized financial statements for the consolidated holding company. The FR Y–9LP, and FR Y 9SP serve as standardized financial statements for parent holding companies; the FR Y–9ES is a financial statement for holding companies that are Employee Stock Ownership Plans (ESOPs). The Federal Reserve also has the authority to use the FR Y–9CS (a free-form supplement) to collect additional information deemed to be (1) critical and (2) needed in an expedited manner.

Current Actions: To implement the reporting requirement set forth in section F, the Board proposes to revise the FR Y–9C to (1) create a new Schedule HC–W, Physical Commodities and Related Activities, which would collect more specific information on the covered physical commodities holdings and activities of FHCs and (2) add data items to Schedule HC–R, Part II, Risk-Weighted Assets, which would report the risk-weighted asset amounts associated with an FHC's engagement in covered physical commodity activities. It is expected that 14 out of the 667 current FR Y–9C respondents would file the new reporting requirements set forth in section F. The Board estimates that proposed revisions to the FR Y–9C would not materially increase the estimated average hours per response or total estimated annual burden. The Board is not proposing to revise the FR Y–9LP, FR Y9–SP, FR Y–9ES, and FR Y–9CS. The draft reporting forms and instructions are available on the Board's public Web site at *http://www.federalreserve.gov/apps/reportforms/review.aspx.*

Estimated Burden per Response: FR Y–9C (non advanced approaches holding companies): 50.17 hours; FR Y–9C (advanced approached holding companies HCs): 51.42 hours; FR Y–9LP: 5.25 hours; FR Y–9SP: 5.40 hours; FR Y–9ES: 0.50 hours; FR Y–9CS: 0.50 hours.

Number of Respondents: FR Y–9C (non advanced approaches holding companies): 654; FR Y–9C (advanced approached holding companies): 13; FR Y–9LP: 792; FR Y–9SP: 4,122; FR Y–9ES: 88; FR Y–9CS: 236.

Total Estimated Annual Burden: FR Y–9C (non advanced approaches holding companies): 131,245 hours; FR Y–9C (advanced approached holding companies): 2,674 hours; FR Y–9LP:

16,632 hours; FR Y–9SP: 44,518 hours; FR Y–9ES: 44 hours; FR Y–9CS: 472 hours.

C. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act requires the agencies to use plain language in all proposed and final rules published after January 1, 2000. The agencies invite comment on how to make this interim final rule easier to understand. For example:

- Have the agencies organized the material to suit your needs? If not, how could the rule be more clearly stated?
- Are the requirements in the rule clearly stated? If not, how could the rule be more clearly stated?
- Does the rule contain technical language or jargon that is not clear? If so, what language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand? If so, what changes would make the rule easier to understand?
- Would more, but shorter, sections be better? If so, which sections should be changed?
- What else could the agencies do to make the rule easier to understand?

List of Subjects

12 CFR Part 217

Administrative practice and procedure; Banks, banking; Capital; Federal Reserve System; Holding companies; Reporting and recordkeeping requirements; Securities.

12 CFR Part 225

Administrative practice and procedure, Banks, Banking, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities.

Authority and Issuance

For the reasons set forth in the preamble, the Board proposes to amend 12 CFR parts 217 and 225 to as follows:

PART 217—CAPITAL ADEQUACY OF BANK HOLDING COMPANIES, SAVINGS AND LOAN HOLDING COMPANIES, AND STATE MEMBER BANKS (REGULATION Q)

■ 1. The authority citation for part 217 continues to read as follows:

Authority: 12 U.S.C. 248(a), 321–338a, 481–486, 1462a, 1467a, 1818, 1828, 1831n, 1831o, 1831p–l, 1831w, 1835, 1844(b), 1851, 3904, 3906–3909, 4808, 5365, 5368, 5371.

■ 2. Section 217.2 is amended by:

■ (a) Revising the definition of "Advanced approaches total risk-weighted assets".

■ (b) Adding the definition of "Approved physical commodity" and "Covered physical commodity".

■ (c) Revising the definition of "Standardized total risk-weighted assets".

The revisions and additions are set forth below:

§ 217.2 Definitions

* * * * *

Advanced approaches total risk-weighted assets means

(1) The sum of:

(i) Credit-risk weighted assets;

(ii) Credit valuation adjustment (CVA) risk-weighted assets;

(iii) Risk-weighted assets for operational risk;

(iv) For a market risk Board-regulated institution only, advanced market risk-weighted assets; and

(v) Risk-weighted assets for covered physical commodity activities as calculated under §§ 217.39 through 217.40; minus

(2) Excess eligible credit reserves not included in the Board-regulated institution's tier 2 capital.

* * * * *

Approved physical commodity means a physical commodity for which a derivative contract has been authorized for trading on a U.S. futures exchange by the Commodity Futures Trading Commission (unless specifically excluded by the Board) or other commodities that have been specifically authorized by the Board under section 4(k)(1)(B) of the Bank Holding Company Act 12 (12 U.S.C. 1843(k)(1)(B)).

* * * * *

Covered physical commodity means any physical commodity that is, or a component of which is, specifically named:

(1) As a "hazardous substance" under section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601);

(2) As "oil" under section 1001 of the Oil Pollution Act of 1990 (33 U.S.C. 2701) or section 311 of the Clean Water Act (33 U.S.C. 1321);

(3) As a "hazardous air pollutant" under section 112 of the Clean Air Act (42 U.S.C. 7412);

(4) In regulations interpreting the foregoing terms under the corresponding statute; or

(5) In a state statute, or regulation promulgated thereunder, that makes a party other than a governmental entity or fund responsible for removal or remediation efforts related to the unauthorized release of the substance or for costs incurred as a result of the unauthorized release; *provided that,* with respect to paragraph (5) of this definition, the Board-regulated institution owned the commodity in the state that promulgated the law imposing such liability during the last reporting period.

* * * * *

Standardized total risk-weighted assets means:

(1) The sum of:

(i) Total risk-weighted assets for general credit risk as calculated under § 217.31;

(ii) Total risk-weighted assets for cleared transactions and default fund contributions as calculated under § 217.35;

(iii) Total risk-weighted assets for unsettled transactions as calculated under § 217.38;

(iv) Total risk-weighted assets for covered physical commodity activities as calculated under §§ 217.39 through 217.40;

(v) Total risk-weighted assets for securitization exposures as calculated under § 217.42;

(vi) Total risk-weighted assets for equity exposures as calculated under §§ 217.52 and 217.53; and

(vii) For a market risk Board-regulated institution only, standardized market risk-weighted assets; minus

(2) Any amount of the Board-regulated institution's allowance for loan and lease losses that is not included in tier 2 capital and any amount of allocated transfer risk reserves.

* * * * *

■ 3. Section 217.30 is amended by revising paragraph (b) as follows:

§ 217.30 Applicability.

* * * * *

(b) Notwithstanding paragraph (a) of this section, a market risk Board-regulated institution must exclude from its calculation of risk-weighted assets under this subpart the risk-weighted asset amounts of all covered positions, as defined in subpart F of this part (except foreign exchange positions that are not trading positions, OTC derivative positions, cleared transactions, unsettled transactions, and covered physical commodities).

■ 4. Section 217.31 is revised to read as follows:

§ 217.31 Mechanics for calculating risk-weighted assets for general credit risk.

(a) *General risk-weighting requirements.* A Board-regulated institution must apply risk weights to its exposures as follows:

(1) A Board-regulated institution must determine the exposure amount of each

on-balance sheet exposure, each OTC derivative contract, and each off-balance sheet commitment, trade and transaction-related contingency, guarantee, repo-style transaction, financial standby letter of credit, forward agreement, or other similar transaction that is not:

(i) An unsettled transaction subject to § 217.38;

(ii) A cleared transaction subject to § 217.35;

(iii) A default fund contribution subject to § 217.35;

(iv) A covered physical commodity, a section 4(o) infrastructure asset, or a covered commodity merchant banking investment subject to §§ 217.39 through 217.40;

(v) A securitization exposure subject to §§ 217.41 through 217.45; or

(vi) An equity exposure (other than an equity OTC derivative contract) subject to §§ 217.51 through 217.53.

(2) The Board-regulated institution must multiply each exposure amount by the risk weight appropriate to the exposure based on the exposure type or counterparty, eligible guarantor, or financial collateral to determine the risk-weighted asset amount for each exposure.

(b) Total risk-weighted assets for general credit risk equals the sum of the risk-weighted asset amounts calculated under this section.

■ 5. Section 217.39 is added to read as follows:

§ 217.39 Covered Physical Commodity Activities.

(a) *General.* A Board-regulated institution's total risk-weighted assets for covered physical commodity activities equals the sum of the risk-weighted asset amounts for each of its covered physical commodities, each of its equity exposures to covered commodities merchant banking investments, and each of its 4(o) infrastructure assets, each as determined under this section and § 217.40.

(b) *Risk-weighted asset amount for covered physical commodities.* The risk-weighted asset amount for a covered physical commodity equals:

(1) The exposure amount for a section 4(k) permissible commodity *multiplied by* 300 percent, subject to the limitation in paragraph (c)(3) of this section, *plus*

(2) The exposure amount for a section 4(o) permissible commodity *multiplied by* 1,250 percent.

(c) *Exposure amounts for covered physical commodities.*

(1) The exposure amount for a section 4(k) permissible commodity equals the section 4(k) permissible commodity quantity, as determined under paragraph (d) of this section, *multiplied by* the simple average of the covered physical commodity's month-end, end-of-day spot prices over the previous 60 months.

(2) The exposure amount for a section 4(o) permissible commodity equals the section 4(o) permissible commodity quantity, as determined under paragraph (d) of this section, *multiplied by* the simple average of the covered physical commodity's month-end, end-of-day spot prices over the previous 60 months.

(3)(i) If the section 4(k) cap parity amount of the Board-regulated institution exceeds 5 percent of the tier 1 capital of the Board-regulated institution, then such excess (up to the sum of the exposure amounts for each section 4(k) permissible commodity owned by the Board-regulated institution pursuant to section 4(o) of the Bank Holding Company Act (12 U.S.C. 1843(o))) must be risk weighted at 1,250 percent.

(ii) For purposes of paragraph (c)(3) of this section, section 4(k) cap parity amount equals:

(A) The sum of the exposure amounts for each section 4(k) permissible commodity that is owned by the Board-regulated institution pursuant to section 4(o) of the Bank Holding Company Act (12 U.S.C. 1843(o)); *plus*

(B) The sum of the market value of each physical commodity (calculated as the average of the amounts of the physical commodity owned by the Board-regulated institution recorded as of the close of business on each day of the previous calendar quarter *multiplied by* the simple average of the physical commodity's month-end, end-of-day spot prices over the previous 60 months) that is owned by the Board-regulated institution pursuant to:

(*1*) Any authority other than sections 4(c)(2), 4(k)(4)(H), 4(k)(4)(I), and 4(o) of the Bank Holding Company Act (12 U.S.C. 1843(c)(2), (k)(4)(H), (k)(4)(I), and (o)); *or*

(*2*) Section 4(o) of the Bank Holding Company Act (12 U.S.C. 1843(o)), but only with respect to a physical commodity that is not a covered physical commodity.

(iii) A Board-regulated institution that owns one or more covered physical commodities pursuant to section 4(o) of the Bank Holding Company Act (12 U.S.C. 1843(o)) must determine the market value of each covered physical commodity described in paragraph (c)(ii)(B) of this section pursuant to the calculation method described therein.

(d) *Quantity of a covered physical commodity.* (1) A Board-regulated institution must determine the section 4(k) permissible commodity quantity and the section 4(o) permissible commodity quantity of each covered physical commodity the Board-regulated institution owns pursuant to section 4(k)(1)(B) or section 4(o) of the Bank Holding Company Act (12 U.S.C. 1843(k)(1)(B) or (o)).

(2) For a covered physical commodity that the Board-regulated institution owns pursuant to section 4(o) of the Bank Holding Company Act (12 U.S.C. 1843(o)):

(i) The section 4(o) permissible commodity quantity of a covered physical commodity equals the average of the amounts of the covered physical commodity owned by the Board-regulated institution recorded as of the close of business on each day of the previous calendar quarter *minus* any section 4(k) permissible commodity quantity;

(ii) If the covered physical commodity is an approved physical commodity, the section 4(k) permissible commodity quantity of the covered physical commodity equals the average of the amounts of the covered physical commodity owned by the Board-regulated institution as of the close of business on each day of the previous calendar quarter, if the daily quantity of the covered physical commodity:

(A) Was purchased by the Board-regulated institution in the spot market or is owned for the purpose of the Board-regulated institution taking or making physical delivery of the commodity to settle a forward contract, option, future, option on future, swap, or a similar contract in which a Board-regulated institution is authorized to engage under section 225.28(b)(8)(ii) of the Board's Regulation Y (12 CFR 225.28(b)(8)(ii)); and

(B) Was stored, extracted, produced, transported, or altered (including by processing or refining) only by reputable, third-party facilities during that day; and

(iii) If the covered physical commodity is not an approved physical commodity, the section 4(k) permissible commodity quantity of the covered physical commodity equals zero.

(3) For a covered physical commodity that the Board-regulated institution owns pursuant to section 4(k)(1)(B) of the Bank Holding Company Act (12 U.S.C. 1843(k)(1)(B)):

(i) The section 4(o) permissible commodity quantity equals zero; and

(ii) The section 4(k) permissible commodity quantity equals the average of the amounts of the covered physical commodity owned by the Board-regulated institution recorded as of the close of business on each day of the previous calendar quarter.

(e) *Covered commodity merchant banking investments risk weights.* (1) The risk-weighted asset amount for a covered commodity merchant banking investment, as the term is defined in § 217.40, is the exposure amount for the investment multiplied by the appropriate risk weight, each as calculated according to this section.

(2) A Board-regulated institution must assign a 1,250 percent risk weight to an exposure amount for a covered commodity merchant banking investment except as provided in paragraphs (e)(3) and (e)(4) of this section.

(3) A Board-regulated institution must assign a 300 percent risk weight to an exposure amount for a covered commodity merchant banking investment that is a publicly traded commodity trading portfolio company, as the term is defined in § 217.40.

(4) A Board-regulated institution must assign a 400 percent risk weight to an exposure amount for a covered commodity merchant investment that is a commodity trading portfolio company, as the term is defined in § 217.40, that is not publicly traded.

(f) *4(o) infrastructure assets risk weights.* (1) The risk-weighted asset amount for a 4(o) infrastructure asset equals the original cost basis (cost basis gross of accumulated depreciation and asset impairment) of the 4(o) infrastructure asset *multiplied by* 1,250 percent.

(2) For purposes of this section, a 4(o) infrastructure asset is an on-balance sheet exposure owned pursuant to section 4(o) of the Bank Holding Company Act that is not a physical commodity.

■ 6. Section 217.40 is added to read as follows:

§ 217.40 Covered Commodity Merchant Banking Investments.

(a) *Definition of covered commodity merchant banking investment and commodity trading portfolio company.* For purposes of this part,

(1) A covered commodity merchant banking investment is a company

(i) The shares, assets, or ownership interests of which are owned or controlled by the Board-regulated institution pursuant to section 4(k)(4)(H) of the Bank Holding Company Act (12 U.S.C. 1843(k)(4)(H)); and

(ii) Is engaged in covered physical commodity activities.

(2) A commodity trading portfolio company is a covered commodity merchant banking investment that engages in covered physical commodity activities that are only the purchasing and selling of one or more covered physical commodities (each of which is an approved physical commodity) in the spot market and the taking and making physical delivery of one or more covered physical commodities (each of which is an approved physical commodity) to settle forward contracts, options, futures, options on futures, swaps, or similar contracts.

(b) *Covered physical commodity activities.* For purposes of this section, covered physical commodity activities include, but are not limited to,

(1) Storing, producing, transporting, or altering (including by processing or refining) a covered physical commodity;

(2) Buying or selling a covered physical commodity in the spot market;

(3) Taking or making physical delivery of a covered physical commodity to settle a contract; and

(4) Owning or operating a facility or vessel that holds or uses a covered physical commodity.

(c) *End-user exception.* Notwithstanding paragraph (b) of this section, covered physical commodity activities do not include

(1) Owning or operating an end-user facility or vessel; or

(2) Buying, owning or storing a covered physical commodity solely for purposes of powering or supporting an end-user facility or vessel that is owned or operated by the portfolio company.

(d) *Definition of end-user facility or vessel.* For purposes of paragraph (c)(2) of this section, end-user facility or vessel means a facility or vessel that does not store, produce, transport, or alter a covered physical commodity except as necessary to power or support the facility or vessel. An end-user facility or vessel does not include a power plant.

217.51 [Amended]

■ 7. Section 217.51(a)(1) is revised to read as follows:

(a) *General.* (1) To calculate its risk-weighted asset amounts for equity exposures that are not equity exposures to an investment fund, a covered commodity merchant banking investment, as defined in § 217.40, a Board-regulated institution must use the Simple Risk-Weight Approach (SRWA) provided in § 217.52. A Board-regulated institution must use the look-through approaches provided in § 217.53 to calculate its risk-weighted asset amounts for equity exposures to investment funds and use the approach provided in §§ 217.39 and 217.40 for equity exposures to covered commodity merchant banking investments.

*   *   *   *   *

217.100 [Amended]

■ 8. Section 217.100(b)(3) is revised to read as follows:

*   *   *   *   *

(b) * * *

(3) A market risk Board-regulated institution must exclude from its calculation of risk-weighted assets under this subpart the risk-weighted asset amounts of all covered positions, as defined in subpart F of this part (except foreign exchange positions that are not trading positions, over-the-counter derivative positions, cleared transactions, unsettled transactions, and covered physical commodities).

*   *   *   *   *

■ 9. Section 217.131 is amended by revising the section heading and revising paragraph (e)(3)(vii) to read as follows:

§ 217.131 Introduction and exposure measurement.

*   *   *   *   *

(e) * * *

(3) * * *

(vii). The risk-weighted asset amount for any other on-balance-sheet asset that does not meet the definition of a wholesale, retail, securitization, IMM, equity exposure, covered commodity merchant banking investment, cleared transaction, or default fund contribution and is not subject to deduction under § 217.22(a), (c), or (d) equals the carrying value of the asset.

*   *   *   *   *

■ 10. Section 217.151(a)(1) is revised to read as follows:

§ 217.151 Introduction and exposure measurement.

(a) *General.* (1) To calculate its risk-weighted asset amounts for equity exposures that are not equity exposures to an investment fund or a covered commodity merchant banking investment, as defined in § 217.40, a Board-regulated institution may apply either the Simple Risk-Weight Approach (SRWA) provided in § 217.152 or, if it qualifies to do so, the Internal Models Approach (IMA) in § 217.153. A Board-regulated institution must use the look-through approaches provided in § 217.154 to calculate its risk-weighted asset amounts for equity funds and use the approach provided in §§ 217.39 through 217.40 for equity exposures to covered commodity merchant banking investments.

*   *   *   *   *

PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

■ 11. The authority citation to part 225 continues to read as follows:

Authority: 12 U.S.C. 1817(j)(13), 1818, 1828(o), 1831i, 1831p–1, 1843(c)(8), 1844(b), 1972(1), 3106, 3108, 3310, 3331–3351, 3906, 3907, and 3909; 15 U.S.C. 1681s, 1681w, 6801 and 6805.

§ 225.28 [Amended]

■ 12. § 225.28 is amended by removing the term "copper" from paragraphs (b)(8)(ii)(B) and (b)(8)(iii).

■ 13. Section 225.95 is added to read as follows:

§ 225.95 What are some of the requirements to engage in complementary activities?

(a) Paragraphs (b)–(e) of this section apply to financial holding companies that the Board has approved to purchase and sell physical commodities in the spot market and to take and make delivery of physical commodities to settle contracts identified in section 225.28(b)(8)(B) of this part (12 CFR 225.28(b)(8)(B)) as an activity that is complementary to a financial activity under section 4(k)(1)(B) of the BHC Act (12 U.S.C. 1843(k)(1)(B)).

(b) A financial holding company may not purchase or sell physical commodities in the spot market or take or make delivery of physical commodities pursuant to sections 4(c)(8) or 4(k)(1)(B) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8), (k)(1)(B)) if the market value of physical commodities owned by the financial holding company and its subsidiaries (other than through ownership or control of assets or subsidiaries pursuant to sections 4(c)(2), 4(k)(4)(H), or 4(k)(4)(I) of the Bank Holding Company Act (12 U.S.C. 1843(c)(2), (k)(4)(H), (k)(4)(I))) exceeds 5 percent of the consolidated tier 1 capital of the financial holding company, as determined under the Board's Regulation Q (12 CFR part 217).

(c) A financial holding company must notify the Board if the aggregate market value of physical commodities owned by the financial holding company and its subsidiaries (other than through ownership or control of assets or subsidiaries pursuant to sections 4(c)(2), 4(k)(4)(H) or 4(k)(4)(I) of the Bank Holding Company Act (12 U.S.C. 1843(c)(2), (k)(4)(H), (k)(4)(I))) exceeds 4 percent of the consolidated tier 1 capital of the financial holding company, as determined under the Board's Regulation Q (12 CFR part 217).

(d) A financial holding company may not own operate, or invest in facilities or vessels for the extraction, transportation, storage, or distribution of physical commodities pursuant to section 4(k)(1)(B) of the Bank Holding Company Act (12 U.S.C. 1843(k)(1)(B)).

(e) For purposes of paragraph (d) of this section, the term *operate* includes

(1) Participation in the day-to-day management or operations of the facility;

(2) Participation in management and operational decisions that occur in the ordinary course of the business of the facility; and

(3) Managing, directing, conducting, or providing advice regarding operations having to do with the leakage or disposal of a physical commodity or hazardous waste or decisions about the facility's compliance with environmental statutes or regulations, including any law or regulation referenced in the definition of covered physical commodity in section 217.2 of the Board's Regulation Q (12 CFR 217.2).

By order of the Board of Governors of the Federal Reserve System, September 23, 2016.

Robert deV. Frierson,

Secretary of the Board.

[FR Doc. 2016–23349 Filed 9–29–16; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

12 CFR Parts 225 and 252

[Regulations Y and YY; Docket No. R–1548; RIN 7100 AE–59]

Amendments to the Capital Plan and Stress Test Rules

AGENCY: Board of Governors of the Federal Reserve System (Board).

ACTION: Notice of proposed rulemaking with request for comment.

SUMMARY: The Board is inviting comment on a notice of proposed rulemaking to revise the capital plan and stress test rules for bank holding companies with $50 billion or more in total consolidated assets and U.S. intermediate holding companies of foreign banks. Under the proposal, large and noncomplex firms, defined below, would no longer be subject to the provisions of the Board's capital plan rule whereby the Board may object to a capital plan on the basis of qualitative deficiencies in the firm's capital planning process. In connection with this modification, large and noncomplex firms would no longer be subject to the qualitative assessment in Comprehensive Capital Analysis and Review (CCAR), but would remain subject to a quantitative assessment in CCAR. The qualitative assessment of the capital plans of large and noncomplex firms instead would be conducted outside of CCAR through the supervisory review process. For purposes of the proposal, a bank holding company or U.S. intermediate holding company with total consolidated assets of $50 billion or greater but less than $250 billion, on-balance sheet foreign exposure of less than $10 billion, and nonbank assets of less than $75 billion would be considered a large and noncomplex firm. The proposal would also modify reporting requirements for large and noncomplex firms to reduce burdens by raising materiality thresholds, reducing the scope of the data collection on these firms' stress test results, and reducing supporting documentation requirements. For all bank holding companies subject to the capital plan rule, the proposal would simplify the initial applicability provisions for the capital plan and stress test rules, reduce the amount of additional capital distributions that a bank holding company may make during a capital plan cycle without seeking the Board's prior approval, and extend the range of potential as-of dates for the trading and counterparty scenario component used in the stress test rules. The proposal would also amend the Parent Company Only Financial Statements for Large Holding Companies (FR Y–9LP) to include new line item 17 of PC–B Memoranda (Total nonbank assets of a holding company that is subject to the Federal Reserve Board's capital plan rule) for purposes of identifying the large and noncomplex firms. All other bank holding companies subject to the capital plan rule that are not large and noncomplex firms would remain subject to objection to their capital plan based on qualitative deficiencies under the rule.

The proposal would not apply to bank holding companies with total consolidated assets of less than $50 billion or to any state member bank or savings and loan holding company.

DATES: Comments must be received by November 25, 2016.

ADDRESSES: You may submit comments, identified by Docket No. R–1548 and RIN 7100 AE–59 by any of the following methods:

- *Agency Web site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.aspx.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

- *Email: regs.comments@federalreserve.gov.* Include the docket number and RIN number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551.

All public comments will be made available on the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.aspx* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room 3515, 1801 K Street NW. (between 18th and 19th Streets NW.), Washington, DC 20006 between 9:00 a.m. and 5:00 p.m. on weekdays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

FOR FURTHER INFORMATION CONTACT: Lisa Ryu, Associate Director, (202) 263–4833, Richard Naylor, Associate Director, (202) 728–5854, Molly Mahar, Deputy Associate Director, (202) 973–7360, Constance Horsley, Assistant Director, (202) 452–5239, Mona Touma Elliot, Manager, (202) 912–4688, Celeste Molleur, Manager (202) 452–2783, Elizabeth MacDonald, Manager, (202) 475–6316, Christine Graham, Senior Supervisory Financial Analyst, (202) 452–3005, Seth Ruhter, Senior Supervisory Financial Analyst, (202) 452–3997, Joseph Cox, Supervisory Financial Analyst, (202) 452–3216, Kevin Tran, Supervisory Financial Analyst, (202) 452–2309, or Hillel Kipnis, Financial Analyst, (202) 452–2924, Division of Banking Supervision and Regulation; Laurie Schaffer, Associate General Counsel, (202) 452–2272, Benjamin McDonough, Special Counsel, (202) 452–2036, Julie Anthony, Counsel, (202) 475–6682, Brian Chernoff, Senior Attorney, (202) 452–2952, or Amber Hay, Attorney, (202) 973–6997, Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551. Users of Telecommunication Device for Deaf (TDD) only, call (202) 263–4869.

SUPPLEMENTARY INFORMATION:

I. Background

A. Description of Capital Plan and Stress Test Requirements

Capital planning and stress testing are two key components of the Board's supervisory framework for large financial companies.[1] Under Section 165 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), the Board of Governors of the Federal Reserve System (Board) is directed to establish enhanced prudential standards for bank holding companies with total consolidated assets of $50 billion or more.[2] As part of this requirement, the Board must conduct annual supervisory stress tests with respect to these bank holding companies and issue regulations requiring these bank holding companies to conduct semi-annual company-run stress tests.[3] The Board adopted final rules to implement these requirements on October 12, 2012.[4]

The Dodd-Frank Act also requires the enhanced prudential standards established by the Board to increase in stringency based on several factors, including the size and risk characteristics of the bank holding companies subject to the requirements.[5] In prescribing more stringent prudential standards, including stress test requirements, the Board may differentiate among bank holding companies on an individual basis or by category, taking into consideration their capital structure, riskiness, complexity, financial activities (including the financial activities of their subsidiaries), size, and any other risk-related factors that the Board deems appropriate.[6]

B. Implementation of Capital Plan and Stress Test Requirements

Consistent with the Dodd-Frank Act mandate, the Board conducts an annual assessment of the capital planning and post-stress capital adequacy of bank holding companies with total consolidated assets of $50 billion or more. All U.S. intermediate holding company subsidiaries of foreign banking organizations will be subject to the Board's capital plan rule beginning in 2017. The Board's capital planning and stress testing framework for these firms consists of two related programs: CCAR, which is conducted pursuant to the Board's capital plan rule,[7] and the Dodd-Frank Act stress tests, which is conducted pursuant to the Board's stress test rules.[8]

In CCAR, the Board assesses the internal capital planning processes of bank holding companies and these companies' ability to maintain sufficient capital to continue their operations under expected and stressful conditions. Pursuant to the capital plan rule, each bank holding company must submit an annual capital plan to the Board that describes its capital planning processes and capital adequacy assessment. The capital plan must include (i) an assessment of the expected uses and sources of capital over the planning horizon; (ii) a detailed description of the bank holding company's processes for assessing capital adequacy; (iii) the bank holding company's capital policy; and (iv) a discussion of any expected changes to the bank holding company's business plan that could materially affect its capital adequacy.[9] A bank holding company may be required to include other information and analysis relevant to its capital planning processes and internal capital adequacy assessment. The Federal Reserve reviews each capital plan submission and may object to a bank holding company's capital plan based on criteria identified in the rule.[10] If the Federal Reserve objects to a bank holding company's capital plan, the bank holding company may not make any capital distributions unless the Federal Reserve indicates in writing that it does not object to such distributions.[11]

---

[1] In addition to bank holding companies with total consolidated assets of $50 billion or more, the changes in this proposed rulemaking would also apply to any nonbank financial company supervised by the Board that becomes subject to the capital planning and stress test requirements pursuant to a rule or order of the Board and to U.S. intermediate holding companies of foreign banking organizations in accordance with the transition provisions under the capital plan rule and subpart O of the Board's Regulation YY (12 CFR part 252). Currently, no nonbank financial companies supervised by the Board are subject to the capital planning or stress test requirements. A U.S. intermediate holding company that was required to be established by July 1, 2016, and that was not previously subject to the Board's capital plan rule is required to submit its first capital plan in 2017 and will become subject to the Board's stress test rules beginning in 2018. References to "bank holding companies" or "firms" in this preamble should be read to include all of these companies, unless otherwise specified.

[2] 12 U.S.C. 5365.

[3] 12 U.S.C. 5365(i).

[4] 77 FR 62380 (October 12, 2012). *See* 12 CFR part 252, subparts E and F. On October 12, 2012, as required by section 165(i) of the Dodd-Frank Act, the Federal Reserve also adopted a final rule to impose company-run stress testing requirements for state member banks and savings and loan holding companies with assets of more than $10 billion and bank holding companies with assets of more than $10 billion but less than $50 billion, which is codified at subpart B of 12 CFR part 252. The Federal Reserve is not proposing to adjust the requirements in subpart B of 12 CFR part 252 at this time.

[5] *See* 12 U.S.C. 5365(b).

[6] 12 U.S.C. 5363(a)(2)(A).

[7] 12 CFR 225.8.

[8] Subparts E and F of the Board's Regulation YY (12 CFR 252, subparts E and F).

[9] *See* 12 CFR 225.8(e)(2).

[10] *See* 12 CFR 225.8(f).

Pursuant to the Board's stress test rules, the Board conducts supervisory stress tests of bank holding companies with total consolidated assets of $50 billion or more, and these bank holding companies are required to conduct annual and mid-cycle company-run stress tests. In conducting the supervisory stress tests, the Board projects balance sheets, risk-weighted assets, net income, and resulting post-stress capital levels and regulatory capital ratios over a planning horizon under baseline, adverse, and severely adverse scenarios, incorporating capital action assumptions prescribed in the Board's stress test rules.[12] Similarly, for the annual company-run stress tests, a bank holding company uses the same planning horizon, capital action assumptions, and baseline, adverse, and severely adverse scenarios used in the supervisory stress test.[13]

C. Review of Capital Plan and Stress Test Requirements

The 2015 capital planning cycle marked the fifth anniversary of CCAR. In 2015, the Board initiated a series of meetings, including with a bank officials, debt and equity-side market analysts, public interest groups, and academics, to solicit their views on their overall evaluation of, and recommendations for, the CCAR program. The Board received a wide range of comments on the program. While meeting participants generally expressed the view that CCAR has been successful in strengthening the capital positions and improving the risk-management capabilities of the bank holding companies subject to CCAR, some participants provided suggestions for improving or strengthening various aspects of the program.[14] Notably, representatives from bank holding companies with less than $250 billion in total consolidated assets recommended that the Board modify CCAR to reduce burdens for these bank holding companies by establishing a separate capital planning program that would reduce the associated regulatory reporting requirements and extend reporting timelines.

In December 2015, the Board released capital planning guidance in Supervision and Regulation (SR) Letters 15–18 and 15–19 to consolidate its existing expectations and clarify that the Board's expectations for capital planning differ depending on the size and complexity of the firm.[15] The guidance provided that firms with $250 billion or more in total consolidated assets, firms with $10 billion or more in foreign exposures, and firms otherwise subject to the Large Institution Supervision Coordinating Committee (LISCC) supervisory framework (typically the largest, most internationally active bank holding companies) would be subject to heightened expectations in all aspects of capital planning, as compared to other large, but less complex firms. The guidance reflects an important objective of the Federal Reserve, which is to tailor supervisory expectations for firms with a lower systemic risk profile, while simultaneously protecting financial stability and improving the resiliency of and the availability of credit from the largest and most complex firms.[16]

While SR Letter 15–19 outlined tailored capital planning expectations for large and noncomplex firms, the high public profile of the CCAR qualitative review could create a risk that large and noncomplex firms will over-invest in stress testing and capital planning processes that are unnecessary to adequately capture the risks of these firms. In this proposal, the Board is proposing to further tailor its stress testing and capital planning requirements, as discussed below.

II. Proposed Revisions to the Capital Plan and Stress Test Rules

A. Overview

This proposal would revise the standards that the Board uses to review capital plans for bank holding companies that have total consolidated assets of at least $50 billion but less than $250 billion, on-balance sheet foreign exposure of less than $10 billion, and nonbank assets of less than $75 billion (each, a large and noncomplex firm). Specifically, these large and noncomplex firms under the proposal would no longer be subject to the provisions of the Board's capital plan rule whereby the Board may object to a firm's capital plan based on unresolved supervisory issues or concerns with the assumptions, analysis, and methodologies in the firm's capital plan (qualitative objection criteria, as described further in section II.D of this preamble below). In connection with this change, large and noncomplex firms would remain subject to a quantitative assessment in CCAR and would no longer be subject to the qualitative assessment in CCAR. The proposal would also amend the Parent Company Only Financial Statements for Large Holding Companies (FR Y–9LP) to include a new line item for purposes of identifying the large and noncomplex firms. All other bank holding companies subject to the capital plan rule (a LISCC firm, if the bank holding company is subject to the LISCC supervisory framework,[17] or large and complex firm, if the bank holding company otherwise has total consolidated assets of $250 billion or more, on-balance sheet foreign exposure of $10 billion or more, or nonbank assets of $75 billion or more) would remain subject to objection to their capital plan based on qualitative deficiencies under the rule.

The proposal would also modify associated regulatory reporting requirements for large and noncomplex firms to collect less detailed information on these firms' stress test results and raise the materiality threshold for reporting on specific portfolios. Under the proposal, large and noncomplex firms would no longer be subject to the qualitative assessment in CCAR beginning with the 2017 CCAR cycle, and a large and noncomplex firm would be able to implement the modified reporting requirements either immediately or after a six-month delay.

In addition, the proposal would simplify the timing of the initial applicability of the capital plan and stress test rules for all bank holding companies that cross the $50 billion asset threshold to become subject to these rules. These revisions are intended to reduce compliance burdens associated with the capital plan and stress test rules.

---

[11] *See* 12 CFR 225.8(f)(2)(iv).

[12] *See* 12 CFR 252.44.

[13] *See* 12 CFR 252.54. For the mid-cycle company-run stress tests, each bank holding company must develop and employ baseline, adverse, and severely adverse scenarios that are appropriate for its risk profile and operations. *See* 12 CFR 252.55(b).

[14] In addition to the changes in this proposal, the Federal Reserve may propose further adjustments to CCAR in the future in response to these comments.

[15] Board of Governors of the Federal Reserve System, Division of Banking Supervision and Regulation, "Federal Reserve Supervisory Assessment of Capital Planning and Positions for LISCC Firms and Large and Complex Firms," SR Letter 15–18 (December 18, 2015), available at *www.federalreserve.gov/bankinforeg/srletters/sr1518.htm* ("SR Letter 15–18"); Board of Governors of the Federal Reserve System, Division of Banking Supervision and Regulation, "Federal Reserve Supervisory Assessment of Capital Planning and Positions for Large and Noncomplex Firms," SR Letter 15–19 (December 18, 2015), available at *www.federalreserve.gov/bankinforeg/srletters/sr1519.htm* ("SR Letter 15–19").

[16] Daniel K. Tarullo (2015). "Application of Enhanced Prudential Standards to Bank Holding Companies" testimony delivered before the Committee on Banking, Housing and Urban Affairs, U.S. Senate, Washington, DC, March 19, available at: *www.federalreserve.gov/newsevents/testimony/tarullo20150319a.htm.*

[17] Based on the current population of bank holding companies, all LISCC firms have total consolidated assets of $250 billion or more, on-balance sheet foreign exposure of $10 billion or more, or nonbank assets of $75 billion or more.

The proposal would also revise the de minimis exception threshold for capital distributions under the capital plan rule. As noted, as part of CCAR, the Federal Reserve evaluates the planned capital distributions, such as dividends or repurchases of common stock, that were included in a capital plan. Under the capital plan rule, a bank holding company may make the capital distributions that were included in the capital plan, provided that the Federal Reserve does not object to the plan.[18] Generally, a bank holding company must obtain the Federal Reserve's prior approval before making additional capital distributions above the dollar amount described in its capital plan.[19] However, a bank holding company that is well capitalized, as defined in 12 CFR 225.2(r), may make additional capital distributions above such dollar amount without seeking the Board's prior approval if certain other requirements are met. These include the requirement that the total distribution amount not exceed 1.00 percent of the bank holding company's tier 1 capital for the year-period following the Federal Reserve's action on the bank holding company's capital plan (the de minimis exception).[20]

The proposal would amend the de minimis exception in two ways for all bank holding companies subject to the capital plan rule. First, the proposal would establish a one-quarter "blackout period" while the Federal Reserve is conducting CCAR (the second quarter of a calendar year), during which bank holding companies would not be able to submit a notice to use the de minimis exception. Second, the proposal would lower the de minimis limitation from 1.00 percent to 0.25 percent of a bank holding company's tier 1 capital, beginning April 1, 2017.

The proposal includes an additional blackout period for additional capital distribution requests that require prior approval from the Federal Reserve. This additional blackout period would also apply during the calendar quarter in which the Federal Reserve conducts the CCAR exercise. The proposed blackout periods for both the de minimis exception and prior approval requests are expected to be effective during the second quarter of 2017, in which the Federal Reserve will be conducting CCAR 2017.

The last proposed change to the capital plan rule relates to the trading and counterparty component of the stress test. Under the Board's stress test rules, the Board may require a bank holding company with significant trading activity to include a trading and counterparty component (global market shock) in its adverse and severely adverse scenarios for its company-run stress tests.[21] Currently, the Board must select a date between January 1 and March 1 of the calendar year of the current stress test cycle for the "as-of" date for the data used as part of the global market shock components of the bank holding company's adverse and severely adverse scenarios.[22] For the reasons described in section III.B of this preamble, the proposal would extend the range of dates from which the Board may select the as-of date for the global market shock to October 1 of the calendar year preceding the year of the stress test cycle to March 1 of the calendar year of the stress test cycle.

As described in section III.C of this preamble, the proposal would also remove transition provisions in the capital plan and stress test rules that are no longer operative.

B. Identifying Large and Noncomplex Firms

Under the proposal, a bank holding company would be considered large and noncomplex if, as of December 31 of the calendar year prior to the capital plan cycle, it has average total consolidated assets of $50 billion or greater but less than $250 billion,[23] total on-balance sheet foreign exposure of less than $10 billion,[24] and average total nonbank assets of less than $75 billion.

The proposed thresholds of $250 billion in average total consolidated assets and $10 billion in foreign exposure identify the largest and most internationally active bank holding companies, whose failure or distress could pose significant risks to U.S. financial stability. The proposed thresholds of $250 billion in total consolidated assets and $10 billion in foreign exposure identify the largest and most internationally active bank holding companies, the failure or distress of which could pose significant risks to U.S. financial stability. These thresholds would be consistent with thresholds used in the Board's capital and liquidity requirements to identify companies that may present elevated risk because of their size and the amount of their cross-border exposure.[25]

In addition to thresholds based on a bank holding company's average total consolidated assets and total on-balance sheet foreign exposure, the Board is proposing an additional threshold to identify a bank holding company as large and noncomplex based on the amount of its total nonbank assets. The proposed nonbank asset threshold of $75 billion would separate out bank holding companies that are significantly engaged in activities outside the business of banking, which have the potential to generate additional systemic risk and therefore warrant heightened capital planning standards. The proposed threshold would also facilitate heightened supervisory oversight with respect to the capital planning practices for a bank holding company that engages in activities through legal entities that are not subject to direct regulation and supervision applicable to a regulated banking entity, which may involve a broader range of risks and more complex structure requiring more sophisticated risk management.

As discussed in more detail below, under the proposal, a LISCC or large and complex firm would remain subject to the qualitative objection criteria, the CCAR qualitative review process, and the current more detailed reporting requirements. The qualitative objection criteria, CCAR qualitative review process, and more detailed reporting requirements would continue to provide for greater supervisory oversight to ensure that these LISCC firms and large and complex firms are effectively identifying and managing risks that may arise in connection with their greater size, international activity, or nonbanking operations. For bank holding companies with significant nonbanking activities in particular, the

---

[18] *See* 12 CFR 225.8.

[19] *See* 12 CFR 225.8(g)(1).

[20] *See* 12 CFR 225.8(g)(2).

[21] *See* 12 CFR 252.14(b)(2).

[22] *Id.*

[23] The proposal would not amend the existing methodology for determining average total consolidated assets under the capital plan rule. Under the rule, average total consolidated assets equals the amount of total assets reported on the bank holding company's Consolidated Financial Statements for Holding Companies (FR Y–9C), measured as an average over the preceding four quarters. If a bank holding company has not filed the FR Y–9C for each of the four most recent consecutive quarters, its total consolidated assets are measured as the average of its total consolidated assets, as reported on the FR Y–9C, for the most recent quarter or consecutive quarters, as applicable. *See* 12 CFR 225.8(b)(2).

[24] Consolidated total on-balance sheet foreign exposure would be based on a calculation of a bank holding company's total foreign countries cross-border claims on an ultimate-risk basis, plus total foreign countries claims on local residents on an ultimate-risk basis, plus total foreign countries fair value of foreign exchange and derivative products, calculated at the most recent year-end in accordance with the Federal Financial Institutions Examination Council (FFIEC) 009 Country Exposure Report.

[25] *See, e.g.,* 12 CFR 217.100(b), 12 CFR 249.1(b).

CCAR qualitative assessment supplements the existing regulatory capital framework by incorporating a comprehensive review of a bank holding company's processes to identify, aggregate, and measure risks from all of its activities, including nonbanking activities. The added scrutiny of the qualitative CCAR review helps to ensure that such LISCC firms and large and complex firms are effectively identifying and managing their combined risks on a consolidated basis.

In developing the proposal, the Federal Reserve considered a range of nonbank asset thresholds between $50 billion and $125 billion. The proposed $75 billion threshold was chosen based on historical failures and bankruptcies of large financial firms and the risk profile of the current population of bank holding companies.

At the low end of the range, a $50 billion nonbank asset threshold would be analogous to the total asset threshold used in section 165 of the Dodd-Frank Act for applying enhanced prudential standards to a bank holding company.[26] However, based on the current population of bank holding companies, a $50 billion nonbank asset threshold appeared to be too low, as many bank holding companies at this level conduct primarily traditional bank-like activities (such as mortgage lending) through nonbank subsidiaries. At the high end of the range, the Board considered a nonbank asset threshold of $125 billion, which would scope in bank holding companies with at least a majority of their assets as nonbank assets, indicating a potentially greater complexity of structure or activities and therefore greater risk.[27] Based on the current population of firms, a nonbank asset threshold of $125 billion would include the most complex U.S. bank holding companies with the largest derivatives trading and capital markets activities, but may exclude some bank holding companies with risk profiles that are significantly concentrated in riskier activities, particularly U.S. intermediate holding companies of foreign banking organizations that engage in significant capital markets activities. In particular, a threshold of $125 billion in nonbank assets would exclude companies that engage in equities trading, prime brokerage, and investment banking activities, and therefore have risk profiles that are more similar to those of the most complex U.S. financial firms than to the risk profiles of the smaller, less complex bank holding companies.

The potential complexity and interconnectedness of a bank holding company with significant nonbank assets heightens the need for such a bank holding company to be subject to an intensive annual review of its capital planning processes and risk management based on its idiosyncratic risk profile, through the CCAR qualitative assessment and qualitative objection criteria (as defined below).The proposed nonbank asset threshold of $75 billion would be slightly below the midpoint of the $50-to-$125 billion range of potential nonbank asset thresholds considered. Based on the current population of bank holding companies, this proposed threshold would include large firms with complex capital markets activities, but would not include firms with less complex structures or activities. This result would be consistent with the proposal's objective of focusing supervisory resources and more detailed reporting requirements on firms with elevated risk profiles.

The Board invites comment on whether the proposed thresholds identify firms for which the proposed relief would be most appropriate in light of the goals and purposes of the CCAR exercises.

Question 1: What other standards, such as revenue related to nonbanking activities, should the Board consider to identify large and noncomplex firms?

C. Measurement and Reporting of Average Total Nonbank Assets

1. Measurement for CCAR 2017

In order to determine whether a bank holding company meets the $75 billion average total nonbank asset threshold for CCAR 2017, average total nonbank assets under the proposal would equal (i) total combined nonbank assets of nonbank subsidiaries, as reported on line 15a of Schedule PC–B of the Parent Company Only Financial Statements for Large Holding Companies (FR Y–9LP) as of December 31, 2016; plus (ii) the total amount of equity investments in nonbank subsidiaries and associated companies as reported on line 2a of Schedule PC–A of the FR Y–9LP as of December 31, 2016, (except that any investments reflected in (i) may be eliminated); plus (iii) assets of each Edge and Agreement Corporation, as reported on the Consolidated Report of Condition and Income for Edge and Agreement Corporations (FR 2886b) as of December 31, 2016, to the extent such corporation is designated as "Nonbanking" in the box on the front page of the FR 2886b; minus (v) assets of each federal savings association, federal savings bank, or thrift subsidiary, as reported on the Call Report as of December 31, 2016.

Question 2: What, if any, additional burdens would the proposed measurement of nonbank assets create for firms for the December 31, 2016, measurement date? What steps should the Board take to address any such burdens (for example, should the Board permit firms to net intercompany exposures among all nonbank subsidiaries for purposes of the December 31, 2016, report)?

2. Measurement for Capital Plan Cycles After 2017

For purposes of capital plan cycles after 2017, the $75 billion average total nonbank asset threshold would be the average of the total nonbank assets of a holding company, calculated in accordance with the instructions to the FR Y–9LP, for the four most recent consecutive quarters or, if the bank holding company has not filed the FR Y–9LP for each of the four most recent consecutive quarters, for the most recent quarter or consecutive quarters, as applicable.

The proposal would amend the FR Y–9LP to include new line item 17 of PC–B Memoranda (Total nonbank assets of a holding company that is subject to the capital plan rule) for purposes of identifying large and noncomplex firms. Under the proposal, a bank holding company with total consolidated assets of $50 billion or more would be required to report on the FR Y–9LP the average dollar amount of its total nonbank assets of consolidated nonbank subsidiaries, whether held directly or indirectly or held through lower-tier holding companies, and its direct investments in unconsolidated nonbank subsidiaries, associated nonbank companies, and those nonbank corporate joint ventures over which the bank holding company exercises significant influence (collectively, "nonbank companies").[28]

---

[26] 12 U.S.C. 5365.

[27] A firm with total consolidated assets of $250 billion or more would have been included by the total consolidated assets threshold, so $125 billion or more in nonbank assets would constitute at least 50 percent of the assets of a bank holding company with total consolidated assets less than $250 billion.

[28] For purposes of the FR Y–9LP, (i) a subsidiary is a company in which the reporting bank holding company directly or indirectly owns more than 50 percent of the outstanding voting stock; (ii) an associated company is a corporation in which the reporting bank holding company, directly or indirectly, owns 20 to 50 percent of the outstanding voting stock and over which the reporting bank holding company exercises significant influence; and (iii) a corporate joint venture is a corporation owned and operated by a group of companies, no one of which has a majority interest, as a separate and specific business or project for the mutual benefit of that group of companies.

Nonbank companies, for purposes of this measure, would exclude (i) all national banks, state member banks, state nonmember insured banks (including insured industrial banks), federal savings associations, federal savings banks, and thrift institutions (collectively, "depository institutions") and (ii) except for an Edge or Agreement Corporation designated as "Nonbanking" in the box on the front page of the Consolidated Report of Condition and Income for Edge and Agreement Corporations (FR 2886b), any subsidiary of a depository institution ("depository institution subsidiary").

For purposes of this measure, a reporting bank holding company should eliminate all intercompany assets and operating revenue among the nonbank companies, but should include assets and operating revenue with the reporting bank holding company; any depository institution; any depository institution subsidiary. For a reporting bank holding company that is a subsidiary of a foreign banking organization, the reporting bank holding company should include assets and operating revenue with any branch or agency of the foreign banking organization or any non-U.S. subsidiary, non-U.S. associated company, or non-U.S. corporate joint venture of the foreign banking organization that is not held through the reporting bank holding company, should be included. For example, a reporting bank holding company should eliminate the loans made by one nonbank company to a second nonbank company, but should not eliminate loans made by one nonbank company to the reporting bank holding company; depository institution; depository institution subsidiary; or for a reporting bank holding company that is a subsidiary of a foreign banking organization, any branch or agency of the foreign banking organization or any non-U.S. subsidiary, non-U.S. associated company, or non-U.S. corporate joint venture of the foreign banking organization that is not held through the reporting bank holding company.

The proposed line item would require a firm to report nonbank assets based on an average over the quarter, as calculated on either a daily, weekly, or monthly basis. Using an average would further the integrity of the nonbank assets measure by ensuring that it is not unduly influenced by end-of-quarter fluctuations in nonbank assets; however, requiring a daily or weekly average may impose undue burden on firms to perform this calculation. The Board is therefore seeking comment as to whether a daily, weekly, or monthly average would be most appropriate for this calculation. This new line item is expected to be effective for the reporting period as of March 31, 2017.

Question 3: What are the costs and benefits of using a daily, weekly, or monthly average for purposes of calculating nonbank assets?

Question 4: What other measures for identifying large and noncomplex firms should the Board consider? For instance, should the Board consider evaluating the percent of revenues from nonbank activities to total revenue, in addition to the asset measure?

D. Elimination of CCAR Qualitative Assessment and Objection for Large and Noncomplex Firms

Capital planning is a core aspect of financial and risk management for all bank holding companies that helps ensure the financial strength and resilience of a firm. Strong forward-looking capital planning processes ensure that a bank holding company with total consolidated assets of $50 billion or more has sufficient capital to absorb losses and continue to lend to creditworthy businesses and consumers, including during times of stress. The Board expects all bank holding companies with total consolidated assets of $50 billion or more to maintain sound capital planning processes on an ongoing basis.

The Board has different expectations for sound capital planning and capital adequacy depending on the size, scope of operations, activity, and systemic risk profile of a firm. Consistent with those different expectations, under the proposal, large and noncomplex firms would no longer be subject to the provisions of the Board's capital plan rule whereby the Board may object to a capital plan on the basis of deficiencies in the firm's capital planning process or unresolved supervisory issues, that is, large and noncomplex firms would no longer be subject to the CCAR qualitative assessment.

In the current CCAR process, the Federal Reserve conducts a qualitative assessment of the strength of each bank holding company's internal capital planning process and a quantitative assessment of each bank holding company's capital adequacy in the calendar quarter in which the bank holding company submits a capital plan. In the qualitative assessment, the Federal Reserve evaluates the extent to which the analysis underlying each bank holding company's capital plan comprehensively captures and addresses potential risks stemming from company-wide activities. In addition, the Federal Reserve evaluates the reasonableness of a bank holding company's capital plan, the assumptions and analysis underlying the plan, and the robustness of the bank holding company's capital planning process. Under the capital plan rule, the Board may object to a bank holding company's capital plan if the Board determines that (1) the bank holding company has material unresolved supervisory issues, including but not limited to issues associated with its capital adequacy process; (2) the assumptions and analysis underlying the bank holding company's capital plan, or the bank holding company's methodologies for reviewing its capital adequacy process, are not reasonable or appropriate;[29] or (3) the bank holding company's capital planning process or proposed capital distributions otherwise constitute an unsafe or unsound practice, or would violate any law, regulation, Board order, directive, or condition imposed by, or written agreement with, the Board or the appropriate Federal Reserve Bank (together, qualitative objection criteria).[30] The Board may also object to a bank holding company's capital plan if the bank holding company has not demonstrated an ability to maintain capital above each minimum regulatory capital ratio on a pro forma basis under expected and stressful conditions throughout the planning horizon (that is, based on a quantitative assessment).[31] In the past CCAR exercises, the Board has publicly announced its decision to object to a bank holding company's capital plan, along with the basis for the decision.[32]

In the feedback meetings that the Board held on CCAR, participants from large and noncomplex firms expressed the view that the CCAR qualitative assessment was unduly burdensome because, in their view, it required the development of large amounts of documentation and sophisticated stress test models to the same degree as the largest firms in order to avoid a public objection to their capital plan. Consistent with this feedback, further tailoring of regulatory requirements for large and noncomplex firms would avoid creating a risk, based on the high public profile of the CCAR qualitative review, that large and noncomplex firms will over-invest in stress testing and capital planning processes that are unnecessary to adequately capture the risks of these firms.

---

[29] As discussed in section II.E of this preamble below, the proposal would revise this criterion to permit objection where the Board determines that the assumptions and analysis underlying the bank holding company's capital plan, or the bank holding company's *methodologies and practices that support its capital planning process*, are not reasonable or appropriate.

[30] *See* 12 CFR 225.8(f)(2)(ii)(A), (B), and (D).

[31] *See* 12 CFR 225.8(f)(2)(ii)(C).

[32] *See* 12 CFR 225.8(f)(v).

In general, large and noncomplex firms present less systemic risk than LISCC firms and large and complex firms. Furthermore, large and noncomplex firms are generally engaged in traditional banking activities and have a more limited geographical scope than LISCC firms and large and complex firms; accordingly, there is less variation in key risks across these firms relative to key risks of LISCC firms and large and complex firms. The strength of each large and noncomplex firm's capital planning process may be assessed through normal supervisory reviews supplemented with targeted, horizontal reviews of aspects of capital planning. Consequently, the Federal Reserve proposes to conduct its supervisory assessment of a large and noncomplex firm's risk-management and capital planning practices through the regular supervisory process and targeted, horizontal assessments of particular aspects of capital planning, rather than the intensive CCAR qualitative horizontal assessment. Further, the Board would not object to the capital plans of large and noncomplex firms due to qualitative deficiencies in their capital planning process, but rather would incorporate an assessment of these practices into regular, ongoing supervision.

As compared to CCAR, the proposed review process for large and noncomplex firms is expected to be more limited in scope, include targeted horizontal evaluations of specific areas of the capital planning process, and focus on the standards set forth in the capital plan rule and SR Letter 15–19. Before the start of the supervisory review process, the Federal Reserve would send a supervisory communication to each large and noncomplex firm describing the scope of the year's review. The review would likely occur in the quarter following the CCAR qualitative assessment for LISCC firms and large and complex firms.

Under the proposal, the Board would continue to perform the annual quantitative assessment of capital plans of the large and noncomplex firms and publicly announce a decision to object or not object to a firm's capital plan on this basis. The quantitative assessment ensures that firms maintain sufficient capital to continue operations throughout times of economic and financial market stress. While an individual large and noncomplex firm is likely to have a lower systemic risk profile than a LISCC firm or large and complex firm, its activities or distress still could pose some degree of risk to financial stability. Moreover, large and noncomplex firms collectively represent over $2 trillion in total assets and nearly $1.3 trillion in loans and leases as of June 30, 2016. A common weakness or insufficient capitalization across a group of large and noncomplex firms could still represent a significant threat to the U.S. economy and to specific regions where the firms' operations or activities are concentrated. Accordingly, the proposal would maintain the current quantitative analysis framework for these firms and the possible basis for objection to a firm's capital plan based on the results of the quantitative assessment, in order to appropriately ensure the capital adequacy of all bank holding companies subject to the capital plan rule.

As under the current capital plan rule, nothing in the proposal would limit the authority of the Federal Reserve to issue a capital directive, such as a directive to reduce capital distributions, or take any other supervisory enforcement action, including an action to address unsafe or unsound practices or conditions or violations of law, such as an unsafe and unsound capital planning process.[33]

E. Continued Application of CCAR for LISCC Firms and Large and Complex Firms

For LISCC firms and large and complex firms, the proposal would maintain the current comprehensive assessment of capital planning processes in the CCAR qualitative assessment. The comprehensive assessment of capital planning processes in the CCAR qualitative assessment produces significant safety and soundness benefits for LISCC firms and large and complex firms and financial stability benefits for the financial system as a whole. As the Board noted when it adopted the capital plan rule in 2011, the analytical techniques and other requirements set forth in the capital plan rule enable a firm to identify, measure, and monitor its risks and promote the stability of the U.S. financial system.[34]

Expectations for LISCC firms and large and complex firms are elevated relative to large and noncomplex firms because material distress or failure of a LISCC firm or large and complex firm is more likely to pose a threat to U.S. financial stability as compared to a large and noncomplex firm, heightening the need to ensure the resiliency of these firms. Furthermore, LISCC firms and large and complex firms engage in more diverse activities and have a larger overall size and geographical scope than large and noncomplex firms. This larger size and greater diversity leads to greater variation in the material risks at these firms, which may not be fully captured by a standardized supervisory stress scenario.

The intensive, comprehensive assessment provided by the CCAR qualitative process enables the Federal Reserve to assess whether a LISCC firm or large and complex firm has sufficient capital and strong capital planning processes in light of the scope and diversity of its activities, including risks that are idiosyncratic to each firm. The systemic footprint of these firms and the damage that their failure could pose to the financial system makes it critical that a comprehensive assessment occur on an annual basis, to ensure that the capital planning processes of LISCC firms and large and complex firms are sufficiently dynamic to reflect changes in economic or financial conditions, as well as changes to the risk profile of the firm.

The public nature of the CCAR process and disclosure of the results of the Federal Reserve's qualitative assessment helps to ensure that LISCC firms and large and complex firms maintain focus on ensuring that their practices are consistent with the Federal Reserve's capital planning expectations articulated in SR Letter 15–18.[35] Additionally, the public profile of the CCAR qualitative assessment improves incentives for firms to ensure the strength of their capital planning processes. The additional scrutiny and market discipline provided by the CCAR process is all the more important in light of the systemic risk presented by LISCC firms and large and complex firms.

The proposal includes a modification to the capital plan rule's qualitative objection criteria for LISCC firms and large and complex firms to better align with the Federal Reserve's focus during the CCAR supervisory assessment. Specifically, the proposal provides that the Board may object to a the capital plan of a LISCC firm or large and complex firm if, among other factors, the *methodologies and practices that support the bank holding company's capital planning process* are not reasonable or appropriate (emphasis added). The current rule instead provides a basis for objection if the bank holding company's *methodologies for*

---

[33] *See* 12 CFR 225.8(b)(4).

[34] 76 FR 74631, 74632 (December 1, 2011).

[35] *See* SR Letter 15–18.

reviewing its capital adequacy process, are not reasonable or appropriate (emphasis added). This modification is intended to clarify the current scope of the CCAR qualitative review and the areas of the focus in the review of the capital plan of a LISCC firm or a large and complex firm.

F. Implementation of Modified Reporting Requirements

The Capital Assessments and Stress Testing Report (FR Y–14 series of reports; OMB No. 7100–0341) collects data used to support supervisory stress testing models and continuous monitoring efforts for bank holding companies with total consolidated assets of $50 billion or more. The FR Y–14 consists of three reports: The semi-annual FR Y–14A, the quarterly FR Y–14Q, and monthly FR Y–14M. Each report contains multiple schedules, several of which are reported only by bank holding companies that meet specified materiality thresholds.

In discussions on CCAR, several large and noncomplex firms recommended that the Board revise the FR Y–14 series of reports to reduce reporting burdens for these firms. For instance, these large and noncomplex firms suggested that the Board raise the materiality threshold for the FR Y–14 reports and reduce the detail required in the supporting documentation requirements. Additionally, these firms indicated that in some cases where a portfolio met the criteria to be considered immaterial, the firm voluntarily reported data on the portfolio due to the Federal Reserve's practice of applying a 75th percentile loss rate to immaterial portfolios in the supervisory stress test. The proposal would reduce burdens associated with reporting the FR Y–14 schedules for large and noncomplex firms in three ways: By raising the materiality threshold, reducing the supporting documentation requirements, removing several sub-schedules from the FR Y–14A Summary Schedule, and using the median loss rate for immaterial portfolios.

The proposal would increase the materiality thresholds for filing schedules on the FR Y–14Q report and the FR Y–14M report for large and noncomplex firms. The FR Y–14 instructions currently define material portfolios as those with asset balances greater than $5 billion or asset balances greater than five percent of tier 1 capital on average for the four quarters preceding the reporting quarter.[36] The proposal would revise the FR Y–14's definition of a "material portfolio" for large and noncomplex firms to mean a portfolio with asset balances greater than either (1) $5 billion or (2) 10 percent of tier 1 capital, both measured as an average for the four quarters preceding the reporting quarter.[37] As a result of this change, respondents would be able to exclude certain portfolios from reporting and in some cases may not be required to report certain schedules at all. In modeling losses on these portfolios for large and noncomplex firms, the Federal Reserve intends to apply the median, rather than 75th percentile, loss rate from supervisory projections based on the firms that reported data, so as not to discourage firms from using the increased threshold for materiality.

The proposal also would reduce the supporting documentation a large and noncomplex firm would be required to be submit with its capital plan. Appendix A of the FR Y–14A report outlines qualitative information that a bank holding company should submit in support of its projections, including descriptions of the methodologies used to develop the internal projections of capital across scenarios and other analyses that support the bank holding company's comprehensive capital plans. The proposal would revise the instructions to Appendix A of the FR Y–14A to remove the requirement that a large and noncomplex firm include in its capital plan submission certain documentation regarding its models, including any model inventory mapping document, methodology documentation, model technical documents, and model validation documentation. Large and noncomplex firms would still be required to be able to produce these materials upon request by the Federal Reserve, and all or a subset of these firms may be required to provide this documentation depending on the focus of the supervisory review of large and noncomplex firm capital plans. Removing the requirement that a large and noncomplex firm submit this information in connection with its capital plan should reduce the resources needed to prepare the plan for submission and alleviate concerns of an adverse supervisory finding that a capital plan is incomplete based on the failure to provide documentation.

Under the proposal, large and noncomplex firms would no longer be required to complete several elements of the FR Y–14A Schedule A (Summary), including the Securities OTTI methodology sub-schedule, Securities Market Value source sub-schedule, Securities OTTI by security sub-schedule, the Retail repurchase sub-schedule, the Trading sub-schedule, Counterparty sub-schedule, and Advanced RWA sub-schedule.[38] The revised instructions for the FR Y–14A Summary schedule reporting form are available on the Board's public Web site. Removing these elements should reduce burdens associated with collecting and validating this data, responding to follow-up inquiries, and implementing and maintaining technical systems. Under the proposal, a large and noncomplex firm may adopt these changes for the FR Y–14A report as of December 31, 2016, or as of June 30, 2017. The Federal Reserve continues to review the details required to be reported in the FR Y–14 series of reports, and may propose additional changes in the future to further reduce burdens associated with these reporting requirements.

G. Simplify Initial Application of Capital Plan and Stress Test Rules and Regulatory Reporting Requirements

The proposal would simplify the applicability provisions for the capital plan and stress test rules that apply to bank holding companies with $50 billion or more in total consolidated assets (subparts E and F of the Board's Regulation YY, hereafter subparts E and F) and provide additional time before the application of these requirements for bank holding companies that cross the $50 billion asset threshold close to the April 5 capital plan submission and stress test date. Under the current rules, a bank holding company that crosses the $50 billion asset threshold on or before December 31 of a calendar year must submit a capital plan by April 5 of the following year. Under the proposal, the cutoff date for the capital plan rule would be moved to September 30, so that a firm that crosses the $50 billion asset threshold in the fourth quarter of a calendar year would not have to submit a capital plan until April 5 of the second year after it crosses the threshold.

The proposal would also align the cutoff date for initial application of the stress test rules in subparts E and F with the proposed September 30 cutoff date for the initial application of the capital plan rule. A bank holding company would become subject to these stress test rules in subparts E and F in the year following the first year in which the bank holding company submitted a capital plan. Under the current stress test rules, a bank holding company that crosses the $50 billion asset threshold before March 31 of a given year becomes subject to the stress test rules under subparts E and F beginning in the following year, and accordingly, may have only nine months before its first stress test under these subparts. Under the proposal, a firm would have at least a year before it would be subject to its initial stress tests under subparts E and F. This revision would simplify the application of the capital plan and stress test rules and allow for a more orderly onboarding process for new FR Y–14 filers, which will improve the quality of data used in the supervisory stress tests.[39]

---

[36] Respondents have the option to complete the data schedules for immaterial portfolios.

[37] The four quarter average percent of tier 1 capital is calculated as the sum of the firm's preceding four quarters of balances subject to the particular materiality threshold divided by the sum of the firm's proceeding four quarters of tier 1 capital.

[38] A large and noncomplex firm would be required to report line item 138 of the income statement, as that line item is currently derived from the retail repurchase sub-schedule.

The proposal would also provide an extended onboarding period for regulatory reporting requirements to a bank holding company after it first crosses the $50 billion asset threshold. Currently, a bank holding company that crosses the $50 billion asset threshold must prepare FR Y–14M reports as of the end of the month in which it crosses the threshold, and must submit its first FR Y–14M within 90 days after the end of the month (at which time, data for the three intervening months is due). The proposal would require a bank holding company to begin preparing its initial FR Y–14M as of the end of the *third* month after the bank holding company first meets the $50 billion asset threshold (rather than as of the month in which the bank holding company crosses the threshold) and must submit its first FR Y–14M within 90 days after the end of that month (at which time, data for the three intervening months would be due). For example, a bank holding company that crosses the $50 billion asset threshold as of September 30, 2016, would be required to prepare its initial FR Y–14M report as of December 2016, and file its FR Y–14M reports for December 2016, January 2017, and February 2017 in March 2017. A bank holding company would continue to prepare its FR Y–14Q report as of the end of the first quarter after it initially crosses the threshold. The additional onboarding time should facilitate communications between the Federal Reserve and a bank holding company and better prepare the bank holding company to comply with FR Y–14 reporting requirements. Generally, a bank holding company does not begin the onboarding process, including dialogue with the data aggregators who collect the FR Y–14M data, until after the Federal Reserve confirms that the bank holding company has exceeded the asset threshold. Accordingly, providing for an extended onboarding period should help bank holding companies become better prepared to comply with the FR Y–14 reporting requirements when they take effect, which will improve data quality for initial reporting periods and reduce burdens and costs for reporting bank holding companies.

III. Other Amendments to the Capital Plan and Stress Test Rules

A. Lowering the de minimis Exception Threshold for All Bank Holding Companies

As noted, a bank holding company subject to the capital plan rule must request prior approval for a capital distribution that has not explicitly been approved by the Board. However, in the event that a bank holding company received a notice of non-objection to its capital plan, the bank holding company may make a capital distribution that exceeds the amount described in the capital plan if: (1) The bank holding company remains well capitalized after the distribution,[40] (2) the bank holding company's performance and capital levels following the distribution are consistent with its projections under the expected conditions in the bank holding company's capital plan, (3) the bank holding company provides 15 days' notice prior to execution and the Board does not object within that time period; and (4) the aggregate dollar amount of all capital distributions during the capital planning cycle (the period beginning on July 1 of a calendar year and ending on June 30 of the following year) would not exceed the total amount described in the bank holding company's capital plan by more than 1.00 percent of the bank holding company's tier 1 capital as reported in the bank holding company's first quarter FR Y–9C.[41]

The purpose of this de minimis exception is to provide flexibility for well-capitalized bank holding companies to distribute small, additional amounts of capital without the need for a complete re-assessment of the bank holding company's capital plan. Prior to the 2015 capital planning cycle, requests to make distributions under the de minimis exception were generally small and typically related to unanticipated events that improved a bank holding company's capital levels (such as tax rebates or litigation settlements). Over time, the Board has observed a pattern of certain bank holding companies using the de minimis exception to increase their common stock repurchases by the maximum amount allowed under the exception. This pattern risks treating the de minimis exception as an automatic add-on to approved common stock distributions under a bank holding company's capital plan rather than for its intended use for unanticipated events. Based on planned net common stock distributions (*i.e.*, planned common stock dividends and repurchases less planned common stock issuances) for the CCAR 2016 approval period, the current level of the de minimis threshold would imply that bank holding companies could increase their net common stock capital distributions by 32 percent on average (median of 13 percent).[42]

The proposal would reduce the de minimis exception from 1.00 percent to 0.25 percent of a bank holding company's tier 1 capital in order to ensure that a de minimis distribution would represent a smaller percentage of the bank holding company's approved capital distributions and tier 1 capital. Based on data from CCAR 2016, a 0.25 percent de minimis threshold would enable bank holding companies to increase their planned net common stock distributions by 8 percent on average (median of 3 percent).

The expected aggregate capital impact of this proposed change to the de minimis exception threshold can be evaluated on both a prospective and historical basis. On a prospective basis, a comparison can be made between the total de minimis capital distributions that could be made across all bank holding companies subject to CCAR (assuming all applicable conditions were met) under the proposal and under the current rule, by taking the difference between 1.00 percent and 0.25 percent of tier 1 capital across all firms. Based on data as of the first quarter of 2016, this difference equals $9.8 billion, equivalent to 0.10 percent of the total risk-weighted assets of bank holding companies subject to CCAR in 2016.[43] On a historical basis, if a 0.25 percent de minimis limitation had applied during the CCAR 2015 cycle rather than a 1.00 percent limitation, $2.3 billion of distributions actually made during the CCAR 2015 period would not have been permitted without prior approval, equivalent to 0.02 percent of total risk-weighted assets of bank holding companies subject to CCAR in 2015.

---

[39] Providing this extension would also have the effect of allowing firms that cross the $50 billion in the fourth quarter of a given year as much as a year and a half before they are required to submit their first capital plan, and two and a half years before they are subject to the stress tests under subparts E and F. This extended period would allow for the significant investments firms must make to meet these requirements and account for the fact that these firms would continue to be subject to prudential supervision during the transition period.

[40] As defined by 12 CFR 225.2(r).

[41] *See* 12 CFR 225.8(g)(2).

[42] Net common stock distributions is calculated as planned common stock dividends and repurchases less planned common stock issuances. This analysis excludes firms that had no or negative net planned common stock distributions in their 2016 capital plans.

A smaller de minimis limitation would not prohibit these additional distributions. Instead, it would require the bank holding company to include the distributions in its next annual capital plan.

In addition, with the proposed revision to the de minimis rule, bank holding companies would still be able to seek approval to make capital distributions not included in their capital plans, consistent with section 225.8(g) of the capital plan rule. Any bank holding company making such a request must provide adequate information regarding any changes to its risk profile, financial condition, and corporate structure since the previous CCAR exercise. In many cases, the Federal Reserve expects to request additional information from bank holding companies that request approval for additional capital distributions, which will likely include revised stress test results using updated data and scenarios. One exception is where a bank holding company replaces the foregone capital with capital of equal or higher quality prior to or concurrently with the incremental distribution.

One important factor in the Board's decision on a capital distribution request is the size and complexity of the bank holding company making the request. All else equal, a capital distribution request from a LISCC or large and complex firm would likely require stronger justification than a request from a large and noncomplex firm. For instance, a request from a LISCC or large and complex firm directly related to an unforeseeable event at the time of the last capital plan submission that has a positive expected impact on current or future capital ratios would likely require more supporting evidence (for instance, updated stress test results) than a similar request from a large and noncomplex firm. This difference reflects the Federal Reserve's elevated expectations for capital planning at LISCC and large and complex firms, where any revision to a firm's capital plan to increase capital distributions following the CCAR qualitative assessment requires strong evidence and support.

B. Blackout Period for the de minimis Exception and Requests for Approval To Make Additional Distributions Not Included in a Bank Holding Company's Capital Plan

In addition to proposing a change in the allowable size of the de minimis exception, the proposal would establish a one-quarter "blackout period" while the Board is conducting CCAR (the second quarter of a calendar year) during which bank holding companies would not be able to submit a notice to use the de minimis exception or submit a request for prior approval for additional capital distributions that do not qualify for the de minimis exception. In the absence of this modification, the Federal Reserve's analysis in CCAR may not in all cases represent a comprehensive evaluation of the bank holding company's capital adequacy and the appropriateness of the bank holding company's planned capital actions in CCAR. Under the proposal, a bank holding company seeking to make capital distributions in the second quarter in excess of the amount described in the capital plan for which a non-objection was issued pursuant to the de minimis exception or prior approval process, when the CCAR exercise is underway, would be required submit a notice to use the de minimis exception by March 15 or submit a request for prior approval for incremental capital distributions that do not qualify for the de minimis exception by March 1 and reflect the additional distributions in its capital plan. The proposed blackout periods are expected to be effective for CCAR 2017.

C. Revisions to the Time Period From Which the Market Shock "as-of" Date May Be Selected

Under the Board's stress test rules, the Board may require a bank holding company with significant trading activity to include a trading and counterparty component ("global market shock") in its adverse and severely adverse scenarios for its company-run stress tests. Currently, the Board must select a date between January 1 and March 1 of the calendar year of the stress test cycle. However, in order to provide bank holding companies with as much time as possible to conduct their company-run stress tests and prepare their capital plans, the Board has typically specified the as-of date for the global market shock as early as possible in January. As such, the Board has a narrow window to select the as-of date for the market shock, effectively sometime very early in January. The narrow window creates the possibility for bank holding companies to artificially reduce the risk of their portfolios around the time of the market shock date. In addition, limiting the as-of date for the market shock to the first weeks of the calendar year does not account for seasonality in trading activity—for example, trading activity typically slows towards the end of the calendar year and gradually picks up in the new calendar year.

The proposal would allow the Board to select any date between October 1 of the prior year and March 1 of the year of the stress test cycle for the as-of date of the global market shock. Bank holding companies subject to the trading and counterparty component would be notified within two weeks of the selected as-of date for the global market shock, to enable the bank holding company to preserve trading and counterparty exposure data from the as-of date. This change would help ensure that the stress tests capture representative trading exposure for bank holding companies with significant trading activity, for example, by avoiding effects caused by unusual trading conditions around year-end. Moreover, the change would provide additional time for both bank holding companies and supervisors to implement the global market shock scenario in a well-controlled manner. Under the proposal, this change would take effect for the 2018 stress test cycle.

D. Removal of Obsolete Provisions

In 2014, the Federal Reserve adjusted the capital planning and stress test cycles from an October 1 as-of date to a January 1 as-of date. The capital plan and stress test rules currently include several provisions reflecting the previous October 1 as-of date, as well as obsolete transition provisions for foreign banking organizations that previously relied on SR Letter 01–01,[44] and for the application of the supplementary leverage ratio. The proposal would remove these provisions, as they are no longer operative.

IV. Administrative Law Matters

A. Paperwork Reduction Act

In accordance with section 3512 of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) (PRA), the Board may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OMB control numbers are 7100–0128, 7100–0341, and 7100–0342 for this information collection. The Board reviewed the proposed rule under the authority delegated to the Board by OMB.

---

[43] Total risk-weighted assets across bank holding companies subject to CCAR in 2016 equaled $9.6 trillion.

[44] SR Letter 01–01 (January 5, 2001), available at *www.federalreserve.gov/boarddocs/srletters/2001/sr0101.htm.*

The proposed rule contains requirements subject to the PRA. The reporting requirements are found in sections 12 CFR 225.8.

Comments are invited on:

a. Whether the collections of information are necessary for the proper performance of the Federal Reserve's functions, including whether the information has practical utility;

b. The accuracy or the estimate of the burden of the information collections, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

All comment will become a matter of public record. Comments on aspects of this notice that may affect reporting, recordkeeping, or disclosure requirements and burden estimates should be sent to: Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets NW., Washington, DC 20551. A copy of the comments may also be submitted to the OMB desk officer by mail to U.S. Office of Management and Budget, 725 17th Street NW., #10235, Washington, DC 20503 or by facsimile to 202–3955806, Attention, Agency Desk Officer.

Proposed Revisions, With Extension for Three Years, of the Following Information Collections:

(1) *Title of Information Collection:* Parent Company Only Financial Statements for Large Holding Companies.

Agency Form Number: FR Y–9C; FR Y–9LP; FR Y–9SP; FR Y–9ES; FR Y–9CS.

OMB Control Number: 7100–0128.

Frequency of Response: Quarterly, semi-annually, and annually.

Affected Public: Businesses or other for-profit.

Respondents: Bank holding companies (BHCs), savings and loan holding companies (SLHCs), securities holding companies (SHCs), and U.S. intermediate holding companies (IHCs), (collectively, "holding companies").

Abstract: The FR Y–9LP serves as standardized financial statements for large parent holding companies. The FR Y–9 family of reporting forms continues to be the primary source of financial data on holding companies that examiners rely on in the intervals between on-site inspections. Financial data from these reporting forms are used to detect emerging financial problems, to review performance and conduct pre-inspection analysis, to monitor and evaluate capital adequacy, to evaluate holding company mergers and acquisitions, and to analyze a holding company's overall financial condition to ensure the safety and soundness of its operations.

Current Actions: The proposal would amend the FR Y–9LP to include new line item 17 of PC–B Memoranda (Total nonbank assets of a holding company subject to the Federal Reserve Board's capital plan rule) for purposes of identifying large and noncomplex firms subject to the capital plan rule. Under the proposal, a top-tier holding company that is subject to the Board's capital plan rule would be required to report on the FR Y–9LP the average dollar amount for the calendar quarter (as calculated on either a daily, weekly, or monthly basis during the calendar quarter) of its total nonbank assets of consolidated nonbank subsidiaries, whether held directly or indirectly or held through lower-tier holding companies, and its direct investments in unconsolidated nonbank subsidiaries, associated nonbank companies, and those nonbank corporate joint ventures over which the bank holding company exercises significant influence (collectively, "nonbank companies").[45] As noted in section II.C.2 of this preamble, the Board seeks comment as to whether a daily, weekly, or monthly average would be most appropriate for this calculation. This proposed amendment would be effective as of March 31, 2017.

Nonbank companies, for purposes of this measure, would exclude (i) all national banks, state member banks, state nonmember insured banks (including insured industrial banks), federal savings associations, federal savings banks, thrift institutions (collectively for purposes of this proposed item 17, "depository institutions") and (ii) except for an Edge or Agreement Corporation designated as "Nonbanking" in the box on the front page of the Consolidated Report of Condition and Income for Edge and Agreement Corporations (FR 2886b), any subsidiary of a depository institution (for purposes of this proposed item 17, "depository institution subsidiary").

All intercompany assets and operating revenue among the nonbank companies should be eliminated, but assets and operating revenue with the reporting holding company; any depository institution; any depository institution subsidiary; and for a reporting holding company that is a subsidiary of a foreign banking organization, any branch or agency of the foreign banking organization or any non-U.S. subsidiary, non-U.S. associated company, or non-U.S. corporate joint venture of the foreign banking organization that is not held through the reporting holding company, should be included. For example, eliminate the loans made by one nonbank company to a second nonbank company, but do not eliminate loans made by one nonbank company to the parent holding company; depository institution; depository institution subsidiary; or for a reporting holding company that is a subsidiary of a foreign banking organization, any branch or agency of the foreign banking organization or any non-U.S. subsidiary, non-U.S. associated company, or non-U.S. corporate joint venture of the foreign banking organization that is not held through the reporting holding company.

While the FR Y–9LP collects another measure of nonbank assets (line item 15 of PC–B Memoranda (Total combined nonbank assets of nonbank subsidiaries)), the proposed nonbank assets measure differs in several important ways. Specifically, proposed line item 17 excludes assets of an insured industrial bank, federal savings association, federal savings bank, or thrift institution and includes assets of an Edge or Agreement Corporation designated as "Nonbanking" in the box on the front page of the Consolidated Report of Condition and Income for Edge and Agreement Corporations (FR 2886b). It also includes the value of an investment in an unconsolidated nonbank company that is held directly by the holding company. While these elements may be sourced from other reporting forms, the new line item is necessary to reflect the elimination of intercompany transactions among these nonbank companies, as described above.

---

[45] For purposes of the FR Y–9LP, (i) a subsidiary is a company in which the reporting bank holding company directly or indirectly owns more than 50 percent of the outstanding voting stock; (ii) an associated company is a corporation in which the reporting bank holding company, directly or indirectly, owns 20 to 50 percent of the outstanding voting stock and over which the reporting bank holding company exercises significant influence; and (iii) a corporate joint venture is a corporation owned and operated by a group of companies, no one of which has a majority interest, as a separate and specific business or project for the mutual benefit of that group of companies.

Number of Respondents: Proposed revision would apply to top-tier holding companies subject to the Board's capital plan rule (BHCs and IHCs with total consolidated assets of $50 billion or more), for a total of 38 of the existing 792 FR Y–9LP respondents. FR Y–9C (non-Advanced Approaches holding companies or other respondents): 654; FR Y–9C (Advanced Approaches holding companies or other respondents): 13; FR Y–9SP: 4,122; FR Y–9ES: 88; FR Y–9CS: 236.

Estimated Average Hours per Response: FR Y–9C (non-Advanced Approaches holding companies or other respondents): 50.17 hours; FR Y–9C (Advanced Approaches holding companies or other respondents): 52.42 hours; FR Y–9LP: 5.25 hours; FR Y–9SP: 5.4 hours; FR Y–9ES: 0.5 hours; FR Y–9CS: 0.5 hours.

Current Estimated Annual Burden Hours: FR Y–9C (non-Advanced Approaches holding companies or other respondents): 131,245 hours; FR Y–9C (Advanced Approaches holding companies or other respondents): 2,674 hours; FR Y–9LP: 16,632 hours; FR Y–9SP: 44,518; FR Y–9ES: 44; FR Y–9CS: 472.

Proposed Revisions only change in Estimated Annual Burden Hours: FR Y–9LP: 76 hours (0.5 hours per quarter for the 38 impacted FR Y–9LP respondents).

Proposed Total Estimated Annual Burden Hours: FR Y–9C (non-Advanced Approaches holding companies or other respondents): 131,245 hours; FR Y–9C (Advanced Approaches holding companies or other respondents): 2,674 hours; FR Y–9LP: 16,651 hours; FR Y–9SP: 44,518; FR Y–9ES: 44; FR Y–9CS: 472.

(2) *Title of Information Collection:* Capital Assessments and Stress Testing information collection.

Agency Form Number: FR Y–14A/Q/M.

OMB Control Number: 7100–0341.

Frequency of Response: Annually, semi-annually, quarterly, and monthly.

Affected Public: Businesses or other for-profit.

Respondents: The respondent panel consists of any top-tier bank holding company (BHC) or intermediate holding company (IHC) that has $50 billion or more in total consolidated assets, as determined based on: (i) The average of the firm's total consolidated assets in the four most recent quarters as reported quarterly on the firm's Consolidated Financial Statements for Bank Holding Companies (FR Y–9C) (OMB No. 7100–0128); or (ii) the average of the firm's total consolidated assets in the most recent consecutive quarters as reported quarterly on the firm's FR Y–9Cs, if the firm has not filed an FR Y–9C for each of the most recent four quarters. Reporting is required as of the first day of the quarter immediately following the quarter in which it meets this asset threshold, unless otherwise directed by the Board.

Abstract: The data collected through the FR Y–14A/Q/M schedules provide the Board with the additional information and perspective needed to help ensure that large BHCs and IHCs have strong, firm-wide risk measurement and management processes supporting their internal assessments of capital adequacy and that their capital resources are sufficient given their business focus, activities, and resulting risk exposures. The annual CCAR exercise is also complemented by other Board supervisory efforts aimed at enhancing the continued viability of large firms, including continuous monitoring of firms' planning and management of liquidity and funding resources and regular assessments of credit, market and operational risks, and associated risk management practices. Information gathered in this data collection is also used in the supervision and regulation of these financial institutions. In order to fully evaluate the data submissions, the Board may conduct follow-up discussions with or request responses to follow up questions from respondents, as needed.

The Capital Assessments and Stress Testing information collection consists of the FR Y–14A, Q, and M reports. The semi-annual FR Y–14A collects quantitative projections of balance sheet, income, losses, and capital across a range of macroeconomic scenarios and qualitative information on methodologies used to develop internal projections of capital across scenarios.[46] The quarterly FR Y–14Q collects granular data on various asset classes, including loans, securities, and trading assets, and pre-provision net revenue (PPNR) for the reporting period. The monthly FR Y–14M comprises three retail portfolio- and loan-level collections, and one detailed address matching collection to supplement two of the portfolio and loan-level collections.

Current Actions: The Capital Assessments and Stress Testing Report (FR Y–14 series of reports; OMB No. 7100–0341) collects data used to support supervisory stress testing models and continuous monitoring efforts for bank holding companies with total consolidated assets of $50 billion or more. The FR Y–14 consists of three reports, the semi-annual FR Y–14A, the quarterly FR Y–14Q, and monthly FR Y–14M. Each report contains multiple schedules, several of which are reported only by bank holding companies that meet specified materiality thresholds. In discussions on CCAR, several large and noncomplex firms recommended that the Board revise the FR Y–14 series of reports to reduce the reporting burden on these firms. For instance, these large and noncomplex firms suggested that the Board raise the materiality threshold for the FR Y–14 reports and reduce the detail required in the supporting documentation requirements. The proposal would reduce burdens associated with reporting the FR Y–14 schedules for large and noncomplex firms by raising the materiality threshold, reducing supporting documentation requirements, removing several sub-schedules from the FR Y–14A Summary Schedule, and using the median loss rate for immaterial portfolios.

The proposal would increase the materiality thresholds for filing schedules on the FR Y–14Q report and the FR Y–14M report for large and noncomplex firms. The FR Y–14 instructions currently define material portfolios as those with asset balances greater than $5 billion or asset balances greater than five percent of tier 1 capital, both measured as an average for the four quarters preceding the reporting quarter.[47] The proposal would revise the FR Y–14's definition of a "material portfolio" for large and noncomplex firms to mean a portfolio with asset balances greater than either (1) $5 billion or (2) 10 percent of tier 1 capital on average for the four quarters preceding the reporting quarter.[48] As a result of this change, respondents would be able to exclude certain portfolios from reporting and in some cases may not be required to report certain schedules at all.

---

[46] A BHC that must re-submit its capital plan generally also must provide a revised FR Y–14A in connection with its resubmission.

[47] Respondents have the option to complete the data schedules for immaterial portfolios.

[48] The four quarter average percent of tier 1 capital is calculated as the sum of the firm's preceding four quarters of balances subject to the particular materiality threshold divided by the sum of the firm's proceeding four quarters of tier 1 capital.

In addition, the proposal would reduce the supporting documentation a large and noncomplex firm would be required to be submit with its capital plan. Appendix A of the FR Y–14A report outlines qualitative information that a bank holding company should submit in support of its projections, including descriptions of the methodologies used to develop the internal projections of capital across scenarios and other analyses that support the bank holding company's comprehensive capital plans. The proposal would revise the instructions to Appendix A of the FR Y–14A to remove the requirement that a large and noncomplex firm include in its capital plan submission certain documentation regarding its models, including any model inventory mapping document, methodology documentation, model technical documents, and model validation documentation. Large and noncomplex firms would still be required to be able to produce these materials upon request by the Federal Reserve, and all or a subset of these firms may be required to provide this documentation depending on the focus of the supervisory review of large and noncomplex firm capital plans. Removing the requirement that a large and noncomplex firm submit this information in connection with its capital plan should reduce the resources needed to prepare the plan for submission and alleviate concerns of an adverse supervisory finding that a capital plan is incomplete based on the failure to provide documentation.

Under the proposal, large and noncomplex firms would no longer be required to complete several elements of the FR Y–14A Schedule A (Summary), including the Securities OTTI methodology sub-schedule, Securities Market Value source sub-schedule, Securities OTTI by security sub-schedule, the Retail repurchase sub-schedule, the Trading sub-schedule, Counterparty sub-schedule, and Advanced RWA sub-schedule.[49] The revised instructions for the FR Y–14A Summary schedule reporting form are available on the Board's public Web site. Removing these elements should reduce burdens associated with collecting and validating this data, responding to follow-up inquiries, and implementing and maintaining technical systems. Under the proposal, a large and noncomplex firm may adopt these changes for the FR Y–14A report as of December 31, 2016, or as of June 30, 2017. The Federal Reserve continues to review the details required to be reported in the FR Y–14 series of reports, and may propose additional changes in the future to further reduce burdens associated with these reporting requirements.

These changes are expected to decrease burden for the information collection by 56,454 hours. This includes a decrease in the average hours per response for the FR Y–14A due to the elimination of the requirement for large and noncomplex firms to file four Summary sub-schedules and a reduction in the supporting documentation requirements, resulting in a decrease of 6,346 hours. The modification to the materiality threshold for the FR Y–14Q and FR Y–14M reports would be anticipated to reduce the number of firms filing certain schedules on the FR Y–14Q and FR Y–14M reports. Specifically, this would result in a decrease of 1,088 hours on the FR Y–14Q report and 49,020 hours for the FR Y–14M report.

Number of Respondents: 38.

Estimated Average Hours per Response: FR Y–14A: Summary, 987 hours; Macro scenario, 31 hours; Operational Risk, 12 hours; Regulatory capital transitions, 23 hours; Regulatory capital instruments, 20 hours; Retail repurchase, 20 hours; and Business plan changes, 10 hours. FR Y–14Q: Securities risk, 13 hours; Retail risk, 16 hours; PPNR, 711 hours; Wholesale, 152 hours; Trading, 1,926 hours; Regulatory capital transitions, 23 hours; Regulatory capital instruments, 52 hours; Operational risk, 50 hours; MSR Valuation, 24 hours; Supplemental, 4 hours; Retail FVO/HFS, 16 hours; CCR, 508 hours; and Balances, 16 hours. FR Y–14M: 1st lien mortgage, 515 hours; Home equity, 515 hours; and Credit card, 510 hours. FR Y–14 On-Going automation revisions, 480 hours; and implementation, 7,200 hours. FR Y–14 Attestation: Implementation, 4,800 hours; and on-going revisions, 2,560 hours.

Current Estimated Annual Burden Hours: FR Y–14A: Summary, 75,012 hours; Macro scenario, 2,356 hours; Operational Risk, 456 hours; Regulatory capital transitions, 874 hours; Regulatory capital instruments, 760 hours; Retail repurchase, 1,520 hours; and Business plan changes, 380 hours. FR Y–14Q: Securities risk, 2,432 hours; Retail risk, 1,976 hours, Pre-provision net revenue (PPNR), 108,072 hours; Wholesale, 23,104 hours; Trading, 46,224 hours; Regulatory capital transitions, 3,496 hours; Regulatory capital instruments, 7,904 hours; Operational risk, 7,600 hours; Mortgage Servicing Rights (MSR) Valuation, 1,632 hours; Supplemental, 608 hours; and Retail Fair Value Option/Held for Sale (Retail FVO/HFS), 1,728 hours; Counterparty, 12,192 hours; and Balances, 2,432 hours. FR Y–14M: 1st lien mortgage, 228,660 hours; Home equity, 197,760 hours; and Credit card, 153,000 hours. FR Y–14 On-going automation revisions, 18,720 hours; and implementation, 0 hours. FR Y–14 Attestation: Implementation, 0 hours; and on-going revisions, 23,040 hours.

Proposed Revisions Only Change in Estimated Annual Burden Hours: FR Y–14A: −6,346 Hours, FR Y–14Q: −1,088 FR Y–14M: −49,020 Hours.

Proposed Total Estimated Annual Burden Hours: FR Y–14A: Summary, 68,780 hours; Macro scenario, 2,356 hours; Operational Risk, 456 hours; Regulatory capital transitions, 760 hours; Regulatory capital instruments, 760 hours; Retail repurchase, 1,520 hours; and Business plan changes, 380. FR Y–14Q: Securities risk, 2,280 hours; Retail risk, 1,824 hours, Pre-provision net revenue (PPNR), 108,072 hours; Wholesale, 22,952 hours; Trading, 46,224 hours; Regulatory capital transitions, 3,496 hours; Regulatory capital instruments, 7,904 hours; Operational risk, 7,600 hours; Mortgage Servicing Rights (MSR) Valuation, 1,288 hours; Supplemental, 608 hours; and Retail Fair Value Option/Held for Sale (Retail FVO/HFS), 1,440 hours; Counterparty, 12,192 hours; and Balances, 2,432 hours. FR Y–14M: 1st lien mortgage, 228,660 hours; Home equity, 191,580 hours; and Credit card, 110,160 hours. FR Y–14 On-going automation revisions, 18,720 hours; and implementation, 0 hours. FR Y–14 Attestation: Implementation, 0 hours; and on-going revisions, 23,040 hours.

(3) *Title of Information Collection:* Recordkeeping and Reporting Requirements Associated with Regulation Y (Capital Plans).

Agency Form Number: Reg Y–13.

OMB Control Number: 7100–0342.

Frequency of Response: Annually.

Affected Public: Businesses or other for-profit.

Respondents: BHCs and IHCs.

Abstract: Regulation Y (12 CFR part 225) requires large bank holding companies (BHCs) to submit capital plans to the Federal Reserve on an annual basis and to require such BHCs to request prior approval from the Federal Reserve under certain circumstances before making a capital distribution.

Current Actions: The proposed rule contains requirements subject to the

---

[49] A large and noncomplex firm would be required to report line item 138 of the income statement, as that line item is currently derived from the retail repurchase sub-schedule.

PRA. The collection of information revised by this final rule is found in section 225.8 of Regulation Y (12 CFR part 225). Under section 225.8(f)(2) of the proposal, large and noncomplex firms would no longer be subject to the provisions of the Board's capital plan rule whereby the Board can object to a capital plan on the basis of qualitative deficiencies in the firm's capital planning process. In feedback meetings that the Board held on CCAR, participants from large and noncomplex firms expressed the view that the provision of the rule permitting the Board to object to a capital plan on the basis of qualitative deficiencies, in their view, required a large and noncomplex firm to develop a large amount of documentation and stress test models to the same degree as the largest firms in order to avoid risk of a public objection to its capital plan. Accordingly, this revision to section 225.8(f)(2) is expected to reduce the recordkeeping requirements for large and noncomplex firms by approximately 25 percent, or 3,000 hours for large and noncomplex firms.

The proposed rule defines a large and noncomplex bank holding company as a bank holding company with average total consolidated assets of $50 billion or more but less than $250 billion, consolidated total on-balance sheet foreign exposure of less than $10 billion, and average total nonbank assets of less than $75 billion. While the total consolidated assets and on-balance sheet foreign exposure measures are calculated for purposes of other regulatory requirements, the proposed average total nonbank assets threshold is not otherwise calculated for purposes of a regulatory requirement.

For the first calculation date (December 31, 2016), firms will be required to calculate nonbank assets by aggregating items reported on other reporting forms. Specifically, nonbank assets would be calculated as (A) total combined nonbank assets of nonbank subsidiaries, as reported on line 15a of Schedule PC–B of the Parent Company Only Financial Statements for Large Holding Companies (FR Y–9LP) as of December 31, 2016; plus (B) the total amount of equity investments in nonbank subsidiaries and associated companies as reported on line 2a of Schedule PC–A of the FR Y–9LP as of December 31, 2016; plus (C) assets of each Edge and Agreement Corporation, as reported on the Consolidated Report of Condition and Income for Edge and Agreement Corporations (FR 2886b) as of December 31, 2016, to the extent such corporation is designated as "Nonbanking" in the box on the front page of the FR 2886b; minus (D) assets of a federal savings association, federal savings bank, or thrift subsidiary, as reported on the Report of Condition and Income (Call Report) as of December 31, 2016. Performing this calculation is expected to require 1 hour per firm.

As noted above, for calculation dates following the initial calculation date, the Federal Reserve is adding a new line item to the FR Y–9LP (Parent Company Only Financial Statements for Large Holding Companies) to collect average total nonbank assets; however, for the December 31, 2016 calculation date, a firm will be required to calculate the line item based on existing line items. The burden associated with this line item will be reflected in that collection.

Number of Respondents: 38.

Estimated Average Hours per Response: Annual capital planning recordkeeping (225.8(e)(1)(i)), 11,920 hours; annual capital planning reporting (225.8(e)(1)(ii)), 80 hours; annual capital planning recordkeeping (225.8(e)(1)(iii)), 100 hours; data collections reporting ((225.8(e)(3)(i)–(vi)), 1,005 hours; data collections reporting (225.8(e)(4)), 100 hours; review of capital plans by the Federal Reserve reporting (225.8(f)(3)(i)), 16 hours; prior approval request requirements reporting (225.8(g)(1), (3), & (4)), 100 hours; prior approval request requirements exceptions (225.8(g)(3)(iii)(A)), 16 hours; prior approval request requirements reports (225.8(g)(6)), 16 hours.

Current Estimated Annual Burden Hours: Annual capital planning recordkeeping (225.8(e)(1)(i)), 452,960 hours; annual capital planning reporting (225.8(e)(1)(ii)), 2,240 hours; annual capital planning recordkeeping (225.8(e)(1)(iii)), 2,800 hours; data collections reporting ((225.8(e)(3)(i)–(vi)), 38,190 hours; data collections reporting (225.8(e)(4)), 1,000 hours; review of capital plans by the Federal Reserve reporting (225.8(f)(3)(i)), 32 hours; prior approval request requirements reporting (225.8(g)(1), (3), & (4)), 2,600 hours; prior approval request requirements exceptions (225.8(g)(3)(iii)(A)), 32 hours; prior approval request requirements reports (225.8(g)(6)), 32 hours.

Proposed Revisions Only Change in Estimated Average Hours per Response: For large and noncomplex firms: Annual capital planning recordkeeping (225.8(e)(1)(i)), 8,920 hours.

Proposed Revisions Only Change in Estimated Annual Burden Hours: Annual capital planning reporting (225.8(e)(1)(ii)): −54,000 hours.

Proposed Total Estimated Annual Burden Hours: Annual capital planning recordkeeping (225.8(e)(1)(i)) (LISCC and large and complex firms), 238,400 hours; Annual capital planning recordkeeping (225.8(e)(1)(i) (large and noncomplex firms), 160,560 hours; annual capital planning reporting (225.8(e)(1)(ii)), 2,240 hours; annual capital planning recordkeeping (225.8(e)(1)(iii)), 2,800 hours; data collections reporting ((225.8(e)(3)(i)–(vi)), 38,190 hours; data collections reporting (225.8(e)(4)), 1,000 hours; review of capital plans by the Federal Reserve reporting (225.8(f)(3)(i)), 32 hours; prior approval request requirements reporting (225.8(g)(1), (3), & (4)), 2,600 hours; prior approval request requirements exceptions (225.8(g)(3)(iii)(A)), 32 hours; prior approval request requirements reports (225.8(g)(6)), 32 hours.

B. Regulatory Flexibility Act

The Board is providing an initial regulatory flexibility analysis with respect to this proposed rule. The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, generally requires that an agency prepare and make available an initial regulatory flexibility analysis in connection with a notice of proposed rulemaking.

Under regulations issued by the Small Business Administration ("SBA"), a small entity includes a depository institution, bank holding company, or savings and loan holding company with total assets of $550 million or less (a small banking organization).[50] As of June 30, 2016, there were approximately 594 small state member banks, 3,203 small bank holding companies and 162 small savings and loan holding companies. The proposed rule would apply only to bank holding companies with total consolidated asset of $50 billion or more. Companies that would be subject to the proposed rule therefore substantially exceed the $550 million total asset threshold at which a company is considered a small company under SBA regulations. Therefore, there are no significant alternatives to the proposed rule that would have less economic impact on small banking organizations. As discussed above, the projected reporting, recordkeeping, and other compliance requirements of the rule are expected to be small. The Board does not believe that the rule duplicates, overlaps, or conflicts with any other Federal rules. In light of the foregoing, the Board does not believe that the final rule would have a significant economic impact on a substantial number of small entities.

---

[50] *See* 13 CFR 121.201. Effective July 14, 2014, the Small Business Administration revised the size standards for banking organizations to $550 million in assets from $500 million in assets. 79 FR 33647 (June 12, 2014).

The Board welcomes comment on all aspects of its analysis. A final regulatory flexibility analysis will be conducted after consideration of comments received during the public comment period.

C. Solicitation of Comments of Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat. 1338, 1471, 12 U.S.C. 4809) requires the federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Board has sought to present the proposed rule in a simple and straightforward manner, and invites comment on the use of plain language.

For example:

- Have we organized the material to suit your needs? If not, how could the rule be more clearly stated?
- Are the requirements in the rule clearly stated? If not, how could the rule be more clearly stated?
- Do the regulations contain technical language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would make the regulation easier to understand?
- Would more, but shorter, sections be better? If so, which sections should be changed?
- What else could we do to make the regulation easier to understand?

List of Subjects

12 CFR Part 225

Administrative practice and procedure, Banks, Banking, Capital planning, Holding companies, Reporting and recordkeeping requirements, Securities, Stress testing.

12 CFR Part 252

Administrative practice and procedure, Banks, Banking, Capital planning, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities, Stress testing.

Authority and Issuance

For the reasons stated in the SUPPLEMENTARY INFORMATION, the Board of Governors of the Federal Reserve System proposes to amend 12 CFR chapter II as follows:

PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

■ 1. The authority citation for part 225 continues to read as follows:

Authority: 12 U.S.C. 1817(j)(13), 1818, 1828(o), 1831i, 1831p–1, 1843(c)(8), 1844(b), 1972(1), 3106, 3108, 3310, 3331–3351, 3906, 3907, and 3909; 15 U.S.C. 1681s, 1681w, 6801 and 6805.

Subpart A—General Provisions

■ 2. Section 225.8 is revised to read as follows:

§ 225.8 Capital planning.

(a) *Purpose.* This section establishes capital planning and prior notice and approval requirements for capital distributions by certain bank holding companies.

(b) *Scope and reservation of authority*—(1) *Applicability.* Except as provided in paragraph (c) of this section, this section applies to:

(i) Any top-tier bank holding company domiciled in the United States with average total consolidated assets of $50 billion or more ($50 billion asset threshold);

(ii) Any other bank holding company domiciled in the United States that is made subject to this section, in whole or in part, by order of the Board;

(iii) Any U.S. intermediate holding company subject to this section pursuant to 12 CFR 252.153; and

(iv) Any nonbank financial company supervised by the Board that is made subject to this section pursuant to a rule or order of the Board.

(2) *Average total consolidated assets.* For purposes of this section, average total consolidated assets means the average of the total consolidated assets as reported by a bank holding company on its Consolidated Financial Statements for Bank Holding Companies (FR Y–9C) for the four most recent consecutive quarters. If the bank holding company has not filed the FR Y–9C for each of the four most recent consecutive quarters, average total consolidated assets means the average of the company's total consolidated assets, as reported on the company's FR Y–9C, for the most recent quarter or consecutive quarters, as applicable. Average total consolidated assets are measured on the as-of date of the most recent FR Y–9C used in the calculation of the average.

(3) *Ongoing applicability.* A bank holding company (including any successor bank holding company) that is subject to any requirement in this section shall remain subject to such requirements unless and until its total consolidated assets fall below $50 billion for each of four consecutive quarters, as reported on the FR Y–9C and effective on the as-of date of the fourth consecutive FR Y–9C.

(4) *Reservation of authority.* Nothing in this section shall limit the authority of the Federal Reserve to issue a capital directive or take any other supervisory or enforcement action, including an action to address unsafe or unsound practices or conditions or violations of law.

(5) *Rule of construction.* Unless the context otherwise requires, any reference to bank holding company in this section shall include a U.S. intermediate holding company and shall include a nonbank financial company supervised by the Board to the extent this section is made applicable pursuant to a rule or order of the Board.

(c) *Transitional arrangements.* (1) *Transition periods for certain bank holding companies.* (i) A bank holding company that meets the $50 billion asset threshold (as measured under paragraph (b) of this section) on or before September 30 of a calendar year must comply with the requirements of this section beginning on January 1 of the next calendar year, unless that time is extended by the Board in writing.

(ii) A bank holding company that meets the $50 billion asset threshold after September 30 of a calendar year must comply with the requirements of this section beginning on January 1 of the second calendar year after the bank holding company meets the $50 billion asset threshold, unless that time is extended by the Board in writing.

(iii) The Board or the appropriate Reserve Bank with the concurrence of the Board, may require a bank holding company described in paragraph (c)(1)(i) or (ii) of this section to comply with any or all of the requirements in paragraphs (e)(1), (e)(3), (f), or (g) of this section if the Board or appropriate Reserve Bank with concurrence of the Board, determines that the requirement is appropriate on a different date based on the company's risk profile, scope of operation, or financial condition and provides prior notice to the company of the determination.

(2) *Transition periods for subsidiaries of certain foreign banking organizations.* (i) *U.S. intermediate holding companies.* (A) A U.S. intermediate holding company required to be established or designated pursuant to 12 CFR 252.153 on or before September 30 of a calendar year must comply with the requirements of this section beginning on January 1 of the next calendar year, unless that time is extended by the Board in writing.

(B) A U.S. intermediate holding company required to be established or designated pursuant to 12 CFR 252.153 after September 30 of a calendar year must comply with the requirements of this section beginning on January 1 of the second calendar year after the U.S. intermediate holding company is required to be established, unless that time is extended by the Board in writing.

(C) The Board or the appropriate Reserve Bank with the concurrence of the Board, may require a U.S. intermediate holding company described in paragraph (c)(2)(i)(A) or (B) of this section to comply with any or all of the requirements in paragraphs (e)(1), (e)(3), (f), or (g) of this section if the Board or appropriate Reserve Bank with concurrence of the Board, determines that the requirement is appropriate on a different date based on the company's risk profile, scope of operation, or financial condition and provides prior notice to the company of the determination.

(ii) *Bank holding company subsidiaries of U.S. intermediate holding companies required to be established by July 1, 2016.* (A) Notwithstanding any other requirement in this section, a bank holding company that is a subsidiary of a U.S. intermediate holding company (or, with the mutual consent of the company and Board, another bank holding company domiciled in the United States) shall remain subject to paragraph (e) of this section until December 31, 2017, and shall remain subject to the requirements of paragraphs (f) and (g) of this section until the Board issues an objection or non-objection to the capital plan of the relevant U.S. intermediate holding company.

(B) After the time periods set forth in paragraph (c)(2)(ii)(A) of this section, this section will cease to apply to a bank holding company that is a subsidiary of a U.S. intermediate holding company, unless otherwise determined by the Board in writing.

(d) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Advanced approaches* means the risk-weighted assets calculation methodologies at 12 CFR part 217, subpart E, as applicable, and any successor regulation.

(2) *Average total nonbank assets* means:

(i) For purposes of the capital plan cycle beginning January 1, 2017:

(A) Total combined nonbank assets of nonbank subsidiaries, as reported on line 15a of Schedule PC–B of the Parent Company Only Financial Statements for Large Holding Companies (FR Y–9LP) as of December 31, 2016; plus

(B) The total amount of equity investments in nonbank subsidiaries and associated companies as reported on line 2a of Schedule PC–A of the FR Y–9LP as of December 31, 2016 (except that any investments reflected in (A) may be eliminated); plus

(C) Assets of each Edge and Agreement Corporation, as reported on the Consolidated Report of Condition and Income for Edge and Agreement Corporations (FR 2886b) as of December 31, 2016, to the extent such corporation is designated as "Nonbanking" in the box on the front page of the FR 2886b; minus

(D) Assets of each federal savings association, federal savings bank, or thrift subsidiary, as reported on the Report of Condition and Income (Call Report) as of December 31, 2016.

(ii) For purposes of any capital plan cycles beginning on or after January 1, 2018, the average of the total nonbank assets of a holding company subject to the Federal Reserve Board's capital plan rule, calculated in accordance with the instructions to the FR Y–9LP, for the four most recent consecutive quarters or, if the bank holding company has not filed the FR Y–9LP for each of the four most recent consecutive quarters, for the most recent quarter or consecutive quarters, as applicable.

(3) *BHC stress scenario* means a scenario designed by a bank holding company that stresses the specific vulnerabilities of the bank holding company's risk profile and operations, including those related to the company's capital adequacy and financial condition.

(4) *Capital action* means any issuance or redemption of a debt or equity capital instrument, any capital distribution, and any similar action that the Federal Reserve determines could impact a bank holding company's consolidated capital.

(5) *Capital distribution* means a redemption or repurchase of any debt or equity capital instrument, a payment of common or preferred stock dividends, a payment that may be temporarily or permanently suspended by the issuer on any instrument that is eligible for inclusion in the numerator of any minimum regulatory capital ratio, and any similar transaction that the Federal Reserve determines to be in substance a distribution of capital.

(6) *Capital plan* means a written presentation of a bank holding company's capital planning strategies and capital adequacy process that includes the mandatory elements set forth in paragraph (e)(2) of this section.

(7) *Capital plan cycle* means the period beginning on January 1 of a calendar year and ending on December 31 of that year.

(8) *Capital policy* means a bank holding company's written assessment of the principles and guidelines used for capital planning, capital issuance, capital usage and distributions, including internal capital goals; the quantitative or qualitative guidelines for capital distributions; the strategies for addressing potential capital shortfalls; and the internal governance procedures around capital policy principles and guidelines.

(9) *Large and noncomplex bank holding company* means any bank holding company subject to this section that has, as of December 31 of the calendar year prior to the capital plan cycle:

(i) Average total consolidated assets of less than $250 billion;

(ii) Consolidated total on-balance sheet foreign exposure at the most recent year-end equal to less than $10 billion (where total on-balance sheet foreign exposure equals total foreign countries cross-border claims on an ultimate-risk basis, plus total foreign countries claims on local residents on an ultimate-risk basis, plus total foreign countries fair value of foreign exchange and derivative products, calculated in accordance with the Federal Financial Institutions Examination Council (FFIEC) 009 Country Exposure Report); and

(iii) Average total nonbank assets of less than $75 billion.

(10) *Minimum regulatory capital ratio* means any minimum regulatory capital ratio that the Federal Reserve may require of a bank holding company, by regulation or order, including the bank holding company's tier 1 and supplementary leverage ratios as calculated under 12 CFR part 217, including the deductions required under 12 CFR 248.12, as applicable, and the bank holding company's common equity tier 1, tier 1, and total risk-based capital ratios as calculated under 12 CFR part 217, including the deductions required under 12 CFR 248.12 and the transition provisions at 12 CFR 217.1(f)(4) and 217.300; except that the bank holding company shall not use the advanced approaches to calculate its regulatory capital ratios.

(11) *Nonbank financial company supervised by the Board* means a company that the Financial Stability Oversight Council has determined under section 113 of the Dodd-Frank Act (12 U.S.C. 5323) shall be supervised by the Board and for which such determination is still in effect.

(12) *Planning horizon* means the period of at least nine consecutive quarters, beginning with the quarter preceding the quarter in which the bank holding company submits its capital plan, over which the relevant projections extend.

(13) *Tier 1 capital* has the same meaning as under 12 CFR part 217.

(14) *U.S. intermediate holding company* means the top-tier U.S. company that is required to be established pursuant to 12 CFR 252.153.

(e) *General requirements.* (1) *Annual capital planning.* (i) A bank holding company must develop and maintain a capital plan.

(ii) A bank holding company must submit its complete capital plan to the Board and the appropriate Reserve Bank by April 5 of each calendar year, or such later date as directed by the Board or by the appropriate Reserve Bank with concurrence of the Board.

(iii) The bank holding company's board of directors or a designated committee thereof must at least annually and prior to submission of the capital plan under paragraph (e)(1)(ii) of this section:

(A) Review the robustness of the bank holding company's process for assessing capital adequacy,

(B) Ensure that any deficiencies in the bank holding company's process for assessing capital adequacy are appropriately remedied; and

(C) Approve the bank holding company's capital plan.

(2) *Mandatory elements of capital plan.* A capital plan must contain at least the following elements:

(i) An assessment of the expected uses and sources of capital over the planning horizon that reflects the bank holding company's size, complexity, risk profile, and scope of operations, assuming both expected and stressful conditions, including:

(A) Estimates of projected revenues, losses, reserves, and pro forma capital levels, including any minimum regulatory capital ratios (for example, leverage, tier 1 risk-based, and total risk-based capital ratios) and any additional capital measures deemed relevant by the bank holding company, over the planning horizon under expected conditions and under a range of scenarios, including any scenarios provided by the Federal Reserve and at least one BHC stress scenario;

(B) A discussion of the results of any stress test required by law or regulation, and an explanation of how the capital plan takes these results into account; and

(C) A description of all planned capital actions over the planning horizon.

(ii) A detailed description of the bank holding company's process for assessing capital adequacy, including:

(A) A discussion of how the bank holding company will, under expected and stressful conditions, maintain capital commensurate with its risks, maintain capital above the minimum regulatory capital ratios, and serve as a source of strength to its subsidiary depository institutions;

(B) A discussion of how the bank holding company will, under expected and stressful conditions, maintain sufficient capital to continue its operations by maintaining ready access to funding, meeting its obligations to creditors and other counterparties, and continuing to serve as a credit intermediary;

(iii) The bank holding company's capital policy; and

(iv) A discussion of any expected changes to the bank holding company's business plan that are likely to have a material impact on the bank holding company's capital adequacy or liquidity.

(3) *Data collection.* Upon the request of the Board or appropriate Reserve Bank, the bank holding company shall provide the Federal Reserve with information regarding:

(i) The bank holding company's financial condition, including its capital;

(ii) The bank holding company's structure;

(iii) Amount and risk characteristics of the bank holding company's on- and off-balance sheet exposures, including exposures within the bank holding company's trading account, other trading-related exposures (such as counterparty-credit risk exposures) or other items sensitive to changes in market factors, including, as appropriate, information about the sensitivity of positions to changes in market rates and prices;

(iv) The bank holding company's relevant policies and procedures, including risk management policies and procedures;

(v) The bank holding company's liquidity profile and management;

(vi) The loss, revenue, and expense estimation models used by the bank holding company for stress scenario analysis, including supporting documentation regarding each model's development and validation; and

(vii) Any other relevant qualitative or quantitative information requested by the Board or by the appropriate Reserve Bank to facilitate review of the bank holding company's capital plan under this section.

(4) *Re-submission of a capital plan.* (i) A bank holding company must update and re-submit its capital plan to the appropriate Reserve Bank within 30 calendar days of the occurrence of one of the following events:

(A) The bank holding company determines there has been or will be a material change in the bank holding company's risk profile, financial condition, or corporate structure since the bank holding company last submitted the capital plan to the Board and the appropriate Reserve Bank under this section; or

(B) The Board or the appropriate Reserve Bank with concurrence of the Board, directs the bank holding company in writing to revise and resubmit its capital plan for any of the following reasons:

(*1*) The capital plan is incomplete or the capital plan, or the bank holding company's internal capital adequacy process, contains material weaknesses;

(*2*) There has been, or will likely be, a material change in the bank holding company's risk profile (including a material change in its business strategy or any risk exposure), financial condition, or corporate structure;

(*3*) The BHC stress scenario(s) are not appropriate for the bank holding company's business model and portfolios, or changes in financial markets or the macro-economic outlook that could have a material impact on a bank holding company's risk profile and financial condition require the use of updated scenarios; or

(*4*) The capital plan or the condition of the bank holding company raise any of the issues described in paragraph (f)(2)(ii) of this section.

(ii) A bank holding company may resubmit its capital plan to the Federal Reserve if the Board or the appropriate Reserve Bank objects to the capital plan.

(iii) The Board or the appropriate Reserve Bank with concurrence of the Board, may extend the 30-day period in paragraph (e)(4)(i) of this section for up to an additional 60 calendar days, or such longer period as the Board or the appropriate Reserve Bank, with concurrence of the Board, determines, in its discretion, appropriate.

(iv) Any updated capital plan must satisfy all the requirements of this section; however, a bank holding company may continue to rely on information submitted as part of a previously submitted capital plan to the extent that the information remains accurate and appropriate.

(5) *Confidential treatment of information submitted.* The

confidentiality of information submitted to the Board under this section and related materials shall be determined in accordance with applicable exemptions under the Freedom of Information Act (5 U.S.C. 552(b)) and the Board's Rules Regarding Availability of Information (12 CFR part 261).

(f) *Review of capital plans by the Federal Reserve; publication of summary results.* (1) *Considerations and inputs.* (i) The Board or the appropriate Reserve Bank with concurrence of the Board, will consider the following factors in reviewing a bank holding company's capital plan:

(A) The comprehensiveness of the capital plan, including the extent to which the analysis underlying the capital plan captures and addresses potential risks stemming from activities across the firm and the company's capital policy;

(B) The reasonableness of the bank holding company's capital plan, the assumptions and analysis underlying the capital plan, and the robustness of its capital adequacy process; and

(C) The bank holding company's ability to maintain capital above each minimum regulatory capital ratio on a pro forma basis under expected and stressful conditions throughout the planning horizon, including but not limited to any scenarios required under paragraphs (e)(2)(i)(A) and (e)(2)(ii) of this section.

(ii) The Board or the appropriate Reserve Bank with concurrence of the Board, will also consider the following information in reviewing a bank holding company's capital plan:

(A) Relevant supervisory information about the bank holding company and its subsidiaries;

(B) The bank holding company's regulatory and financial reports, as well as supporting data that would allow for an analysis of the bank holding company's loss, revenue, and reserve projections;

(C) As applicable, the Federal Reserve's own pro forma estimates of the firm's potential losses, revenues, reserves, and resulting capital adequacy under expected and stressful conditions, including but not limited to any scenarios required under paragraphs (e)(2)(i)(A) and (e)(2)(ii) of this section, as well as the results of any stress tests conducted by the bank holding company or the Federal Reserve; and

(D) Other information requested or required by the Board or the appropriate Reserve Bank, as well as any other information relevant, or related, to the bank holding company's capital adequacy.

(2) *Federal Reserve action on a capital plan.* (i) *Timing of action.* The Board or the appropriate Reserve Bank with concurrence of the Board, will object, in whole or in part, to the capital plan or provide the bank holding company with a notice of non-objection to the capital plan:

(A) By June 30 of the calendar year in which a capital plan was submitted pursuant to paragraph (e)(1)(ii) of this section; and

(B) For a capital plan resubmitted pursuant to paragraph (e)(4) of this section, within 75 calendar days after the date on which a capital plan is resubmitted, unless the Board provides notice to the company that it is extending the time period.

(ii) *Objection.* (A) *Large and noncomplex bank holding companies.* The Board, or the appropriate Reserve Bank with concurrence of the Board, may object to a capital plan submitted by a large and noncomplex bank holding company if it determines that the bank holding company has not demonstrated an ability to maintain capital above each minimum regulatory capital ratio on a pro forma basis under expected and stressful conditions throughout the planning horizon.

(B) *Bank holding companies that are not large and noncomplex bank holding companies.* The Board or the appropriate Reserve Bank with concurrence of the Board, may object to a capital plan submitted by a bank holding company that is not a large and noncomplex bank holding company if it determines that:

(*1*) The bank holding company has not demonstrated an ability to maintain capital above each minimum regulatory capital ratio on a pro forma basis under expected and stressful conditions throughout the planning horizon;

(*2*) The bank holding company has material unresolved supervisory issues, including but not limited to issues associated with its capital adequacy process;

(*3*) The assumptions and analysis underlying the bank holding company's capital plan, or the bank holding company's methodologies and practices that support its capital planning process, are not reasonable or appropriate; or

(*4*) The bank holding company's capital planning process or proposed capital distributions otherwise constitute an unsafe or unsound practice, or would violate any law, regulation, Board order, directive, or condition imposed by, or written agreement with, the Board or the appropriate Reserve Bank. In determining whether a capital plan or any proposed capital distribution would constitute an unsafe or unsound practice, the Board or the appropriate Reserve Bank would consider whether the bank holding company is and would remain in sound financial condition after giving effect to the capital plan and all proposed capital distributions.

(iii) *Notification of decision.* The Board or the appropriate Reserve Bank will notify the bank holding company in writing of the reasons for a decision to object to a capital plan.

(iv) *General distribution limitation.* If the Board or the appropriate Reserve Bank objects to a capital plan and until such time as the Board or the appropriate Reserve Bank with concurrence of the Board, issues a non-objection to the bank holding company's capital plan, the bank holding company may not make any capital distribution, other than capital distributions arising from the issuance of a regulatory capital instrument eligible for inclusion in the numerator of a minimum regulatory capital ratio or capital distributions with respect to which the Board or the appropriate Reserve Bank has indicated in writing its non-objection.

(v) *Publication of summary results.* The Board may disclose publicly its decision to object or not object to a bank holding company's capital plan under this section, along with a summary of the Board's analyses of that company. Any disclosure under this paragraph will occur by June 30 of the calendar year in which a capital plan was submitted pursuant to paragraph (e)(1)(ii) of this section, unless the Board determines that a later disclosure date is appropriate.

(3) *Request for reconsideration or hearing.* (i) *General.* Within 15 calendar days of receipt of a notice of objection to a capital plan by the Board or the appropriate Reserve Bank:

(A) A bank holding company may submit a written request to the Board requesting reconsideration of the objection, including an explanation of why reconsideration should be granted. Within 15 calendar days of receipt of the bank holding company's request, the Board will notify the company of its decision to affirm or withdraw the objection to the bank holding company's capital plan or a specific capital distribution; or

(B) As an alternative to paragraph (f)(3)(i)(A) of this section, a bank holding company may request an informal hearing on the objection.

(ii) *Request for an informal hearing.* (A) A request for an informal hearing shall be in writing and shall be submitted within 15 calendar days of a notice of an objection. The Board may, in its sole discretion, order an informal hearing if the Board finds that a hearing is appropriate or necessary to resolve disputes regarding material issues of fact.

(B) An informal hearing shall be held within 30 calendar days of a request, if granted, provided that the Board may extend this period upon notice to the requesting party.

(C) Written notice of the final decision of the Board shall be given to the bank holding company within 60 calendar days of the conclusion of any informal hearing ordered by the Board, provided that the Board may extend this period upon notice to the requesting party.

(D) While the Board's final decision is pending and until such time as the Board or the appropriate Reserve Bank with concurrence of the Board issues a non-objection to the bank holding company's capital plan, the bank holding company may not make any capital distribution, other than those capital distributions with respect to which the Board or the appropriate Reserve Bank has indicated in writing its non-objection.

(4) *Application of this section to other bank holding companies.* The Board may apply this section, in whole or in part, to any other bank holding company by order based on the institution's size, level of complexity, risk profile, scope of operations, or financial condition.

(g) *Approval requirements for certain capital actions.* (1) *Circumstances requiring approval.* Notwithstanding a notice of non-objection under paragraph (f)(2)(i) of this section, a bank holding company may not make a capital distribution (excluding any capital distribution arising from the issuance of a regulatory capital instrument eligible for inclusion in the numerator of a minimum regulatory capital ratio) under the following circumstances, unless it receives prior approval from the Board or appropriate Reserve Bank pursuant to paragraph (g)(5) of this section:

(i) After giving effect to the capital distribution, the bank holding company would not meet a minimum regulatory capital ratio;

(ii) The Board or the appropriate Reserve Bank with concurrence of the Board, notifies the company in writing that the Federal Reserve has determined that the capital distribution would result in a material adverse change to the organization's capital or liquidity structure or that the company's earnings were materially underperforming projections;

(iii) Except as provided in paragraph (g)(2) of this section, the dollar amount of the capital distribution will exceed the amount described in the capital plan for which a non-objection was issued under this section, as measured on an aggregate basis beginning in the third quarter of the planning horizon through the quarter at issue; or

(iv) The capital distribution would occur after the occurrence of an event requiring resubmission under paragraphs (e)(4)(i)(A) or (B) of this section and before the Federal Reserve has acted on the resubmitted capital plan.

(2) *Exception for well capitalized bank holding companies.* (i) A bank holding company may make a capital distribution for which the dollar amount exceeds the amount described in the capital plan for which a non-objection was issued under paragraph (f)(2)(i) of this section if the following conditions are satisfied:

(A) The bank holding company is, and after the capital distribution would remain, well capitalized as defined in § 225.2(r) of Regulation Y (12 CFR 225.2(r));

(B) The bank holding company's performance and capital levels are, and after the capital distribution would remain, consistent with its projections under expected conditions as set forth in its capital plan under paragraph (f)(2)(i) of this section;

(C) Until March 31, 2017, the annual aggregate dollar amount of all capital distributions in the period beginning on July 1 of a calendar year and ending on June 30 of the following calendar year would not exceed the total amounts described in the company's capital plan for which the bank holding company received a notice of non-objection by more than 1.00 percent multiplied by the bank holding company's tier 1 capital, as reported to the Federal Reserve on the bank holding company's most recent first-quarter FR Y–9C;

(D) Beginning April 1, 2017, the annual aggregate dollar amount of all capital distributions in the period beginning on July 1 of a calendar year and ending on June 30 of the following calendar year would not exceed the total amounts described in the company's capital plan for which the bank holding company received a notice of non-objection by more than 0.25 percent multiplied by the bank holding company's tier 1 capital, as reported to the Federal Reserve on the bank holding company's most recent first-quarter FR Y–9C;

(E) Between July 1 of a calendar year and March 15 of the following calendar year, the bank holding company provides the appropriate Reserve Bank with notice 15 calendar days prior to a capital distribution that includes the elements described in paragraph (g)(4) of this section; and

(F) The Board or the appropriate Reserve Bank with concurrence of the Board, does not object to the transaction proposed in the notice. In determining whether to object to the proposed transaction, the Board or the appropriate Reserve Bank shall apply the criteria described in paragraph (g)(5)(ii) of this section.

(ii) The exception in this paragraph (g)(2) shall not apply if the Board or the appropriate Reserve Bank notifies the bank holding company in writing that it is ineligible for this exception.

(3) *Net distribution limitation.* (i) *General.* Notwithstanding a notice of non-objection under paragraph (f)(2)(i) of this section, a bank holding company must reduce its capital distributions in accordance with paragraph (g)(3)(ii) of this section if the bank holding company raises a smaller dollar amount of capital of a given category of regulatory capital instruments than it had included in its capital plan, as measured on an aggregate basis beginning in the third quarter of the planning horizon through the end of the current quarter.

(ii) *Reduction of distributions.* (A) *Common equity tier 1 capital.* If the bank holding company raises a smaller dollar amount of common equity tier 1 capital (as defined in 12 CFR 217.2), the bank holding company must reduce its capital distributions relating to common equity tier 1 capital such that the dollar amount of the bank holding company's capital distributions, net of the dollar amount of its capital raises, ("net distributions") relating to common equity tier 1 capital is no greater than the dollar amount of net distributions relating to common equity tier 1 capital included in its capital plan, as measured on an aggregate basis beginning in the third quarter of the planning horizon through the end of the current quarter.

(B) *Additional tier 1 capital.* If the bank holding company raises a smaller dollar amount of additional tier 1 capital (as defined in 12 CFR 217.2), the bank holding company must reduce its capital distributions relating to additional tier 1 capital (other than scheduled payments on additional tier 1 capital instruments) such that the dollar amount of the bank holding company's net distributions relating to additional tier 1 capital is no greater than the dollar amount of net distributions relating to additional tier 1 capital included in its capital plan, as measured on an aggregate basis beginning in the third quarter of the planning horizon through the end of the current quarter.

(C) *Tier 2 capital.* If the bank holding company raises a smaller dollar amount of tier 2 capital (as defined in 12 CFR 217.2), the bank holding company must reduce its capital distributions relating to tier 2 capital (other than scheduled payments on tier 2 capital instruments) such that the dollar amount of the bank holding company's net distributions relating to tier 2 capital is no greater than the dollar amount of net distributions relating to tier 2 capital included in its capital plan, as measured on an aggregate basis beginning in the third quarter of the planning horizon through the end of the current quarter.

(iii) *Exceptions.* Paragraphs (g)(3)(i) and (g)(3)(ii) of this section shall not apply:

(A) To the extent that the Board or appropriate Reserve Bank indicates in writing its non-objection pursuant to paragraph (g)(5) of this section, following a request for non-objection from the bank holding company that includes all of the information required to be submitted under paragraph (g)(4) of this section;

(B) To capital distributions arising from the issuance of a regulatory capital instrument eligible for inclusion in the numerator of a minimum regulatory capital ratio that the bank holding company had not included in its capital plan;

(C) To the extent that the bank holding company raised a smaller dollar amount of capital in the category of regulatory capital instruments described in paragraph (g)(3)(i) of this section due to employee-directed capital issuances related to an employee stock ownership plan;

(D) To the extent that the bank holding company raised a smaller dollar amount of capital in the category of regulatory capital instruments described in paragraph (g)(3)(i) of this section due to a planned merger or acquisition that is no longer expected to be consummated or for which the consideration paid is lower than the projected price in the capital plan;

(E) Until March 31, 2017, to the extent that the dollar amount by which the bank holding company's net distributions exceed the dollar amount of net distributions included in its capital plan in the category of regulatory capital instruments described in paragraph (g)(3)(i) of this section, as measured on an aggregate basis beginning in the third quarter of the planning horizon through the end of the current quarter, is less than 1.00 percent of the bank holding company's tier 1 capital, as reported to the Federal Reserve on the bank holding company's most recent first-quarter FR Y–9C; between July 1 of a calendar year and March 15 of the following calendar year, the bank holding company provides the appropriate Reserve Bank with notice 15 calendar days prior to any capital distribution in that category of regulatory capital instruments that includes the elements described in paragraph (g)(4) of this section; and the Board or the appropriate Reserve Bank with concurrence of the Board, does not object to the transaction proposed in the notice. In determining whether to object to the proposed transaction, the Board or the appropriate Reserve Bank shall apply the criteria described in paragraph (g)(5)(ii) of this section; or

(F) Beginning April 1, 2017, to the extent that the dollar amount by which the bank holding company's net distributions exceed the dollar amount of net distributions included in its capital plan in the category of regulatory capital instruments described in paragraph (g)(3)(i) of this section, as measured on an aggregate basis beginning in the third quarter of the planning horizon through the end of the current quarter, is less than 0.25 percent of the bank holding company's tier 1 capital, as reported to the Federal Reserve on the bank holding company's most recent first-quarter FR Y–9C; between July 1 of a calendar year and March 15 of the following calendar year, the bank holding company provides the appropriate Reserve Bank with notice 15 calendar days prior to any capital distribution in that category of regulatory capital instruments that includes the elements described in paragraph (g)(4) of this section; and the Board or the appropriate Reserve Bank with concurrence of the Board, does not object to the transaction proposed in the notice. In determining whether to object to the proposed transaction, the Board or the appropriate Reserve Bank shall apply the criteria described in paragraph (g)(5)(ii) of this section.

(iv) The exceptions in paragraph (g)(3)(iii) shall not apply if the Board or the appropriate Reserve Bank notifies the bank holding company in writing that it is ineligible for this exception.

(4) *Contents of request.* (i) A request for a capital distribution under this section shall be filed between July 1 of a calendar year and March 1 of the following calendar year with the appropriate Reserve Bank and the Board and shall contain the following information:

(A) The bank holding company's current capital plan or an attestation that there have been no changes to the capital plan since it was last submitted to the Federal Reserve;

(B) The purpose of the transaction;

(C) A description of the capital distribution, including for redemptions or repurchases of securities, the gross consideration to be paid and the terms and sources of funding for the transaction, and for dividends, the amount of the dividend(s); and

(D) Any additional information requested by the Board or the appropriate Reserve Bank (which may include, among other things, an assessment of the bank holding company's capital adequacy under a revised stress scenario provided by the Federal Reserve, a revised capital plan, and supporting data).

(ii) Any request submitted with respect to a capital distribution described in paragraph (g)(1)(i) of this section shall also include a plan for restoring the bank holding company's capital to an amount above a minimum level within 30 calendar days and a rationale for why the capital distribution would be appropriate.

(5) *Approval of certain capital distributions.* (i) The Board or the appropriate Reserve Bank with concurrence of the Board, will act on a request under this paragraph (g)(5) within 30 calendar days after the receipt of all the information required under paragraph (g)(4) of this section.

(ii) In acting on a request under this paragraph, the Board or appropriate Reserve Bank will apply the considerations and principles in paragraph (f) of this section. In addition, the Board or the appropriate Reserve Bank may disapprove the transaction if the bank holding company does not provide all of the information required to be submitted under paragraph (g)(4) of this section.

(6) *Disapproval and hearing.* (i) The Board or the appropriate Reserve Bank will notify the bank holding company in writing of the reasons for a decision to disapprove any proposed capital distribution. Within 15 calendar days after receipt of a disapproval by the Board, the bank holding company may submit a written request for a hearing.

(A) The Board may, in its sole discretion, order an informal hearing if the Board finds that a hearing is appropriate or necessary to resolve disputes regarding material issues of fact.

(B) An informal hearing shall be held within 30 calendar days of a request, if granted, provided that the Board may extend this period upon notice to the requesting party.

(C) Written notice of the final decision of the Board shall be given to the bank holding company within 60 calendar days of the conclusion of any informal hearing ordered by the Board, provided that the Board may extend this period upon notice to the requesting party.

(D) While the Board's final decision is pending and until such time as the Board or the appropriate Reserve Bank with concurrence of the Board, approves the capital distribution at issue, the bank holding company may not make such capital distribution.

PART 252—ENHANCED PRUDENTIAL STANDARDS (REGULATION YY)

■ 3. The authority citation for part 252 continues to read as follows:

Authority: 12 U.S.C. 321–338a, 1467a(g), 1818, 1831p–1, 1844(b), 1844(c), 5361, 5365, 5366.

■ 4. Section 252.42 is amended by revising paragraph (p) to read as follows:

§ 252.42 Definitions.

* * * * *

(p) *Stress test cycle* means the period beginning on January 1 of a calendar year and ending on December 31 of that year.

* * * * *

■ 5. Section 252.43 is amended by

■ a. Revising paragraph (b); and

■ b. Removing paragraph (c).

The revision reads as follows:

§ 252.43 Applicability.

* * * * *

(b) *Transitional arrangements.* (1) A bank holding company that becomes a covered company on or before September 30 of a calendar year must comply with the requirements of this subpart beginning on January 1 of the second calendar year after the bank holding company becomes a covered company, unless that time is extended by the Board in writing.

(2) A bank holding company that becomes a covered company after September 30 of a calendar year must comply with the requirements of this subpart beginning on January 1 of the third calendar year after the bank holding company becomes a covered company, unless that time is extended by the Board in writing.

■ 6. Section 252.44 is amended by revising paragraph (b) to read as follows:

§ 252.44 Annual analysis conducted by the Board.

* * * * *

(b) *Economic and financial scenarios related to the Board's analysis.* The Board will conduct its analysis under this section using a minimum of three different scenarios, including a baseline scenario, adverse scenario, and severely adverse scenario. The Board will notify covered companies of the scenarios that the Board will apply to conduct the analysis for each stress test cycle by no later than February 15 of each year, except with respect to trading or any other components of the scenarios and any additional scenarios that the Board will apply to conduct the analysis, which will be communicated by no later than March 1 of that year.

■ 7. Section 252.46 is amended by revising paragraph (b)(1) to read as follows:

§ 252.46 Review of the Board's analysis; publication of summary results.

* * * * *

(b) *Publication of results by the Board.* (1) The Board will publicly disclose a summary of the results of the Board's analyses of a covered company by June 30 of the calendar year in which the stress test was conducted pursuant to 12 CFR 252.44.

* * * * *

■ 8. Section 252.52 is amended by revising paragraphs (k) and (r) to read as follows:

§ 252.52 Definitions.

* * * * *

(k) *Planning horizon* means the period of at least nine consecutive quarters, beginning on the first day of a stress test cycle over which the relevant projections extend.

* * * * *

(r) *Stress test cycle* means the period beginning on January 1 of a calendar year and ending on December 31 of that year.

* * * * *

■ 9. Section 252.53 is amended by revising paragraph (b) to read as follows:

§ 252.53 Applicability.

* * * * *

(b) *Transitional arrangements.* (1) A bank holding company that becomes a covered company on or before September 30 of a calendar year must comply with the requirements of this subpart beginning on January 1 of the second calendar year after the bank holding company becomes a covered company, unless that time is extended by the Board in writing.

(2) A bank holding company that becomes a covered company after September 30 of a calendar year must comply with the requirements of this subpart beginning on January 1 of the third calendar year after the bank holding company becomes a covered company, unless that time is extended by the Board in writing.

■ 10. Section 252.54 is amended by revising paragraphs (a), (b)(1), (b)(2)(i), (b)(4)(i), and (b)(4)(iii) to read as follows:

§ 252.54 Annual stress test.

(a) *In general.* A covered company must conduct an annual stress test. The stress test must be conducted by April 5 of each calendar year based on data as of December 31 of the preceding calendar year, unless the time or the as-of date is extended by the Board in writing.

(b) *Scenarios provided by the Board.* (1) *In general.* In conducting a stress test under this section, a covered company must, at a minimum, use the scenarios provided by the Board. Except as provided in paragraphs (b)(2) and (3) of this section, the Board will provide a description of the scenarios to each covered company no later than February 15 of the calendar year in which the stress test is performed pursuant to this section.

(2) *Additional components.* (i) The Board may require a covered company with significant trading activity, as determined by the Board and specified in the Capital Assessments and Stress Testing report (FR Y–14), to include a trading and counterparty component in its adverse and severely adverse scenarios in the stress test required by this section:

(A) For the stress test cycle beginning on January 1, 2017, the data used in this component must be as of a date selected by the Board between January 1, 2017 and March 1, 2017, and the Board will communicate the as-of date and a description of the component to the company no later than March 1, 2017; and

(B) For the stress test cycle beginning on January 1, 2018, and for each stress test cycle beginning thereafter, the data used in this component must be as of a date selected by the Board between October 1 of the previous calendar year and March 1 of the calendar year in which the stress test is performed pursuant to this section, and the Board will communicate the as-of date and a description of the component to the company no later than March 1 of the calendar year in which the stress test is performed pursuant to this section.

* * * * *

(4) *Notice and response*—(i) *Notification of additional component.* If the Board requires a covered company to include one or more additional components in its adverse and severely adverse scenarios under paragraph (b)(2) of this section or to use one or more additional scenarios under paragraph (b)(3) of this section, the Board will notify the company in writing. The Board will provide such notification no later than December 31 of the preceding calendar year. The notification will

include a general description of the additional component(s) or additional scenario(s) and the basis for requiring the company to include the additional component(s) or additional scenario(s).

* * * * *

(iii) *Description of component.* The Board will respond in writing within 14 calendar days of receipt of the company's request. The Board will provide the covered company with a description of any additional component(s) or additional scenario(s) by March 1 of the calendar year in which the stress test is performed pursuant to this section.

■ 11. Section 252.55 is amended by revising paragraphs (a), (b)(4)(i), and (b)(4)(iii) to read as follows:

§ 252.55 Mid-cycle stress test.

(a) *Mid-cycle stress test requirement.* In addition to the stress test required under § 252.54, a covered company must conduct a mid-cycle stress test. The stress test must be conducted by September 30 of each calendar year based on data as of June 30 of that calendar year, unless the time or the as-of date is extended by the Board in writing.

(b) * * *

(4) *Notice and response*—(i) *Notification of additional component.* If the Board requires a covered company to include one or more additional components in its adverse and severely adverse scenarios under paragraph (b)(2) of this section or one or more additional scenarios under paragraph (b)(3) of this section, the Board will notify the company in writing. The Board will provide such notification no later than June 30. The notification will include a general description of the additional component(s) or additional scenario(s) and the basis for requiring the company to include the additional component(s) or additional scenario(s).

* * * * *

(iii) *Description of component.* The Board will provide the covered company with a description of any additional component(s) or additional scenario(s) by September 1 of the calendar year prior to the year in which the stress test is performed pursuant to this section.

■ 12. Section 252.57 is amended by revising paragraph (a) to read as follows:

§ 252.57 Reports of stress test results.

(a) *Reports to the Board of stress test results.* (1) A covered company must report the results of the stress test required under § 252.54 to the Board in the manner and form prescribed by the Board. Such results must be submitted by April 5 of the calendar year in which the stress test is performed pursuant to 12 CFR 252.54, unless that time is extended by the Board in writing.

(2) A covered company must report the results of the stress test required under § 252.55 to the Board in the manner and form prescribed by the Board. Such results must be submitted by October 5 of the calendar year in which the stress test is performed pursuant to 12 CFR 252.55, unless that time is extended by the Board in writing.

* * * * *

■ 13. Section 252.58 is amended by revising paragraph (a)(1)(ii) to read as follows:

§ 252.58 Disclosure of stress test results.

(a) * * *

(1) * * *

(ii) A covered company must publicly disclose a summary of the results of the stress test required under § 252.55. This disclosure must occur in the period beginning on October 5 and ending on November 4 of the calendar year in which the stress test is performed pursuant to 12 CFR 252.55, unless that time is extended by the Board in writing.

* * * * *

By order of the Board of Governors of the Federal Reserve System, September 26, 2016.

Robert deV. Frierson,

Secretary of the Board.

[FR Doc. 2016–23629 Filed 9–29–16; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 573

[Docket No. FDA–2014–F–0988]

BASF Corp.; Filing of Food Additive Petition (Animal Use)

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of petition.

SUMMARY: The Food and Drug Administration (FDA) is announcing that BASF Corp., as a part of their petition (FAP 2286) proposing that the food additive regulations be amended to provide for the safe use of feed grade sodium formate as a feed acidifying agent in complete swine feeds, also proposed that FDA amend the animal food additive regulations for formic acid and ammonium formate to limit formic acid and formate salts from all added sources.

DATES: Submit either electronic or written comments on FDA's environmental assessment by October 31, 2016.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comment, that information will be posted on *http://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA–2014–F–0988 for "Food Additives Permitted in Feed and Drinking Water of Animals; Feed Grade Sodium Formate." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comment only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Chelsea Trull, Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–402–6729, *chelsea.trull@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (section 409(b)(5) (21 U.S.C. 348(b)(5)), notice is given that the food additive petition (FAP 2286) filed by BASF Corp., 100 Park Ave., Florham Park, NJ 07932 proposing to amend Title 21 of the Code of Federal Regulations (CFR) in part 573 *Food Additives Permitted in Feed and Drinking Water of Animals* (21 CFR part 573) to provide for the safe use of feed grade sodium formate as a feed acidifying agent in complete swine feeds, also proposed that FDA amend the animal food additive regulations for formic acid (§ 573.480) and ammonium formate (§ 573.170) to limit formic acid and formate salts from all added sources to 1.2 percent of complete feed when multiple sources of formic acid and its salts are used in combination. This element of the petition was not described in the July 25, 2014, notice of petition (79 FR 43325).

Elsewhere in this issue of the **Federal Register**, FDA is publishing a regulation providing for the safe use of feed grade sodium formate as a feed acidifying agent in complete swine feeds.

The potential environmental impact of this action is being reviewed. The Agency will prepare a claim of categorical exclusion or an environmental assessment to evaluate the potential environmental impacts of these actions. Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday. FDA will also place on public display any comments on potential environmental impact without further announcement in the **Federal Register**. If FDA determines a categorical exclusion applies, neither an environmental assessment nor an environmental impact statement is required. If FDA determines a categorical exclusion does not apply, FDA will prepare an environmental assessment and place it on public display at the Division of Dockets Management (see **DATES** and **ADDRESSES**) for public review and comment.

Dated: September 26, 2016.

Tracey H. Forfa,

Deputy Director, Center for Veterinary Medicine.

[FR Doc. 2016–23645 Filed 9–29–16; 8:45 am]

BILLING CODE 4164–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2016–0134; FRL–9953–51–Region 5]

Air Plan Approval; Wisconsin; NO_X as a Precursor to Ozone, $PM_{2.5}$ Increment Rules and PSD Infrastructure SIP Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing approval of a revision to Wisconsin's state implementation plan (SIP), revising portions of the State's Prevention of Significant Deterioration (PSD) and ambient air quality programs to address deficiencies identified in EPA's previous narrow infrastructure SIP disapprovals and Finding of Failure to Submit. This SIP revision request is consistent with the Federal PSD rules and addresses the required elements of the fine particulate matter ($PM_{2.5}$) PSD Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC) Rule. EPA is also proposing to approve elements of SIP submissions from Wisconsin regarding PSD infrastructure requirements of section 110 of the Clean Air Act (CAA) for the 1997 $PM_{2.5}$, 1997 ozone, 2006 $PM_{2.5}$, 2008 lead, 2008 ozone, 2010 nitrogen dioxide (NO_2), 2010 sulfur dioxide (SO_2), and 2012 $PM_{2.5}$ National Ambient Air Quality Standards (NAAQS). The infrastructure requirements are designed to ensure that the structural components of each state's air quality management program are adequate to meet the state's responsibilities under the CAA.

DATES: Comments must be received on or before October 31, 2016.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2016–0134 at *http://www.regulations.gov,* or via email to *damico.genevieve@epa.gov.* For comments submitted at *Regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, *etc.*) must be accompanied by a written comment.

The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Andrea Morgan, Environmental Engineer, Air Permitting Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–6058, *morgan.andrea@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

I. What is the background of these SIP submissions?
II. What is EPA's review of these SIP submissions?
III. What action is EPA taking?
IV. Incorporation by Reference
V. Statutory and Executive Order Reviews

I. What is the background of these SIP submissions?

On August 8, 2016, the Wisconsin Department of Natural Resources (WDNR) submitted a SIP revision request to EPA to revise portions of its PSD and ambient air quality programs to address deficiencies identified in EPA's previous narrow infrastructure SIP disapprovals and Finding of Failure to Submit (FFS). Final approval of this SIP revision request will be consistent with the Federal PSD requirements and will address the required elements of the $PM_{2.5}$ PSD Increments, SILs and SMC Rule. Wisconsin submitted revisions to its rules NR 404 and 405 of the Wisconsin Administrative Code. The submittal requests that EPA approve the following revisions to Wisconsin's SIP: (1) Amend NR 404.05 (2) (intro); (2) create NR 404.05(2) (am); (3) amend NR 404.05(3) (intro); (4) create NR 404.05(3) (am); (5) amend NR 404.05(4) (intro); (6) create NR 404.05(4) (am); (7) amend NR 405.02(3), (21)(a), and (21m)(a); (8) create NR 405.02(21m)(c); (9) amend NR 405.02(22)(b) and (22m)(a)1. and (b)1.; (10) create NR 405.02(22m)(a)3.; (11) amend NR 405.02(27)(a)6.; (12) amend NR 405.07(8)(a)3m; (13) create NR 405.07(8)(a)3m (Note); and (14) amend NR 405.07(8)(a)5. (Note).

WDNR also requested that this SIP revision supplement the PSD portions of its previously submitted infrastructure submittals, including 1997 $PM_{2.5}$, 1997 ozone, 2006 $PM_{2.5}$, 2008 lead, 2008 ozone, 2010 NO_2, SO_2, and 2012 $PM_{2.5}$.

A. PSD Rule Revisions

1. $PM_{2.5}$ Increments

To implement the $PM_{2.5}$ NAAQS, EPA issued two separate final rules that establish the New Source Review (NSR) permitting requirements for $PM_{2.5}$: The NSR $PM_{2.5}$ Implementation Rule promulgated on May 16, 2008 (73 FR 28321), and the $PM_{2.5}$ PSD Increments, SILs and SMC Rule promulgated on October 20, 2010 (75 FR 64864). EPA's 2008 NSR $PM_{2.5}$ Implementation Rule required states to submit applicable SIP revisions to EPA no later than May 16, 2011, to address this rule's PSD and nonattainment NSR SIP requirements. This rule requires that the state submit revisions to its SIP, including the identification of precursors for $PM_{2.5}$, the significant emissions rates for $PM_{2.5}$ and the requirement to include emissions which may condense to form particulate matter at ambient temperatures, known as condensables, in permitting decisions. EPA published a final approval of a revision to Wisconsin's SIP on October 16, 2014, (79 FR 62008), which included all of the required elements of the 2008 NSR Implementation Rule.

The $PM_{2.5}$ PSD Increments, SILs and SMC Rule required states to submit SIP revisions to EPA by July 20, 2012, adopting provisions equivalent to or at least as stringent as the $PM_{2.5}$ PSD increments and associated implementing regulations. On August 11, 2014, EPA published a finding that Wisconsin had failed to submit the required elements of the $PM_{2.5}$ PSD Increments, SILs and SMC Rule (79 FR 46703).

The $PM_{2.5}$ PSD Increments, SILs and SMC Rule also allows states to discretionarily adopt and submit for EPA approval: (1) SILs, which are used as a screening tool to evaluate the impact a proposed new major source or major modification may have on the NAAQS or PSD increment; and (2) a SMC (also a screening tool), which is used to determine the subsequent level of data gathering required for a PSD permit application for emissions of $PM_{2.5}$. However, on January 22, 2013, the United States Court of Appeals for the District of Columbia (Court) granted a request from EPA to vacate and remand to EPA the portions of the $PM_{2.5}$ PSD Increments, SILs and SMC Rule $PM_{2.5}$ addressing the SILs for $PM_{2.5}$ so that EPA could voluntarily correct an error in these provisions. The Court also vacated parts of the $PM_{2.5}$ PSD Increments, SILs and SMC Rule establishing a $PM_{2.5}$ SMC, finding that EPA was precluded from using the $PM_{2.5}$ SMCs to exempt permit applicants from the statutory requirement to compile preconstruction monitoring data. *Sierra Club* v. *EPA,* 705 F.3d 458, 463–69. On December 9, 2013, EPA issued a good cause final rule formally removing the affected SILs and replacing the SMC with a numeric value of 0 micrograms per cubic meter ($\mu g/m^3$) and a note that no exemption is available with regard to $PM_{2.5}$. See 78 FR 73698. As a result, SIP submittals could no longer include the vacated $PM_{2.5}$ SILs at 40 CFR 51.166(k)(2) and 52.21(k)(2) and the $PM_{2.5}$ SMC must be revised to 0 $\mu g/m^3$, consistent with 40 CFR 51.166(i)(5)(i)(c) and 52.21(i)(5)(i)(c).

2. Ozone

On November 29, 2005, EPA published (70 FR 71612) in the **Federal Register** the "Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2". Part of this rule established, among other requirements, oxides of nitrogen (NO_X) as a precursor to ozone. The final rule became effective on January 30, 2006.

On October 6, 2015, EPA finalized approval of revisions to Wisconsin's SIP that included the identification of NO_X as a precursor to ozone in the definition of regulated NSR pollutant. *See* 79 FR 60064.

B. Infrastructure SIP Submittals

The requirement for states to make a SIP submission of this type arises out of CAA section 110(a)(1). Pursuant to section 110(a)(1), states must make SIP submissions "within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof)," and these SIP submissions are to provide for the "implementation, maintenance, and enforcement" of such NAAQS. The statute directly imposes on states the duty to make these SIP submissions, and the requirement to make the submissions is not conditioned upon EPA's taking any action other than promulgating a new or revised NAAQS. Section 110(a)(2) includes a list of specific elements that "[e]ach such plan" submission must address.

This specific rulemaking is only taking action on the PSD elements of the Wisconsin infrastructure submittals.

Separate action has been or will be taken on the non-PSD infrastructure elements in separate rulemakings. The infrastructure elements for PSD are found in CAA 110(a)(2)(C), 110(a)(2)(D), and 110(a)(2)(J) and will be discussed in detail below. For further discussion on the background of infrastructure submittals, see 77 FR 45992.

II. What is EPA's review of these SIP submissions?

A. PSD Rule Revisions

EPA has evaluated WDNR's proposed revision to the Wisconsin SIP in accordance with the Federal requirements governing state permitting programs. The revisions described in section I above are intended to update the Wisconsin SIP to comply with the current rules and address deficiencies identified by EPA in its previous SIP disapprovals. As discussed below, EPA is proposing to approve these revisions because they meet Federal requirements.

1. $PM_{2.5}$

The $PM_{2.5}$ PSD Increments, SILs and SMC Rule finalized several new requirements for states to revise their SIPs to incorporate increments for $PM_{2.5}$. Specifically, the rule requires a state's submitted PSD SIP revision to adopt and submit for EPA approval the $PM_{2.5}$ increments issued pursuant to section 166(a) of the CAA to prevent significant deterioration of air quality in areas meeting the NAAQS. States were also required to adopt and submit for EPA approval revisions to the definitions for "major source baseline date," "minor source baseline date," and "baseline area" as part of the implementing regulations for the $PM_{2.5}$ increments. The $PM_{2.5}$ increments are codified in 40 CFR 51.166(c)(1) and 40 CFR 52.21(c)(1). For class I areas the maximum allowable increase is codified as 1 μg/m^3 determined on an annual arithmetic mean, and a 24-hr maximum of 2 μg/m^3. For class II areas the maximum allowable increase is 4 μg/m^3 determined on an annual arithmetic mean, and a 24-hr maximum of 9 μg/m^3. For class III areas the maximum allowable increase is 8 μg/m^3 determined on an annual arithmetic mean, and a 24-hr maximum of 18 μg/m^3. Wisconsin incorporated these maximum allowable increases for $PM_{2.5}$ into their rules at NR 404.05(2) (intro) and (am); NR 404.05(3) (intro) and (am); and NR 404.05(4) (intro) and (am) for the class I, class II, and class III increments, respectively. As Wisconsin has utilized the same maximum allowable increases as the Federal regulations, their revisions are found to be consistent with the Federal regulations.

States were also required to adopt and submit for EPA approval revisions to the definitions for "major source baseline date," "minor source baseline date," and "baseline area" as part of the implementing regulations for the $PM_{2.5}$ increments. Wisconsin's revisions to the definition of "major source baseline date," at NR 405.02(21m)(a) and (c), clarifies that the baseline date for particulate matter less than 10 micrometers (PM_{10}) is January 6, 1975, and adds October 20, 2010, as the major source baseline date for $PM_{2.5}$. This is consistent with the Federal definition at 40 CFR 51.166(b)(14)(i). Wisconsin's revisions to the definition of "minor source baseline date" at NR 405.02(22m)(a)1. and 3., clarify that the trigger date for PM_{10} is January 6, 1975, and establish October 20, 2011, as the trigger date for $PM_{2.5}$. The revisions to NR 405.02(22m)(b)(1) revise the definition of baseline date to update references to the U.S. Code of Federal Regulations. These revisions are consistent with the definition of "minor source baseline date" at 40 CFR 51.166(b)(14)(ii). The State revised the definition of "Baseline area" at NR 405.02(3) to explicitly identify pollutant air quality impacts that would define a baseline area where a minor source baseline date is already established. This revision is consistent with 40 CFR 51.166(b)(14)(ii)(c).

Wisconsin also revised provisions pertaining to the $PM_{2.5}$ SMC to be consistent with Federal requirements after the January 22, 2013, Court decision. WDNR's revision to NR 405.07(8)(a)3m. revises the $PM_{2.5}$ SMC to 0 μg/m^3 and NR 405.07(8)(a)3m.(Note) adds a note that no exemption is available with regard to $PM_{2.5}$. These revisions are consistent with the language in 40 CFR 51.166(i)(5)(i)(c) regarding the SMC for $PM_{2.5}$.

2. Ozone

The "Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2" required states to make revisions to their PSD programs to establish NO_X as a precursor to ozone. Specifically, NO_X was required to be identified as a precursor to ozone in the definition of major stationary source, the definition of major modification, the definition of significant, the definition of regulated NSR pollutant, and the SMC for ozone.

Wisconsin's revisions to the definition of "major modification" in NR 405.02(21)(a) states that any net emission increase at major stationary source that is significant for NO_X or volatile organic compounds (VOCs) shall be considered significant for ozone. This is consistent with the Federal requirements of 40 CFR 51.166(b)(2)(ii). Wisconsin's revisions to the definition of "Major Stationary Source" at NR 405.02(22)(b) add that a major stationary source that is major for NO_X shall be considered major for ozone. This is consistent with the Federal definition at 40 CFR 51.166(b)(1). Wisconsin's revisions to NR 405.07(8)(a)5.(note) revise the SMC for ozone to provide that sources with a net increase of 100 tons per year of NO_X need to perform an ambient impact analysis for ozone. This matches the note at 40 CFR 51.166(i)(5)(i)(f).[1] The revisions to the definition of "Significant" at NR 405.02(27)(a)6. adds a significant emission rate for ozone of 40 tons per year of nitrogen oxides. This is consistent with the Federal requirements of 40 CFR 51.166(b)(23)(i).

Because Wisconsin's requested revisions are consistent with the applicable requirements found in Federal regulations, EPA is proposing to approve the requested revisions.

B. Infrastructure SIP Submittals

PSD infrastructure elements are addressed in different sections of the CAA: Sections 110(a)(2)(C), 110(a)(2)(D)(i)(II), and 110(a)(2)(J).

1. Section 110(a)(2)(C)—Program for Enforcement of Control Measures; PSD

States are required to include a program providing for enforcement of all SIP measures and the regulation of construction of new or modified stationary sources to meet NSR requirements under PSD and nonattainment new source review (NNSR) programs. Part C of the CAA (sections 160–169B) addresses PSD, while part D of the CAA (sections 171–193) addresses NNSR requirements.

The evaluation of each state's submission addressing the infrastructure SIP requirements of section 110(a)(2)(C) covers: (i) Enforcement of SIP measures; (ii) PSD provisions that explicitly identify NO_X as a precursor to ozone in the PSD program; (iii) identification of precursors to $PM_{2.5}$ and the identification of $PM_{2.5}$ and PM_{10} [1] condensables in the PSD program; (iv) $PM_{2.5}$ increments in the PSD program;

---

[1] PM_{10} refers to particles with diameters less than 10 microns, oftentimes referred to as "coarse" particles.

and, (v) Greenhouse Gas (GHG) permitting and the "Tailoring Rule."[2]

(i) Enforcement of SIP Measures

The enforcement of SIP measures provision was approved in previous rulemakings.

(ii) PSD Provisions That Explicitly Identify NO$_X$ as a Precursor to Ozone in the PSD Program

EPA's "Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2; Final Rule to Implement Certain Aspects of the 1990 Amendments Relating to New Source Review and Prevention of Significant Deterioration as They Apply in Carbon Monoxide, Particulate Matter, and Ozone NAAQS; Final Rule for Reformulated Gasoline" (Phase 2 Rule) was published on November 29, 2005 (*see* 70 FR 71612). Among other requirements, the Phase 2 Rule obligated states to revise their PSD programs to explicitly identify NO$_X$ as a precursor to ozone (70 FR 71612 at 71679, 71699–71700). This requirement was codified in 40 CFR 51.166.

The Phase 2 Rule required that states submit SIP revisions incorporating the requirements of the rule, including those identifying NO$_X$ as a precursor to ozone, by June 15, 2007 (*see* 70 FR 71612 at 71683, November 29, 2005).

EPA is proposing to approve revisions to Wisconsin's PSD SIP reflecting these requirements in today's rulemaking, and therefore is proposing to find that Wisconsin has met this set of infrastructure SIP requirements of section 110(a)(2)(C) with respect to the 1997 PM$_{2.5}$, 1997 ozone, 2006 PM$_{2.5}$, 2008 lead, 2008 ozone, 2010 NO$_2$, 2010 SO$_2$, and 2012 PM$_{2.5}$ NAAQS.

(iii) Identification of Precursors to PM$_{2.5}$ and the Identification of PM$_{2.5}$ and PM$_{10}$ Condensables in the PSD Program

On May 16, 2008 (*see* 73 FR 28321), EPA issued the Final Rule on the "Implementation of the New Source Review Program for Particulate Matter Less than 2.5 Micrometers" (2008 NSR Rule). The 2008 NSR Rule finalized several new requirements for SIPs to address sources that emit direct PM$_{2.5}$ and other pollutants that contribute to secondary PM$_{2.5}$ formation. One of these requirements is for NSR permits to address pollutants responsible for the secondary formation of PM$_{2.5}$, otherwise known as precursors. In the 2008 rule, EPA identified precursors to PM$_{2.5}$ for the PSD program to be SO$_2$ and NO$_X$ (unless the state demonstrates to the Administrator's satisfaction or EPA demonstrates that NO$_X$ emissions in an area are not a significant contributor to that area's ambient PM$_{2.5}$ concentrations). The 2008 NSR Rule also specifies that VOCs are not considered to be precursors to PM$_{2.5}$ in the PSD program unless the state demonstrates to the Administrator's satisfaction or EPA demonstrates that emissions of VOCs in an area are significant contributors to that area's ambient PM$_{2.5}$ concentrations.

The explicit references to SO$_2$, NO$_X$, and VOCs as they pertain to secondary PM$_{2.5}$ formation are codified at 40 CFR 51.166(b)(49)(i)(*b*) and 40 CFR 52.21(b)(50)(i)(*b*). As part of identifying pollutants that are precursors to PM$_{2.5}$, the 2008 NSR Rule also required states to revise the definition of "significant" as it relates to a net emissions increase or the potential of a source to emit pollutants. Specifically, 40 CFR 51.166(b)(23)(i) and 40 CFR 52.21(b)(23)(i) define "significant" for PM$_{2.5}$ to mean the following emissions rates: 10 Tons per year (tpy) of direct PM$_{2.5}$; 40 tpy of SO$_2$; and 40 tpy of NO$_X$ (unless the state demonstrates to the Administrator's satisfaction or EPA demonstrates that NO$_X$ emissions in an area are not a significant contributor to that area's ambient PM$_{2.5}$ concentrations). The deadline for states to submit SIP revisions to their PSD programs incorporating these changes was May 16, 2011 (*see* 73 FR 28321 at 28341).[3]

The 2008 NSR Rule did not require states to immediately account for gases that could condense to form particulate matter, known as condensables, in PM$_{2.5}$ and PM$_{10}$ emission limits in NSR permits. Instead, EPA determined that states had to account for PM$_{2.5}$ and PM$_{10}$ condensables for applicability determinations and in establishing emissions limitations for PM$_{2.5}$ and PM$_{10}$ in PSD permits beginning on or after January 1, 2011. This requirement is codified in 40 CFR 51.166(b)(49)(i)(*a*) and 40 CFR 52.21(b)(50)(i)(*a*). Revisions to states' PSD programs incorporating the inclusion of condensables were required be submitted to EPA by May 16, 2011 (*see* 73 FR 28321 at 28341).

EPA approved revisions to Wisconsin's PSD SIP reflecting these requirements on October 16, 2014 (*see* 79 FR 62008), and therefore proposes that Wisconsin has met this set of infrastructure SIP requirements of section 110(a)(2)(C) with respect to the 1997 PM$_{2.5}$, 1997 ozone, 2006 PM$_{2.5}$, 2008 lead, 2008 ozone, 2010 NO$_2$, 2010 SO$_2$, and 2012 PM$_{2.5}$ NAAQS.

(iv) PM$_{2.5}$ Increments in the PSD Program

On October 20, 2010, EPA issued the final rule on the "Prevention of Significant Deterioration for Particulate Matter Less Than 2.5 Micrometers—Increments, Significant Impact Levels and Significant Monitoring Concentration" (2010 NSR Rule). This rule established several components for making PSD permitting determinations for PM$_{2.5}$, including a system of "increments," which is the mechanism used to estimate significant deterioration of ambient air quality for a pollutant. These increments are codified in 40 CFR 51.166(c) and 40 CFR 52.21(c), and are included in the table below.

TABLE 1—PM$_{2.5}$ INCREMENTS ESTABLISHED BY THE 2010 NSR RULE IN MICROGRAMS PER CUBIC METER

	Annual arithmetic mean	24-hour max
Class I	1	2
Class II	4	9
Class III	8	18

---

[2] EPA highlights this statutory requirement in an October 2, 2007, guidance document entitled "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 1997 8-hour Ozone and PM$_{2.5}$ National Ambient Air Quality Standards" and has issued additional guidance documents, the most recent on September 13, 2013, "Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and (2)" (2013 memo).

[3] EPA notes that on January 4, 2013, the U.S. Court of Appeals for the D.C. Circuit, in *Natural Resources Defense Council* v. *EPA*, 706 F.3d 428 (D.C. Cir.), held that EPA should have issued the 2008 NSR Rule in accordance with the CAA's requirements for PM$_{10}$ nonattainment areas (Title I, Part D, subpart 4), and not the general requirements for nonattainment areas under subpart 1. As the subpart 4 provisions apply only to nonattainment areas, EPA does not consider the portions of the 2008 rule that address requirements for PM$_{2.5}$ attainment and unclassifiable areas to be affected by the court's opinion. Moreover, EPA does not anticipate the need to revise any PSD requirements promulgated by the 2008 NSR Rule in order to comply with the court's decision. Accordingly, EPA's approval of Wisconsin's infrastructure SIP as to elements (C), (D)(i)(II), or (J) with respect to the PSD requirements promulgated by the 2008 implementation rule does not conflict with the court's opinion.

The court's decision with respect to the nonattainment NSR requirements promulgated by the 2008 implementation rule also does not affect EPA's action on the present infrastructure action. EPA interprets the CAA to exclude nonattainment area requirements, including requirements associated with a nonattainment NSR program, from infrastructure SIP submissions due three years after adoption or revision of a NAAQS. Instead, these elements are typically referred to as nonattainment SIP or attainment plan elements, which would be due by the dates statutorily prescribed under subparts 2 through 5 under part D, extending as far as 10 years following designations for some elements.

The 2010 NSR Rule also established a new "major source baseline date" for $PM_{2.5}$ as October 20, 2010, and a new trigger date for $PM_{2.5}$ as October 20, 2011. These revisions are codified in 40 CFR 51.166(b)(14)(i)(*c*) and (b)(14)(ii)(*c*), and 40 CFR 52.21(b)(14)(i)(*c*) and (ii)(*c*). Lastly, the 2010 NSR Rule revised the definition of "baseline area" to include a level of significance of 0.3 micrograms per cubic meter, annual average, for $PM_{2.5}$. This change is codified in 40 CFR 51.166(b)(15)(i) and 40 CFR 52.21(b)(15)(i).

EPA is proposing to approve revisions to Wisconsin's PSD SIP reflecting these requirements in today's rulemaking, and therefore is proposing to find that Wisconsin has met this set of infrastructure SIP requirements for section 110(a)(2)(C) with respect to the 1997 $PM_{2.5}$, 1997 ozone, 2006 $PM_{2.5}$, 2008 lead, 2008 ozone, 2010 NO_2, 2010 SO_2, and 2012 $PM_{2.5}$ NAAQS.

(v) GHG Permitting and the "Tailoring Rule"

With respect to CAA Sections 110(a)(2)(C) and (J), EPA interprets the CAA to require each state to make an infrastructure SIP submission for a new or revised NAAQS that demonstrates that the air agency has a complete PSD permitting program meeting the current requirements for all regulated NSR pollutants. The requirements of section 110(a)(2)(D)(i)(II) may also be satisfied by demonstrating the air agency has a complete PSD permitting program correctly addressing all regulated NSR pollutants. Wisconsin has shown that it currently has a PSD program in place that covers all regulated NSR pollutants, including GHGs.

On June 23, 2014, the United States Supreme Court issued a decision addressing the application of PSD permitting requirements to GHG emissions. *Utility Air Regulatory Group* v. *Environmental Protection Agency,* 134 S.Ct. 2427. The Supreme Court said that the EPA may not treat GHGs as an air pollutant for purposes of determining whether a source is a major source required to obtain a PSD permit. The Court also said that the EPA could continue to require that PSD permits, otherwise required based on emissions of pollutants other than GHGs, contain limitations on GHG emissions based on the application of Best Available Control Technology (BACT).

In order to act consistently with its understanding of the Court's decision, the EPA no longer applies EPA regulations that would require that SIPs include the permitting requirements that the Supreme Court found impermissible. Specifically, EPA is not applying the requirement that a state's SIP-approved PSD program require that sources obtain PSD permits when GHGs are the only pollutant (i) that the source emits or has the potential to emit above the major source thresholds, or (ii) for which there is a significant emissions increase and a significant net emissions increase from a modification (*e.g.* 40 CFR 51.166(b)(48)(v)).

EPA anticipates a need to revise Federal PSD rules and for many states to revise their existing SIP-approved PSD programs in light of the Supreme Court opinion. The timing and content of subsequent EPA actions with respect to the EPA regulations and state PSD program approvals are expected to be informed by additional legal process before the United States Court of Appeals for the District of Columbia. At this juncture, EPA is not expecting states to have revised their PSD programs for purposes of infrastructure SIP submissions and is only evaluating such submissions to ensure that the state's program correctly addresses GHGs consistent with the Supreme Court's decision.

At present, EPA is proposing that Wisconsin's SIP is sufficient to satisfy sections 110(a)(2)(C), (D)(i)(II), and (J) with respect to GHGs, because the PSD permitting program previously approved by EPA into the SIP continues to require that PSD permits (otherwise required based on emissions of pollutants other than GHGs) contain limitations on GHG emissions based on the application of BACT. Although the approved Wisconsin PSD permitting program may currently contain provisions that are no longer necessary in light of the Supreme Court decision, this does not render the infrastructure SIP submission inadequate to satisfy Section 110(a)(2)(C), (D)(i)(II), and (J). The SIP contains the necessary PSD requirements and the application of those requirements is not impeded by the presence of other previously-approved provisions regarding the permitting of sources of GHGs that EPA does not consider necessary at this time in light of the Supreme Court decision.

For the purposes infrastructure SIPs, EPA reiterates that NSR Reform regulations are not within the scope of these actions. Therefore, we are not taking action on existing NSR Reform regulations for Wisconsin. EPA approved Wisconsin's minor NSR program on January 18, 1995 (*see* 60 FR 3543); and since that date, WDNR and EPA have relied on the existing minor NSR program to ensure that new and modified sources not captured by the major NSR permitting programs do not interfere with attainment and maintenance of the NAAQS.

Certain sub-elements in this section overlap with elements of section 110(a)(2)(D)(i) and 110(a)(2)(J). These links will be discussed in the appropriate areas below.

2. Section 110(a)(2)(D)(i)(II)—Interstate Transport

Section 110(a)(2)(D)(i)(II) requires that SIPs include provisions prohibiting any source or other type of emissions activity in one state from interfering with measures required to prevent significant deterioration of air quality or to protect visibility in another state.

EPA notes that Wisconsin's satisfaction of the applicable infrastructure SIP PSD requirements for the 1997 $PM_{2.5}$, 1997 ozone, 2006 $PM_{2.5}$, 2008 lead, 2008 ozone, 2010 NO_2, 2010 SO_2, and 2012 $PM_{2.5}$ NAAQS have been detailed in the section addressing section 110(a)(2)(C). EPA further notes that the proposed actions in that section related to PSD are consistent with the proposed actions related to PSD for section 110(a)(2)(D)(i)(II), and they are reiterated below.

EPA has previously approved or is proposing in today's action to approve revisions to Wisconsin's SIP that meet certain requirements required by the Phase 2 Rule and the 2008 NSR Rule. These revisions included provisions that: Explicitly identify NO_X as a precursor to ozone, explicitly identify SO_2 and NO_X as precursors to $PM_{2.5}$, and regulate condensable $PM_{2.5}$ and PM_{10} in applicability determinations and in establishing emissions limits. EPA is also proposing in today's action to approve revisions to Wisconsin's SIP that incorporate the $PM_{2.5}$ increments and the associated implementation regulations including the major source baseline date, trigger date, and level of significance for $PM_{2.5}$ per the 2010 NSR Rule. EPA is proposing that Wisconsin's SIP contains provisions that adequately address the 1997 $PM_{2.5}$, 1997 ozone, 2006 $PM_{2.5}$, 2008 lead, 2008 ozone, 2010 NO_2, 2010 SO_2, and 2012 $PM_{2.5}$ NAAQS.

States also have an obligation to ensure that sources located in nonattainment areas do not interfere with a neighboring state's PSD program. One way that this requirement can be satisfied is through an NNSR program consistent with the CAA that addresses any pollutants for which there is a designated nonattainment area within the state.

Wisconsin's EPA-approved NNSR regulations found in Part 2 of the SIP, specifically in chapter NR 408 of the Wisconsin Administrative Code, are consistent with 40 CFR 51.165, or 40

CFR part 51, appendix S. Therefore, EPA proposes that Wisconsin has met all of the applicable PSD requirements for the 1997 $PM_{2.5}$, 1997 ozone, 2006 $PM_{2.5}$, 2008 lead, 2008 ozone, 2010 NO_2, 2010 SO_2, and 2012 $PM_{2.5}$ NAAQS for transport prong 3 related to section 110(a)(2)(D)(i)(II).

3. Section 110(a)(2)(J)—Consultation With Government Officials; Public Notifications; PSD; Visibility Protection

States must meet applicable requirements of section 110(a)(2)(C) related to PSD. WDNR's PSD program in the context of infrastructure SIPs has already been discussed in the paragraphs addressing section 110(a)(2)(C) and 110(a)(2)(D)(i)(II), and EPA notes that the proposed actions for those sections are consistent with the proposed actions for this portion of section 110(a)(2)(J). Therefore, EPA proposes that Wisconsin has met all of the infrastructure SIP requirements for PSD associated with section 110(a)(2)(J) for the 1997 $PM_{2.5}$, 1997 ozone, 2006 $PM_{2.5}$, 2008 lead, 2008 ozone, 2010 NO_2, 2010 SO_2, and 2012 $PM_{2.5}$ NAAQS.

III. What action is EPA taking?

EPA is proposing to approve revisions to Wisconsin's SIP that implement the $PM_{2.5}$ increment requirements and also incorporates NO_X as an ozone precursor. These revisions were made to meet EPA's requirements for Wisconsin's PSD and NSR program and are consistent with Federal regulations. Specifically, EPA is proposing to approve the following:

(i) NR 404.05(2)(intro) and (am)
(ii) NR 404.05(3)(intro) and (am)
(iii) NR 404.05(4)(intro) and (am)
(iv) NR 405.02(3) and (21)(a)
(v) NR 405.02(21m)(a) and (c)
(vi) NR 405.02(22)(b)
(vii) NR 405.02(22m)(a)1. and 3., and (b)1.
(viii) NR 405.02(27)(a)6.
(ix) NR 405.07(8)(a)3m and 3m(Note)
(x) NR 405.07(8)(a)5.(Note)

The revisions pertaining to $PM_{2.5}$ increment will fully address the requirements of the $PM_{2.5}$ PSD Increments, SILs, and SMC Rule and the deficiencies identified in EPA's August 11, 2014, Finding of Failure to Submit. The revisions pertaining to NO_X as a precursor to ozone will, in conjunction with EPA's October 6, 2015 approval, address all of the PSD requirements of the "Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2".

EPA is also proposing to approve the PSD related infrastructure requirements found in CAA sections 110(a)(2)(C), (D)(i)(II), and (J) for Wisconsin's 1997 $PM_{2.5}$, 1997 ozone, 2006 $PM_{2.5}$, 2008 lead, 2008 ozone, 2010 NO_2, 2010 SO_2, and 2012 $PM_{2.5}$ NAAQS submittals.

IV. Incorporation by Reference

In this rule, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference the WDNR rules regarding revisions to the PSD and NSR programs discussed in section I of this preamble. EPA has made, and will continue to make, these documents generally available through *www.regulations.gov,* and/or at the National Archives and Records Administration (NARA), and/or at the EPA Region 5 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). For information on the availability of this material at NARA, go to: *www.archives.gov/federal-register/cfr/ibr-locations.html.*

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: September 21, 2016.

Robert A. Kaplan,

Acting Regional Administrator, Region 5.

[FR Doc. 2016–23689 Filed 9–29–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 435

[EPA–HQ–OW–2016–0598; FRL–9953–25–OW]

[RIN 2040–AF68]

Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category—Implementation Date Extension

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) proposes to extend the implementation deadline for certain

facilities subject to the final rule establishing pretreatment standards under the Clean Water Act (CWA) for discharges of pollutants into publicly owned treatment works (POTWs) from onshore unconventional oil and gas (UOG) extraction facilities. EPA proposes these revisions in response to new information received after promulgation of the rule suggesting that there are likely facilities subject to the final rule not presently meeting the zero discharge requirements in the final rule.

DATES: Written comments must be received by October 31, 2016.

ADDRESSES: Submit your comments, identified by Docket ID No. [EPA–HQ–OW–2016–0598], at *http://www.regulations.gov*. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets*.

FOR FURTHER INFORMATION CONTACT: For more information, see EPA's Web site: *https://www.epa.gov/eg/unconventional-oil-and-gas-extraction-effluent-guidelines*. For technical information, contact Karen Milam, Engineering and Analysis Division (4303T), Office of Water, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone: 202–566–1915; email: *milam.karen@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Does this action apply to me?

Entities potentially regulated by this final action include:

Category	Example of regulated entity	North American Industry Classification System (NAICS) code
Industry	Crude Petroleum and Natural Gas Extraction	211111
Industry	Natural Gas Liquid Extraction	211112

II. Why is EPA issuing this proposed rule?

This document proposes to establish a compliance date for pretreatment standards for existing onshore unconventional oil and gas extraction facilities within the Oil and Gas Extraction Point Source Category that differs from the date specified in the preamble to that final rule (81 FR 41845, June 28, 2016). We have published a direct final rule to extend the compliance date to August 29th, 2019 for existing sources that were lawfully discharging UOG wastewater to POTWs on or between the date of the **Federal Register** Notice of the proposed rule (April 7, 2015) and the date of the **Federal Register** Notice of the final rule (June 28, 2016) in the "Rules and Regulations" section of this **Federal Register** because we view this as a noncontroversial action and anticipate no adverse comment. For purposes of this proposed rule, compliance date and implementation date are used interchangeably. We have explained our reasons for this action in the preamble to the direct final rule.

If no adverse comments are received, the direct final rule will go into effect. If we receive adverse comment, we will withdraw the direct final rule and it will not take effect. We would address all public comments in any subsequent final rule based on this proposed rule. EPA will not consider any comment submitted on the proposed rule published today on any topic other than the appropriateness of an extension of the compliance date; any other comments will be considered to be outside the scope of this rulemaking.

We do not intend to institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information, please see the information provided in the **ADDRESSES** section of this document.

III. Where is the location of regulatory text for this proposal?

The regulatory text for this proposal is identical to that for the direct final rule published in the Rules and Regulations section of the **Federal Register**. For further supplemental information, the detailed rationale for the proposal, and the regulatory revisions, see the information provided in the direct final rule published in the Rules and Regulations section of this **Federal Register**.

IV. Statutory and Executive Order Reviews

For a complete discussion of all of the administrative requirements applicable to this action, see the direct final rule in the Rules and Regulations section of this **Federal Register**.

List of Subjects in 40 CFR Part 435

Environmental protection, Pretreatment, Waste treatment and disposal, Water pollution control, Unconventional oil and gas extraction.

Dated: September 22, 2016.

Gina McCarthy,

Administrator.

[FR Doc. 2016–23458 Filed 9–29–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Bureau of Safety and Environmental Enforcement

43 CFR Part 2

[Docket ID: BSEE–2016–0001; 167E1700D2 EEAA010000 ET1EX0000.SZH000]

RIN 1014–AA29

Privacy Act Regulations; Exemption for the Investigations Case Management System

AGENCY: Bureau of Safety and Environmental Enforcement, Interior.

ACTION: Proposed rule.

SUMMARY: The Department of the Interior is amending its regulations to exempt certain records in the Investigations Case Management System from one or more provisions of the Privacy Act because of civil and administrative law enforcement requirements.

DATES: Submit written comments on or before November 29, 2016.

ADDRESSES: You may submit comments on this proposed rulemaking by any of the following methods. Please use the Regulation Identifier Number (RIN) 1014–AA29 as an identifier in your comments. BSEE may post all submitted comments, in their entirety, at: *www.regulations.gov.*

1. *Federal eRulemaking Portal: www.regulations.gov.* In the search box, enter "BSEE–2016–0001," then click search. Follow the instructions to submit public comments and view supporting and related materials available for this rulemaking.

2. Mail or hand-carry comments to the Department of the Interior (DOI); Bureau of Safety and Environmental Enforcement; ATTN: Regulations and Standards Branch; 45600 Woodland Road, Mail Code VAE–ORP; Sterling, VA 20166. Please reference "Privacy Act Exemptions for the Investigations Case Management System, 1014–AA29," in your comments and include your name and return address.

FOR FURTHER INFORMATION CONTACT: Rowena Dufford, Bureau of Safety and Environmental Enforcement Privacy Act Officer, 45600 Woodland Road, Mail Stop VAE–MSD, Sterling, VA 20166. Email at *Rowena.Dufford@bsee.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Privacy Act of 1974, as amended, 5 U.S.C. 552a, governs the means by which the U.S. Government collects, maintains, uses and disseminates personally identifiable information. The Privacy Act applies to records about individuals that are maintained in a "system of records." A system of records is a group of any records under the control of an agency from which information about an individual is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. See 5 U.S.C. 552a(a)(4) and (5).

An individual may request access to records containing information about him or herself, 5 U.S.C. 552a(b), (c) and (d). However, the Privacy Act authorizes Federal agencies to exempt systems of records from access by individuals under certain circumstances, such as where the access or disclosure of such information would impede national security or law enforcement efforts. Exemptions from Privacy Act provisions must be established by regulation, 5 U.S.C. 552a(k).

The Department of the Interior (DOI) Bureau of Safety and Environmental Enforcement (BSEE) created the "Investigations Case Management System (CMS), BSEE–01", system of records to enable BSEE to conduct and document civil administrative investigations related to incidents, operations of the Outer Continental Shelf (OCS), and employee misconduct investigations. The CMS will store, track, and analyze reportable injuries, the loss or damage of property, possible violations of Federal laws and regulations, and investigation information related to operations on the OCS to identify safety concerns or environmental risks. The CMS will contain investigatory materials related to possible criminal activity and referrals to internal and external law enforcement organizations as appropriate for investigation.

Incident and non-incident data related to activity occurring on the OCS collected in support of investigations, regulatory enforcement, homeland security, and security (physical, personnel, stability, environmental, and industrial) activities may include data documenting investigation activities, enforcement recommendations, recommendation results, property damage, injuries, fatalities, and analytical or statistical reports. The CMS will also provide information for BSEE management to make informed decisions on recommendations for enforcement, civil penalties, and other administrative actions.

In this notice of proposed rulemaking, DOI is proposing to exempt portions of the CMS system of records from certain provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2) because of civil and administrative law enforcement requirements. Under 5 U.S.C. 552a(k)(2), the head of a Federal agency may promulgate rules to exempt a system of records from certain provisions of 5 U.S.C. 552a if the system of records is "investigatory material complied for law enforcement purposes, other than material within the scope of subsection (j)(2)."

Because this system of records contains investigative matters compiled for law enforcement purposes under the provisions of 5 U.S.C. 552a(k)(2), the Department of the Interior plans to exempt portions of the CMS system of records from one or more of the following provisions: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f). Where a release would not interfere with or adversely affect investigations or enforcement activities, including but not limited to revealing sensitive information or compromising confidential sources, the exemption may be waived on a case-by-case basis. Exemptions from these particular subsections are justified for the following reasons:

1. 5 U.S.C. 552a(c)(3). This section requires an agency to make the accounting of each disclosure of records required by the Privacy Act available to the individual named in the record upon request. Release of accounting of disclosures would alert the subjects of an investigation to the existence of the investigation and the fact that they are subjects of the investigation. The release of such information to the subjects of an investigation would provide them with significant information concerning the nature of the investigation, and could seriously impede or compromise the investigation; and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony.

2. 5 U.S.C. 552(d); (e)(4)(G) and (e)(4)(H); and (f). These sections require an agency to provide notice and disclosure to individuals that a system contains records pertaining to the individual, as well as providing rights of access and amendment. Granting access to records in the CMS system of records could inform the subject of an investigation of the existence of that investigation, the nature and scope of the information and evidence obtained, the identity of confidential sources, witnesses, lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony; and disclose investigative techniques and procedures.

3. 5 U.S.C. 552a(e)(1). This section requires the agency to maintain information about an individual only to the extent that such information is relevant or necessary. The application of this provision could impair investigations and civil or administrative law enforcement, because it is not always possible to determine the relevance or necessity of specific information in the early stages of an investigation. Relevance and necessity are often questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established. Furthermore, during the course of the investigation, an investigator may obtain information concerning the violation of laws outside the scope of the investigator's jurisdiction. BSEE investigators will refer information obtained outside of their civil or administrative jurisdictions to the appropriate agency.

4. 5 U.S.C. 552a(e)(4)(I). This section requires an agency to provide public notice of the categories of sources of records in the system. The application

of this section could disclose investigative techniques and procedures and cause sources to refrain from giving such information because of fear of reprisal. This could compromise BSEE's ability to conduct investigations and to identify and detect violators.

Procedural Requirements

1. Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant. Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. DOI developed this rule in a manner consistent with these requirements.

2. Regulatory Flexibility Act

DOI certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). This rule does not impose a requirement for small businesses to report or keep records on any of the requirements contained in this rule. The exemptions to the Privacy Act apply to individuals, and individuals are not covered entities under the Regulatory Flexibility Act.

3. Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

(a) Does not have an annual effect on the economy of $100 million or more.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises.

4. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments in the aggregate, or on the private sector, of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. This rule makes only minor changes to 43 CFR part 2. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

5. Takings (E.O. 12630)

In accordance with Executive Order 12630, the rule does not have significant takings implications. The rule is not a governmental action capable of interference with constitutionally protected property rights. This rule makes only minor changes to 43 CFR part 2. A takings implication assessment is not required.

6. Federalism (E.O. 13132).

In accordance with Executive Order 13132, this rule does not have any federalism implications to warrant the preparation of a Federalism Assessment. The rule is not associated with, nor will it have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. A Federalism Assessment is not required.

7. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

(a) Does not unduly burden the judicial system.

(b) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(c) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

8. Consultation With Indian Tribes (E.O. 13175)

In accordance with Executive Order 13175, the Department of the Interior has evaluated this rule and determined that it would have no substantial effects on federally recognized Indian Tribes.

9. Paperwork Reduction Act

This rule does not require an information collection from 10 or more parties and a submission under the Paperwork Reduction Act is not required.

10. National Environmental Policy Act (NEPA) of 1969

This rule does not constitute a major Federal Action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because the rule is covered by a categorical exclusion. This rule meets the criteria set forth in 43 CFR 46.210(i), 516 Departmental Manual 15.4C(1), and the BSEE Interim NEPA Policy Document 2013–09, for a categorical exclusion. The rule's administrative effects are to exempt CMS from certain provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2) because of civil and administrative law enforcement requirements and therefore would not have any environmental impacts. BSEE also analyzed this proposed rule to determine if it involves any of the extraordinary circumstances set forth in 43 CFR 46.215 that would require an environmental assessment or an environmental impact statement for actions otherwise eligible for a categorical exclusion. BSEE concluded that this rule does not meet any of the criteria for extraordinary circumstances.

11. Data Quality Act

In developing this rule, there was no need to conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L. 106–554).

12. Effects on Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211, and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. A Statement of Energy Effects is not required.

13. Clarity of This Regulation

We are required by Executive Order 12866 and 12988, the Plain Writing Act of 2010 (H.R. 946), and the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means each rule we publish must:

—Be logically organized;
—Use the active voice to address readers directly;
—Use clear language rather than jargon;
—Be divided into short sections and sentences; and

—Use lists and table wherever possible.

List of Subjects in 43 CFR Part 2

Administrative practice and procedure, Confidential information, Courts, Freedom of Information Act, Privacy Act.

Dated: September 7, 2016.

Kristen J. Sarri,

Principal Deputy Assistant Secretary for Policy, Management and Budget.

For the reasons stated in the preamble, the Department of the Interior proposes to amend 43 CFR part 2 as follows:

PART 2—FREEDOM OF INFORMATION ACT; RECORDS AND TESTIMONY

■ 1. The authority citation for part 2 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 553; 31 U.S.C. 3717; 43 U.S.C. 1460, 1461.

■ 2. Amend § 2.254 to add paragraph (b)(18) to read as follows:

§ 2.254 Exemptions.

* * * * *

(b) * * *

(18) Investigations Case Management System (CMS), BSEE–01.

[FR Doc. 2016–23707 Filed 9–29–16; 8:45 am]

BILLING CODE 4310–VH–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R5–ES–2016–0030; 4500030113]

RIN 1018–BB50

Endangered and Threatened Wildlife and Plants; Endangered Species Status for the Kenk's Amphipod

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list the Kenk's amphipod (*Stygobromus kenki*), a ground water species from the District of Columbia, Maryland, and Virginia, as an endangered species under the Endangered Species Act (Act). If we finalize this rule as proposed, it would extend the Act's protections to this species. The effect of this regulation will be to add the species to the List of Endangered and Threatened Wildlife.

DATES: We will accept comments received or postmarked on or before November 29, 2016. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by November 14, 2016.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter FWS–R5–ES–2016–0030, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on "Comment Now!"

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R5–ES–2016–0030; U.S. Fish and Wildlife Service Headquarters, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see *Public Comments* below for more information).

FOR FURTHER INFORMATION CONTACT: Genevieve LaRouche, Field Supervisor, U.S. Fish and Wildlife Service, Chesapeake Bay Field Office, 177 Admiral Cochrane Drive, Annapolis, MD 21401, by telephone 410–573–4577 or by facsimile 410–269–0832. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, if a species is determined to be an endangered or threatened species throughout all or a significant portion of its range, we are required to promptly publish a proposal in the **Federal Register** and make a determination on our proposal within 1 year. Critical habitat shall be designated, to the maximum extent prudent and determinable, for any species determined to be an endangered or threatened species under the Act. Listing a species as an endangered or threatened species and designating and revising critical habitat can be completed only by issuing a rule.

What this document does. This document proposes the listing of the Kenk's amphipod (*Stygobromus kenki*) as an endangered species. The Kenk's amphipod is a candidate species for which we have on file sufficient information on its biological vulnerability and threats to support preparation of a listing proposal, but for which development of a listing regulation has been precluded by other higher priority listing activities. This proposed rule assesses the best available information and data regarding the status of and threats to the Kenk's amphipod.

The basis for our action. Under the Act, we can determine that a species is an endangered or threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence. We have determined that the Kenk's amphipod is in danger of extinction primarily due to poor water quality, erosion, and sedimentation resulting from urban runoff in Maryland and the District of Columbia (Factor A) and the effects of small population dynamics (Factor E) at all known locations.

We will seek peer review. We will seek comments from independent specialists to ensure that our determination is based on scientifically sound data, assumptions, and analyses. We will invite these peer reviewers to comment on our listing proposal. Because we will consider all comments and information received during the comment period, our final determination may differ from this proposal.

Information Requested

Public Comments

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from the public, other concerned governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

(1) The Kenk's amphipod's biology, range, and population trends, including:

(a) Biological or ecological requirements of the species, including habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range including distribution patterns;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the species, its habitat, or both.

(2) Factors that may affect the continued existence of the species, which may include habitat modification or destruction, overutilization, disease, predation, the inadequacy of existing regulatory mechanisms, or other natural or manmade factors.

(3) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to the species and existing regulations that may be addressing those threats.

(4) Additional information concerning the historical and current status, range, distribution, and population size of this species, including the locations of any additional populations of the species.

(5) Additional information on the hydrology (*e.g.*, connectedness, size of recharge areas) of the known Kenk's amphipod sites.

(6) Reliable methodology for estimating the total population size at an individual seep site (*e.g.*, calculating the number of animals in the subsurface from the number of animals at the surface).

(7) Additional information on the interspecific interactions of amphipods at the known Kenk's amphipod sites (*e.g.*, predator/prey dynamics or competition for food or space resources).

(8) The specific tolerance of the Kenk's amphipod or the Potomac groundwater amphipod (*Stygobromus tenuis potomacus*) to temperature, sewage effluent, chlorinated water, or other contaminants.

Please include supporting documentation with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made "solely on the basis of the best scientific and commercial data available."

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *http://www.regulations.gov*, your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov*.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Chesapeake Bay Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Public Hearing

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days after the date of publication of this proposed rule in the **Federal Register**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

Peer Review

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our listing determination is based on scientifically sound data, assumptions, and analyses. The peer reviewers have expertise in Kenk's/*Stygobromus* amphipod biology, habitat, or stressors (factors negatively affecting the species) to the Kenk's amphipod species or its habitat. We invite comment from the peer reviewers during this public comment period.

Previous Federal Action

In 2001, the Service received a petition to list the Kenk's amphipod and two other invertebrates. Higher priority workload that consumed the listing budget prevented the Service from making a 90-day finding until fiscal year (FY) 2006 when we found that the petition did not present substantial information (72 FR 51766, September 11, 2007) indicating that listing may be warranted. In 2010, the Service, under its own candidate assessment process, initiated a status review for the Kenk's amphipod, completed an analysis on the best available data, and determined that listing the species was warranted. However, we were precluded from moving forward with rulemaking for the species due to other higher priority listing actions. The Kenk's amphipod was added to the FY 2010 candidate list (75 FR 69222, November 10, 2010). The species' status was reviewed at least annually and continued to be found warranted but precluded for listing in all subsequent annual Candidate Notices of Review (76 FR 66370, October 26, 2011; 77 FR 69994, November 21, 2012; 78 FR 70104, November 22, 2013; 79 FR72450, December 5, 2014; 80 FR 80584, December 24, 2015). For additional information see: *http://ecos.fws.gov/tess_public/profile/speciesProfile?spcode=K04P* (last accessed June 22, 2016). In 2011, the Service entered into a settlement agreement with the Center for Biological Diversity and WildEarth Guardians that specified a listing determination must be made for all species from the FY 2010 candidate list (*Center for Biological Diversity* v. *Salazar* 10–cv–0230 (D.D.C.); *WildEarth Guardians* v. *Salazar* Nos. 10–cv–0048; 10–cv–0421; 10–cv–1043; 10–cv–1045; 10–cv–1048; 10–cv–1049; 10–cv–50; 10–cv–51; 10–cv–1068; 10–cv–2299; 10–cv–2595; 10–cv–3366 (D.D.C.)). Per the settlement agreement, a not warranted finding or proposed listing rule for the Kenk's amphipod must be delivered to the **Federal Register** no later than September 30, 2016.

Background

Taxonomy and Species Description

The Kenk's amphipod (*Stygobromus kenki*) was first collected in 1967 by Roman Kenk from a spring in Rock Creek Park (Park), southeast of North National Capitol Parks' headquarters in the District of Columbia, and it was formally described by J.R. Holsinger (1978, pp. 39–42). We have carefully reviewed the best available taxonomic data and conclude that the Kenk's amphipod is a valid species.

The Kenk's amphipod is a moderately small ground water crustacean, with the largest male and female specimens growing to 0.15 inch (in) (3.7 millimeters (mm)) and 0.22 in (5.5 mm) in length, respectively. The Kenk's amphipod is a member of the Spinosus Group of *Stygobromus*, which includes two other closely related but separate species, Blue Ridge stygobromid (*S. spinosus*) and Luray Caverns amphipod (*S. pseudospinosus*), that are found only in Virginia, primarily in Shenandoah National Park. The Kenk's amphipod is distinguished from those two species, as well as other co-occurring amphipods, such as the Potomac groundwater amphipod and Hay's spring amphipod (*S. hayi*), on the basis of various morphological features (Holsinger 1978, p. 39). For additional morphological description details, please see the Kenk's amphipod's FY 2015 candidate assessment form here: *http://ecos.fws.gov/docs/candidate/assessments/2015/r5/K04P_I01.pdf* (last accessed on June 22, 2016).

Accurate identification of the Kenk's amphipod can occur only when a specimen is removed from the seepage spring site (hereafter referred interchangeably as seepage spring, seep, spring, or site depending upon the reference), and preserved in alcohol or other fixing agent for identification by a species expert who removes legs and other appendages from the specimen for microscopic examination. This identification method is the best scientific method available. Because the laboratory identification results in mortality, the Service has been judicious in limiting the frequency and number of specimens removed from known sites.

Reproduction and Longevity

We have no reproductive or longevity information specific to the Kenk's amphipod, but assume those attributes are similar to other *Stygobromus* species. Like other amphipods, females of the genus *Stygobromus* deposit their eggs in a brood pouch on their underside (Foltz and Jepson 2009, p. 2). Young of the Potomac groundwater amphipod hatch from the egg and actively swim from the brood pouch, with days or even weeks passing between the hatching of the first and last young of a brood (Williams 2013, p. 10). The immature stages resemble the adults, and individuals undergo successive molts (usually between eight and nine) until maturity. Most surface amphipod species from the family Talitridae complete their life cycle (egg to adult) in 1 year or less, but subterranean species like the Kenk's amphipod have a longer life span and may live for 4 to 6 years (Foltz and Jepson 2009, p. 2).

Habitat

Amphipods of the genus *Stygobromus* occur in ground water and ground water-related habitats (*e.g.*, caves, seeps, small springs, wells, interstices, and rarely deep ground water lakes). Members of this genus occur only in freshwater and belong to the family Crangonyctidae, the largest family of freshwater amphipods in North America, and have modified morphology for survival in the subterranean ground water that is their primary habitat. These species are generally eyeless and unpigmented (without color), and frequently have attenuated (reduced in length and width) bodies (Holsinger 1978, pp. 1–2).

The Kenk's amphipod is found in wooded areas where ground water emerges to form seepage springs (Holsinger 1978, p. 39). More specifically, this habitat is called the hypotelminorheic. Hypotelminorheic is described as habitats: (1) With a perched aquifer fed by subsurface water that creates a persistent wet spot; (2) underlain by a clay or other impermeable layer typically 5 to 50 centimeters (cm) (2 to 20 in) below the surface; and (3) rich in organic matter compared with other aquatic subterranean habitats. The water supplying the springs infiltrates to the ground water from precipitation and runoff into the catchment (*e.g.*, recharge or drainage) areas (see Factor A—Water Quality/Quantity Degradation Due to Chronic Pollution of Urban/Suburban Runoff section below for more details). The water exits these habitats at seepage springs. Seepage springs typically have a diffuse discharge of water where the flow cannot be immediately observed but the land surface is wet compared to the surrounding area (Culver *et al.* 2012, p. 2). The shading, hydrologic conditions, and organic matter found in these woodlands are considered important factors in maintaining suitable habitat for the species.

The Kenk's amphipod has been found in the dead leaves or fine sediment submerged in the waters of its seepage spring outflows (Holsinger 1978, p. 130). The best available data indicate that the species will move between the surface and subterranean portions of the spring habitat, but it is unknown when or how often that movement occurs (Kavanaugh 2009, p. 3). Seepage springs typically have a drainage area of less than 10,000 square meters (2.5 acres (ac); 1 hectare (ha)) and their water quality parameters differ from those parameters of small surface waters by having higher conductivity and dissolved oxygen, and lower pH and temperature (Culver *et al.* 2012, pp. 5–6). For example, an unpublished study (Culver and Chestnut 2006, pp. 1–3) found that sites supporting the genus *Stygobromus* had lower temperatures during spring and summer, higher dissolved oxygen, lower pH, and lower nitrate levels than other seepage springs (70 putative seepage springs) along the George Washington Memorial Parkway in Virginia. The Service has contracted with the Maryland Geological Survey to delineate the recharge areas and conduct electrical resistivity surveying to determine elevations of bedrock or clay that may be perching the water table, and to detect elevation of the water table of several seepage springs supporting the Kenk's amphipod; however, the results of this study will not be available until 2017.

All *Stygobromus* species found in the hypotelminorheic habitats appear to have similar requirements—shallow ground water and springs with good water quality and persistent flow for most of the year in wooded habitats. Forest canopy cover appears to be necessary both for the shading and the food source its leaf litter provides. This food source consists of organic detritus and the microorganisms using the leaf litter as substrate.

Springs currently known to support the Kenk's amphipod are found in forested areas with steep slopes, adjacent to streams, and overlying the Wissahickon geologic formation in the Piedmont of Maryland and the District of Columbia and in the Calvert formation just above the Nanjemoy formation in the upper Coastal Plain of Virginia. While the applicable areas containing the known appropriate geology in the Piedmont of Maryland and the District of Columbia have been extensively surveyed for Kenk's amphipod, the same is not true for areas in the Coastal Plain of Maryland and Virginia because information that these geological formations support occupied Kenk's amphipod habitat is new to the Service and species experts (see the *Distribution and Relative Abundance*—Current Range and Distribution Since 2016 section below for more information). The Service conducted a preliminary geographic information system (GIS) analysis to determine that the total amount of forested areas containing the appropriate geology in the Coastal Plain areas of Maryland and Virginia is approximately 20,500 ac (8,296 ha), with approximately 3,063 ac (1,240 ha) on public lands. However, the potential amount of suitable habitat for the Kenk's amphipod is less than 20,500 ac (8,296 ha). The Service will narrow the scope of potential habitat areas to survey by evaluating slope, adjacent waterways, and other habitat quality parameters.

Distribution and Relative Abundance

Known Range and Distribution Prior to 2016

Prior to 2016, all known occurrences of the Kenk's amphipod were from the Potomac River watershed in or near the District of Columbia. At the time of its description, this amphipod was known from two seepage springs (East Spring and Holsinger Spring) in Rock Creek Park in the District of Columbia and was initially thought to be identified from one shallow well in Fairfax County in northern Virginia (Holsinger 1978, p. 39; Terwilliger 1991, p. 184). However, the single immature male specimen from this well was later reexamined by a taxonomic expert and determined not to be a Kenk's amphipod (Holsinger 2009, p. 266). Because of the difficulty in finding the small seepage area of Holsinger Spring, the location was surveyed only once (in 2003) between the Kenk's amphipod's original discovery at the site in 1967 and surveys conducted in 2015.

The Kenk's amphipod was discovered in two additional springs (Sherrill Drive Spring and Kennedy Street Spring (this spring also supports the federally endangered Hay's Spring amphipod) in Rock Creek Park in 1995 and 2001 and in two springs (Coquelin Run Spring and Burnt Mill Spring #6) in Montgomery County, Maryland, in 2003 to 2004, bringing the total number of springs known to support the Kenk's amphipod to six. All of these sites are considered to be in the Washington metropolitan area because they are all within the Washington Beltway (*i.e.,* the I–495 highway).

Until 2016, the species was known only from six seepage spring sites in the District of Columbia and Montgomery County, MD (Culver and Sereg 2004, pp. 35–36; Feller 2005, p. 5) (see figure 1 below), despite extensive surveys for the species in the same area (Feller 1997, entire; Culver and Sereg 2004, entire; Feller 2005, entire). Ground water amphipod surveys on National Park Service (NPS) properties in Arlington and Fairfax Counties, VA, failed to detect the Kenk's amphipod (Hutchins and Culver 2008, entire). In addition, surveys in 2014 in the vicinity of the proposed Purple Line light rail project in Montgomery County, MD, also failed to detect the species (Culver 2015, entire).

Within the species' historical range, the District of Columbia and Maryland, it is plausible that urbanization of the Rock Creek and Northwest Branch watersheds (outside of the protected parklands) has reduced the range and distribution of the Kenk's amphipod because many large and small springs throughout these drainages have been lost as a result of urbanization (Williams 1977, entire; Feller 2005, p. 11). In particular, the southern Rock Creek watershed is where most of the natural tributaries and springs in the District of Columbia south of the National Zoo have been lost due to leveling and filling of the stream valleys, or conversion to covered sewers (Williams 1977, pp. 6, 11). However, there is no available method to estimate to what extent the Kenk's amphipod may have been present in these areas. The best available data indicate that there were no ground water amphipod surveys at any of the springs prior to those habitat areas being filled or otherwise converted to unsuitable habitat.

Current Range and Distribution Since 2016

Within the Washington metropolitan area, five of the known sites are within the Rock Creek drainage: Four are within Rock Creek Park in the District of Columbia (Holsinger Spring, Kennedy Street Spring, East Spring, and Sherrill Drive Spring), and the fifth (Coquelin Run Spring) is in Montgomery County, MD, not far from the District of Columbia border. A sixth known site (Burnt Mill Spring #6) is within the Northwest Branch Park in the Northwest Branch drainage in Montgomery County, MD, approximately 3 miles (mi) (4.8 kilometers (km)) from the District of Columbia border. Thus, the current range of this species in the Washington metropolitan area is limited to Federal land (four sites) and private property (one site) adjacent to approximately 4 linear mi (6.4 km) of Rock Creek, and a single site to the east, on county parkland adjacent to the Northwest Branch. Both Rock Creek Park and the Northwest Branch Park are long, linear parks within heavily urbanized areas.

In addition to the distribution described above for the Washington metropolitan area, a new area occupied by the Kenk's amphipod was identified in 2016—the U.S. Army's Fort A.P. Hill installation in Caroline County, VA, approximately 60 mi (97 km) south of all previously known sites (see figure 1 below). The species was collected during surveys conducted for another amphipod species in 2014, but not identified as the Kenk's amphipod until May 2016, when the Service was notified of the information. Out of a total of 21 surveyed sites on the installation, 4 were found to contain the Kenk's amphipod. Seven Kenk's amphipod individuals were identified from these four springs, which are along Mount and Mill Creeks, both tributaries of the Rappahannock River (J. Applegate, pers. comm., 05/02/2016; C. Hobson, pers. comm., 05/12/2016) (see figure 1). The spring sites in the two creek systems are approximately 7.5 mi (12 km) apart. The area immediately surrounding Fort A.P. Hill is less developed than the Washington metropolitan area.

BILLING CODE 4333–15–P

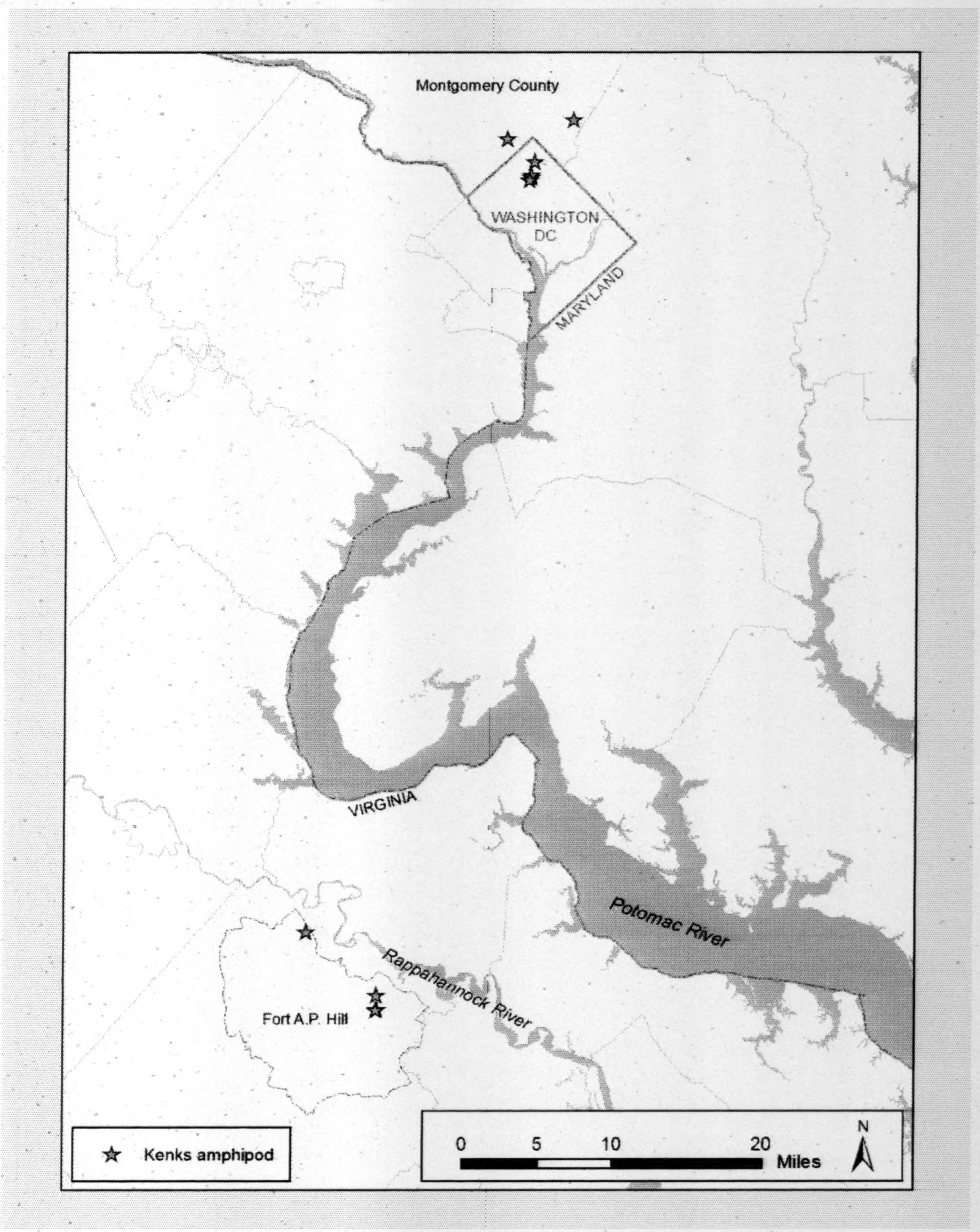

Montgomery County
WASHINGTON DC
MARYLAND
VIRGINIA
Potomac River
Rappahannock River
Fort A.P. Hill
☆ Kenks amphipod
0
5
10
20
Miles
N

Figure 1. Current distribution of the 10 known Kenk's amphipod seep sites. Due to scale, some sites are obscured by the symbols of others.

BILLING CODE 4333–15–C

Relative Abundance

There are no reliable total population numbers for Kenk's amphipod sites due to sampling difficulties (*e.g.,* flow conditions) and the lack of information on the portion of the population that may remain in the springs' ground water supply (Feller 2005, p. 10). However, because surveying in the Washington metropolitan area has been conducted using systematic and consistent methodology over many years, often by the same individuals, the numbers of Kenk's amphipod individuals observed and the number of conducted surveys required to find the species are considered to be the best available data and do provide a reliable indication of the species' relative abundance.

The species is typically found in small numbers and then only when ground water levels are high and springs are flowing freely, conditions that cause the Kenk's amphipod to be transported to the surface. These conditions typically occur during the spring season, except during especially dry years. Given the small size of the shallow ground water aquifers supporting the sites occupied by this species, and the known characteristics of subterranean invertebrates, it is probable that each of the Kenk's amphipod populations has always been small (Hutchins and Culver 2008, pp. 3–6).

Although specimens were not collected and identified to the species level, *Stygobromus sp.,* including some in the right size range for Kenk's amphipod, were observed during site reconnaissance visits between 2004 and 2015 in several of the known Kenk's amphipod Washington metropolitan area spring habitats (B. Yeaman, pers. comm., 05/04/2012). In addition, visual inspections during this same time period indicated that most of the sites continued to appear to be suitable habitat, leading us to conclude that the Kenk's amphipod was extant at least at Burnt Mill Spring #6, Kennedy Street Spring, and East Spring (D. Feller, pers. comm., 04/01/2015). However, actual identifications of specimens collected during surveys conducted in 2015 and 2016 (D. Feller, pers. comm., 03/16/2016) suggest that the species may not be extant at those sites (see below).

Prior to 2015, all Kenk's amphipod specimens were discovered on the first or second survey conducted at all known sites. In 2015 and 2016, Kenk's amphipod was confirmed at only one of the Washington metropolitan area spring sites, Coquelin Run Spring, despite all of the sites being sampled multiple times during these 2 years (see table 1 below) (D. Feller, pers. comm., 03/16/2016; D. Feller, pers. comm., 04/22/2016). It is unclear whether the species may be extirpated at Burnt Mill Spring #6, Kennedy Street Spring, and East Spring, but the best available data show a decrease in observed individuals at these sites.

Although there have been no Kenk's amphipods (*Stygobromus kenki*) observed at five of the six District of Columbia/Maryland sites during the 2015–2016 survey efforts, increasing numbers of Potomac groundwater amphipod have been observed at several of the sites (Burnt Mill Spring #6, East Spring, Kennedy Street Spring, and Holsinger Spring) (D. Feller, pers. comm., 04/22/2016). At Sherrill Drive Spring, no *Stygobromus* species have been detected for 12 years, and the water quality at this site has been documented to be poor (see Factor A—*Water Quality/Quantity Degradation Due to Chronic Pollution of Urban/Suburban Runoff* section below for more details), leading us to conclude that the species is likely extirpated at this site. This conclusion is consistent with the earlier characterization of the population at this site by Culver and Sereg (2004, p. 73) over a decade ago as "barely hanging on."

Table 1. Survey results for Kenk's amphipod—The first pair of numbers (e.g., "1 of 2") indicates the number of site visits where the species was detected compared to the total number of site visits that year. The numbers in parenthesis "()" are the total number of Kenk's amphipod collected. The N/A indicates no surveys were conducted at the site in that year.

Site Name (owner)	1960s			1990s		2000 to 2006						Current	
	1966	**1967**	**1968**	**1994**	**1995**	**2000**	**2001**	**2003**	**2004**	**2005**	**2006**	**2015**	**2016**
East Spring	1 of 1 (3)	5 of 5 (3 to 21)	1 of 1 (1)	0 of 2	0 of 1	0 of 1	2 of 3 (1 and 2)	N/A	N/A	N/A	N/A	0 of 3	0 of 4
Holsinger Spring	N/A	1 of 1 (24)	N/A	N/A	N/A	N/A	N/A	0 of 1	N/A	N/A	N/A	0 of 3	N/A
Sherrill Drive Spring	N/A	N/A	N/A	0 of 1	1 of 2 (3)	0 of 1	1 of 2 (1)	0 of 1	N/A	N/A	N/A	0 of 3	0 of 4
Kennedy Street Spring	N/A	N/A	N/A	N/A	N/A	N/A	1 of 2 (1)	0 of 1	N/A	N/A	N/A	N/A	0 of 4
Coquelin Run	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	1 of 1 (2)	1 of 1 (2)	N/A	N/A	1 of 4 (1)
Burnt Mill Spring #6	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	1 of 1 (5)	0 of 1	0 of 3	0 of 6
Upper Mill #2 (DoD)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	1 of 4 (1)
Mill #4 (DoD)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	1 of 6 (1)
Mill #5 (DoD)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	2 of 7 (4)
Mount #2 (DoD)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	2 of 6 (1)

At Fort A.P. Hill, all collections of the Kenk's amphipod were taken during surveys conducted in the spring of 2014; therefore, no trend data exist for the four occupied spring sites. Twenty-one sites were surveyed with 5 to 7 visits per site. The numbers of the Kenk's amphipod collected that year were low at all sites, ranging from 1 to 4 individuals (see table 1 above). Other species of *Stygobromus,* including *S. tenuis* (no common name), Tidewater stygonectid amphipod (*S. indentatus*), and Rappahannock Spring amphipod (*S. foliatus),* were also found at several of these Virginia sites.

Summary of Distribution and Relative Abundance: The above information represents the best available data on the Kenk's amphipod's known distribution and relative abundance. However, the habitat areas at Fort A.P. Hill occur in different river drainages and geological formations from those in the Washington metropolitan area, which suggests that additional surveys may identify additional locations and further expand the species' current known range. The Service plans to fund additional amphipod surveys to be conducted during suitable sampling conditions in late 2016 and early 2017 in accessible areas of Maryland and northeastern Virginia that have geology similar to that of the Fort A.P. Hill sites and other suitable habitat characteristics (*e.g.,* forested slopes dissected by streams). The U.S. Army also plans to conduct additional amphipod surveys at Fort A.P. Hill in spring 2017. Additional surveys for the known Maryland and the District of Columbia sites are also planned.

Summary of Biological Status and Threats

The Act directs us to determine whether any species is an endangered species or a threatened species because of any factors affecting its continued existence. In this section, we review the biological condition of the species and its resources, and the influences on such to assess the species' overall viability and the risks to that viability.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Water Quality/Quantity Degradation Due to Chronic Pollution of Urban/Suburban Runoff

Habitat modification, in the form of degraded water quality and quantity, is one of the primary drivers of Kenk's amphipod viability. While the species' specific tolerances to parameters affecting water quality and quantity is not yet known, we do know that the Kenk's amphipod is at increased risk to parameters that negatively affect water quality and quantity because these freshwater amphipods spend their entire life cycle in water and are, therefore, continually exposed to changes in the aquatic habitat. Water quality degradation of ground water at spring sites located in the Washington metropolitan area has been previously cited as a top concern in several studies and reports (Feller 1997, pp. 12–13; Culver and Sereg 2004, p. 13; Feller 2005, p. 9; Hutchins and Culver 2008, p. 6; Kavanaugh 2009, p. 60; Culver *et al.* 2012, p. 37; Culver and Pipan 2014, p. 219).

The amount of forested buffer surrounding the seep influences the species' vulnerability and exposure to negative effects, and the smaller the buffer, the greater the risk of exposure. Buffer distance is important because the buffer helps filter sediment and other contaminants from the surface water entering the catchment areas and, therefore, the ground water that supports the Kenk's amphipod. The Washington metropolitan area amphipod sites have narrow riparian buffers (94 feet (ft) to 1,000 ft) (29 m to 305 m) separating them from the surrounding urban landscape. This urban land is characterized by impervious surface cover, which includes paved roads, sidewalks, parking lots, and buildings (Sexton *et al.* 2013, p. 42). The general percentage of impervious surface inside the Capitol Beltway (I–495) (*i.e.*, where all the District of Columbia and Maryland Kenk's amphipod sites are located) increased from 22 percent in 1984 to 26 percent in 2010. The annual rate of increase in impervious cover within the Washington Beltway has also doubled since the 1980s, from 2 to 4 square (sq.) miles (6 to 12 sq. km) (Sexton *et al.* 2013, pp. 42–53; Song *et al.* 2016, pp. 1–13; *http://www.earthobservatory.nasa.gov/IOTD/view.php?id=87731*, last accessed 07/07/2016).

Urban impervious surfaces can result in increased surface water flow after storm events due to decreased opportunity for immediate or proximal infiltration. The surface flow waters have higher temperatures, higher sediment loads, and higher levels of heavy metals (zinc, cadmium), nitrogen, phosphorus, and fecal coliform bacteria (Walsh *et al.* 2005, pp. 706–723). In addition to affecting water quality, urban impervious surfaces can affect water quantity; decreased infiltration can result in depletion of ground water reserves and ultimately cause springs to dry up over time (Frazer 2005, p. 3).

It is well documented that impervious cover from urbanization affects biological communities in streams. For example, a review of more than 30 studies by the Center for Watershed Protection (2003, pp. 101–102) found that sensitive aquatic insect species were absent or less abundant in streams that drain from urban areas, and aquatic insect diversity decreased when imperviousness reached 10 to 15 percent. The Maryland Department of Natural Resources (MDDNR) found that, in Maryland when the general percentage of watershed imperviousness exceeds 15 percent, stream health is never rated as "good," based on a combined fish and benthic macroinvertebrate Index of Biotic Integrity. The Potomac Washington metropolitan basin, which incorporates the area surrounding Kenk's amphipod sites, has the smallest percentage of stream miles rated as "good" (less than 1 percent) (Boward *et al.* 1999, p. 45).

Hyporheic habitat, which is a transition area between surface and shallow ground water, is found within the interstitial spaces within the sediments of a stream bed but also can be found in spring runs (Culver and Sereg 2004, pp. 70–71) that support the Kenk's amphipod. Hancock (2002, pp. 766–775) evaluated human activities that affect the hyporheic zone. Pesticide pollution, heavy metal and chemical pollution from industrial and urban sources, increased salinity, and acidity were all cited as stressors that may make this habitat unsuitable for invertebrates. In addition to documenting lethal effects on individuals from these stressors, researchers have documented changes in macroinvertebrate diversity and abundance that include an increase in species that are tolerant to elevated levels of the stressors and a decrease in species sensitive to elevated levels of those stressors (Hancock 2002, pp. 768–770).

The hypotelminorheic zone, which is described as the main habitat required by the Kenk's amphipod, may be more vulnerable to the effects of urban runoff than streams or the hyporheic zone with respect to pollutants, erosion, and sedimentation because of the small size and shallow nature of the habitat. In addition, the aforementioned narrow buffer zones around the hypotelminorheic sites increase the habitat's and species' exposure to urban runoff.

Storm water runoff in urban areas is commonly transported through Municipal Separate Storm Sewer Systems (MS4s), from which it is often discharged untreated into local waterbodies. Storm water is regulated to prevent harmful discharges of pollutants into MS4s. The Clean Water Act's (CWA's) National Pollutant Discharge Elimination System program requires permits for discharges into MS4s and development of storm water management programs. Despite these regulatory requirements, poor water quality has been documented in the past at several springs in Rock Creek Park (Culver and Sereg 2004, p. 69).

In the Washington metropolitan area, water quality degradation from urban runoff is believed to have affected the Kenk's amphipod's Sherrill Drive Spring population (Culver and Sereg 2004, p. 69). Sherrill Drive Spring is close (approximately 115 ft (35 m)) to the edge of Rock Creek Park where there is an abrupt change from forested habitat to an urban landscape along 16th Street Northwest, which parallels the park boundary. There is a significant amount of impervious cover that routes runoff into the catchment area surrounding the Sherrill Drive Spring.

While there have been no laboratory studies conducted to evaluate the effects and tolerance of the Kenk's amphipod or the more common Potomac groundwater amphipod to chemical, nutrient, pesticide, or heavy metal pollution, we do know from published studies that amphipods may be one of the most vulnerable groups of organisms to chemical pollution due to their high sensitivity to toxicants and contaminant accumulation (Borgmann *et al.* 1989, p. 756; Brumec-Turc 1989, p. 40). Culver and Sereg (2004, pp. 30–31) collected water samples from the East Spring, Kennedy Spring, and Sherrill Drive Spring sites on four occasions (October 2000, April 2001, July 2001, and March 2003) to measure temperature, pH, conductivity, dissolved oxygen, and nitrates. Sediment samples surrounding the springs were also collected in September 2001 at East Spring and Sherrill Drive Spring to analyze metal and organic contaminants. From these samples, Sherrill Drive Spring showed evidence of water quality degradation via the presence of heavy metals and higher nitrate and conductivity levels as compared to the other sampled spring sites; East Spring also had evidence of heavy metals (see below) (Culver and Sereg 2004, pp. 30–31).

Heavy metals were found in sediment samples taken from Sherrill Drive Spring and East Spring in Rock Creek Park. Values were similar for the two sites, although East Spring had the highest values for all heavy metals, with the exception of zinc (Culver and Sereg 2004, p. 65). Because the spring sediments instead of water samples were collected for heavy metal analysis, it is difficult to know whether the value of the heavy metals measured in the sediments exceed aquatic life standards in water or any published values for freshwater amphipod species. Sources of trace metals in an urban environment may include vehicles, streets, parking lots, snowpacks, and rooftops (Center for Watershed Protection 2003, p. 73).

Nitrate levels as high as 30.8 milligrams per liter (mg/L) were also found at Sherrill Drive Spring. There are no aquatic life standards for nitrates issued by the Maryland Department of the Environment, the District of Columbia Department of the Environment, or the U.S. Environmental Protection Agency (EPA). Therefore, we reviewed the best available and relevant guidance values from Minnesota, Canada, and New Zealand (Minnesota Pollution Control Agency 2010, p. 9; Canadian Council of Ministers of the Environment 2012, p. 1; Hickey and Martin 2009, p. 20). Based on the comparison with available guidance, the nitrate concentrations collected at Sherrill Drive Spring (up to 30.8 mg/L) exceeded the chronic aquatic life exposure criterion for nitrate (*e.g.*, 2.4 mg/L to 4.9 mg/L) based on Minnesota, New Zealand, and Canada guidance values on three of the four sampling events. It is not known how typical these concentrations are and if chronic exposure is occurring. The source of the nitrate is unknown; nitrate could come from runoff containing fertilizers or animal waste or from sanitary sewer leaks. There is a sanitary sewer line that runs adjacent to the spring, and this sewer line has leaked in the past (Feller 1997, p. 37; B. Yeaman, pers. comm., 06/02/2014).

Chloride levels as high as 207 mg/L were detected at Sherrill Drive Spring. Chronic concentrations of chloride as low as 250 mg/L have been recognized as harmful to freshwater life (Canadian Council of Ministers of the Environment 2011, p. 1; *https://www.epa.gov/wqc/national-recommended-water-quality-criteria-aquatic-life-criteria-table*, last accessed 07/19/2016). Although we do not know the exact source of the elevated chloride levels at Sherrill Drive Spring, one potential source could be road salt. The Washington metropolitan area receives, on average depending on where it was measured and the time series, approximately 15 inches of snow annually (*https://www.sercc.com/climateinfo/historical/avgsnowfall.html*, last accessed August 10, 2016; *https://www.currentresults.com/Weather/US/washington-dc-snowfall-totals-snow-accumulation-averages.php*, last accessed 8/10/2106). The District of Columbia Department of Public Works uses road salt and other salt products to pre- and post-treat road surfaces before and after ice and snowfall events (*http://dpw.dc.gov/service/dc-snow-removal*, last accessed 8/10/2016). Studies have shown that the widespread use of salt to deice roadways has led to regionally elevated chloride levels equivalent to 25 percent of the chloride concentration in seawater during winter. The chloride levels can remain high throughout the summer even in less urbanized watersheds due to long-term (*e.g.*, decades) accumulation of chloride in ground water (Kaushal *et al.* 2005, pp. 13518–13519).

At Coquelin Run Spring, ground water pollution from yard chemicals and road runoff (*e.g.*, road salts, oil) could be a concern for the species' long-term viability. U.S. Geological Survey (USGS) research on water quality degradation in other urban areas indicates that chemicals enter waterways and ground water primarily through runoff from rain events and these chemicals have commonly been detected in streams and shallow ground water (USGS 1999a, pp. 1–3; USGS 1999b, p. 1; USGS 2001, p. 2; *http://pubs.usgs.gov/fs/1998/fs007-98/index.html*, last accessed 07/19/2016). Although no water samples have been taken at the Coquelin Run Spring site, it is separated from backyards in this neighborhood by a narrow, wooded riparian strip (less than 100 ft) (30 m) that slopes steeply down to the site. Therefore, the Coquelin Run Spring may be at increased risk of exposure to chemical pollutants from the surrounding urban development.

The other four Washington metropolitan area sites (Burnt Mill Spring #6, Holsinger Spring, East Spring, and Kennedy Spring) have wider buffers than Sherrill Drive Spring and Coquelin Run Spring, with buffer distances ranging from approximately 272 ft (83 m) to 1,000 ft (305 m). East Spring and Kennedy Spring had much lower conductivity and nitrate levels than Sherrill Drive Spring (Culver and Sereg 2004, pp. 55–58). Surveys conducted in 2015 and 2016 did not reconfirm the Kenk's amphipod at any of these sites but consistently found the more common Potomac groundwater amphipod at all the sites in higher numbers (*e.g.*, greater than 40 observed at Burnt Mill Spring #6 during 1 sampling event). As discussed previously, urban runoff can decrease biotic richness and favor more pollution-tolerant species in urban streams (Center for Watershed Protection 2003, pp. 101–102). If the Potomac groundwater amphipod has a higher tolerance than Kenk's amphipod to poor water quality parameters, the change in species' composition discussed above in the Relative Abundance section and below in Factor E—*Changes in Species Composition* could indicate that urban runoff is negatively affecting the Kenk's populations at these spring sites. Water quality samples will be collected at these sites in 2016 and 2017 to better assess whether water quality parameters exceed general EPA guidance values for aquatic life.

The NPS manages the surrounding habitat at the four seepage spring sites supporting the Kenk's amphipod in Rock Creek Park. Conservation of park resources is mandated by the National Park Service Organic Act of 1916, which requires the NPS "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." It is also mandated by section 7 of the Rock Creek Park enabling legislation of 1890, which states that "such regulations shall provide for the preservation from injury and spoilation of all timber, animals, or curiosities within said park, and their retention in their natural condition, as nearly as possible." These laws are implemented through the NPS's formal management policy that requires that management of candidate species should, to the greatest extent possible, parallel the management of federally listed species (D. Pavek, pers. comm., 05/12/2011). While the NPS is utilizing its regulatory authority to manage water quality concerns for the species within Rock Creek Park, the agency has little influence over the protection of or effects to any seep recharge areas occurring outside park boundaries, and over maintenance or repair of city-owned infrastructure such as storm water and sewer systems located near the spring sites.

The NPS worked with the District of Columbia Department of Transportation (DCDOT) to incorporate the construction of a storm sewer under

Sherrill Drive into the design of the 16th Street road reconstruction and storm drainage project (B. Yeaman, pers. comm., 05/19/2015), resulting in the elimination of a major outfall at the Sherrill Drive Spring site. However, as discussed above, this effort has not completely eliminated the documented erosion and poor water quality concerns at the site.

The NPS is communicating with DCDOT on the need to move the sanitary sewer line adjacent to the Sherrill Drive Spring out of Rock Creek Park and into the neighborhood on the other side of 16th Street. If the line cannot be moved, the alternative is to reline the existing pipe to prevent further leakage (B. Yeaman, pers. comm., 07/11/2016). In addition, the Service, NPS, and the District of Columbia Department of the Environment have worked cooperatively to obtain funding for best management practices (reducing erosion and increasing infiltration) on two tributaries flowing into the drainage of Kennedy Street Spring, which supports both the Kenk's amphipod and the federally endangered Hay's Spring amphipod. Project funding was approved in January of 2015, and implementation, which includes construction of bioretention basins and infiltration berms, is to be completed by November 2017.

In Virginia, poor water quality may not be affecting the species at the Fort A.P. Hill because the sites are substantially buffered by currently undeveloped property.

Summary of Water Quality—In total, poor water quality is believed to be a significant or contributing stressor at all six of the Washington metropolitan area sites (*i.e.*, 60 percent of the total known sites). Water quality in this area is expected to worsen due to significant runoff events from anticipated increases in both winter and spring precipitation and the frequency of high intensity storms. See Factor A—*Excessive Storm Water Flows* and Factor E—*Effects of Climate Change* sections below for more details.

Excessive Storm Water Flows

Runoff from impervious surfaces after heavy rain events can result in flooding (Frazer 2005, p. 4; *http://www.nbcwashington.com/traffic/transit/Metro-Station-Flooding-Nearby-Parking-Lot-Expansion-Could-Be-Part-of-Cause-384015451.html*; last accessed 06/24/16). Flash flooding can also result in erosion and sedimentation (Center for Center for Watershed Protection 2003, pp. 30–33), which, if it occurs in the catchment area, can subsequently degrade a spring site's value as habitat for the Kenk's amphipod.

In the Washington metropolitan area, excessive storm water flows are causing significant habitat degradation at two sites—Sherrill Drive Spring and Coquelin Run Spring. A washout at Sherrill Drive Spring from 16th Street was observed in 2016 making it difficult to find a seep to survey (D. Feller, pers. comm., 06/15/2016). Coquelin Run Spring is severely degraded by runoff from the surrounding Chevy Chase Lake Subdivision, where severe erosion was first observed at this site in 2006 (D. Feller, pers. comm., 07/01/2016). When the site was first re-surveyed in 2016, a plastic underground pipe several inches in diameter was observed less than 1 ft (0.3 m) from the original seep (D. Feller, pers. comm., 02/27/2016; D. Feller, pers. comm., 05/27/2016), which may have been an attempt to address water flow and erosion at the site. Erosion was still evident during the 2016 surveys and it was difficult for MDDNR to find a flowing seep (D. Feller, pers. comm., 02/27/2016). A small flow was observed in May 2016, but was located several feet above the original seep documented in 2006. Plastic sheet material was also observed under this uphill seep (D. Feller, pers. comm., 05/25/2016), which may have been an attempt to address water flow and erosion at the site. It is unknown what affect the pipe or plastic may have on the long-term hydrology of the site.

Erosion from storm water flows has also been observed at the other four springs in Rock Creek Park, but not to the extent that it has been observed at Sherrill Drive and Coquelin Run springs. It is unknown how much chronic or acute erosion and sedimentation causes a site to become unsuitable for the Kenk's amphipod; however, Culver and Sereg (2004, p. 69) found that sediment transported by storm runoff results in the degradation of ground water animals' habitat by clogging the interstices of gravels in the spring seep, thereby preventing the species from using those interstitial spaces for shelter. It is uncertain to what extent Kenk's amphipod uses those interstitial spaces, but if they do, then it is plausible that this type of sedimentation would cause the habitat to become unsuitable for the species.

At the Virginia sites, we have no information indicating excessive storm water flows may affect the species.

Summary of Excessive Storm Water Flows—Excessive storm water flows are a concern at 60 percent (6 of 10) of the species' sites.

Sewer Line Breaks and Spills

The same riparian areas that contain the habitats of the Kenk's amphipod are among the principal areas where sewer lines are located in the Washington metropolitan area (Feller 2005, p. 2). Most of these sewer lines are old (most installed between 1900 and 1930 in the District of Columbia, and between 1941 and 1971 in Montgomery County, MD) and subject to periodic breakage and leakage (Shaver 2011, entire; Kiely 2013, entire). While there have been no laboratory or field studies evaluating the effect of sewage leaks or spills on the Kenk's amphipod or the Potomac groundwater amphipod, adverse effects of sewage contamination on amphipods and other invertebrates have been documented by several researchers. For instance, Simon and Buikema (1977, entire) studied a karst ground water system and found that amphipods were absent from ground water pools polluted by septic system effluent. The authors reported that the highest densities of Virginia cave isopods were found in pools that were slightly and moderately polluted from septic systems, whereas an amphipod, *Stygobromus makini* (southwestern Virginia cave amphipod), was absent from all polluted pools. de-la-Ossa-Carretero *et al.* (2012, p. 137) stated that, as an Order, amphipods were generally sensitive to sewage pollution, but that there are substantial differences in sensitivity between amphipod species (de-La-Ossa-Carretero *et al.* 2012, p. 129).

Releases of large volumes of sewage (up to 2 million gallons (gal)) from sanitary sewer leaks have occurred in the District of Columbia and Montgomery County, MD. Distances of seep sites to nearby upslope sewer lines are shown in table 2 below. Based on these distances, Coquelin Run Spring, Burnt Mill Spring #6, and Sherrill Drive Spring are most vulnerable to sewage spills (see table 2 below). As mentioned above, a sanitary sewer line located nearby Sherrill Drive Spring has been described as structurally unsound and is subject to leakage (Feller 1997, p. 37; B. Yeaman, pers. comm., 06/02/2014; B. Yeaman, pers. comm., 02/24/15).

Over the 10-year period from 2005 through 2015, the Washington Suburban Sanitary Commission (WSSC) has documented approximately 38 leaks of more than 1,000 gal in the Rock Creek drainage and 15 leaks of more than 1,000 gal in the Northwest Branch in Montgomery County. During the same period there were 136 leaks of more than 100 gal in the Rock Creek drainage and 51 leaks of more than 100 gal in the

Northwest Branch in Montgomery County (WSSC 2015). The District of Columbia does not have such detailed records, but the District of Columbia Water Chief Executive Officer has stated that half the District's 1,800 mi (2,896 km) of sewer lines are at least 84 years old and has estimated that faulty pipes result in two dozen sewer spills every year (Olivio 2015). The frequency of spills is likely to increase in the future as the sewer lines continue to age.

TABLE 2—SEWER AND WATER LINES NEAR KENK'S AMPHIPOD SPRINGS

Site name	Location	Pipe type	Diameter in inches (″)	Year installed	Pipe material	Distance from spring in feet (′)
Sherrill Drive Spring	Rock Creek Park	Sanitary Sewer	12	1924	unknown	10
Sherrill Drive Spring	Rock Creek Park	Sanitary Sewer	12	1926	unknown	200
Sherrill Drive Spring	Rock Creek Park	Storm Sewer	30	1958	unknown	30
Sherrill Drive Spring	Rock Creek Park	Storm Sewer	24	1933	unknown	60
Sherrill Drive Spring	Rock Creek Park	Storm Sewer	15	1949	unknown	120
Sherrill Drive Spring	Rock Creek Park	Water Transmission Main.	30	1955	PCCP Lined Cylinder.	130
Sherrill Drive Spring	Rock Creek Park	Water Distribution Main.	12	1919	cast iron	155
East Spring	Rock Creek Park	Storm Sewer	18	unknown	unknown	475
East Spring	Rock Creek Park	Sanitary Sewer	10	1925	unknown	658
East Spring	Rock Creek Park	Sanitary Sewer	10	1911	unknown	750
East Spring	Rock Creek Park	Water Distribution Main.	6	1921	cast iron	560
East Spring	Rock Creek Park	Water Distribution Main.	8	1911	cast iron	740
Kennedy Street Spring.	Rock Creek Park	Sanitary Sewer	10	1911	unknown	900
Kennedy Street Spring.	Rock Creek Park	Storm Sewer	21	1931	unknown	1300
Kennedy Street Spring.	Rock Creek Park	Sanitary Sewer	10	1911	unknown	1350
Kennedy Street Spring.	Rock Creek Park	Water Distribution Main.	8	1911	cast iron	860
Kennedy Street Spring.	Rock Creek Park	Water Distribution Main.	8	1912	cast iron	1357
Coquelin Run Spring.	Montgomery County, MD.	Gravity sewer pipe	8	1954	unknown	220
Coquelin Run Spring.	Montgomery County, MD.	Water pipe	8	1954 (lined 1995)	cast iron or sand spun.	205
Coquelin Run Spring.	Montgomery County, MD.	Water pipe	4	unknown	ductile iron	213
Coquelin Run Spring.	Montgomery County, MD.	Water pipe	8	1954 (lined 1995)	cast iron or sand spun.	232
Burnt Mill Spring #6	Montgomery County, MD.	Gravity sewer pipe	6	unknown	cast iron	186
Burnt Mill Spring #6	Montgomery County, MD.	Gravity sewer pipe	8	unknown	unknown	383
Burnt Mill Spring #6	Montgomery County, MD.	Water pipe	6	1959	cast iron or sand spun.	394
Holsinger Spring	Rock Creek Park	Storm Sewer	36	1931	unknown	1875
Holsinger Spring	Rock Creek Park	Sanitary Sewer	18	1908	unknown	1925
Holsinger Spring	Rock Creek Park	Water Distribution Main.	6	1898	cast iron	1885

At the Virginia sites, we have no information indicating sewer pipelines may affect the species.

Summary of Sewer Line Spills—In total, sewer line breaks and spills are a concern at 30 percent (3 of 10) of the species' sites.

Water Pipe Breaks

Bursting of large-diameter water pipes can cause significant erosion of surrounding areas as a result of the large volume of fast-moving water that exits the pipe at the break point. Bursting water pipes and the resulting erosion has been documented within the Washington metropolitan area, including at areas near but not directly at a specific Kenk's amphipod seep site. For example, a 60-in (152.4-cm) water main broke at the Connecticut Avenue crossing of Coquelin Run in 2013, releasing 60 million gal of water and scouring out a 500-ft (152.4-m) length of the creek (Dudley *et al.* 2013, entire). The Coquelin Run Spring site is on a small tributary that flows into Coquelin Run, about a quarter mile downstream of the aforementioned severely damaged section of the creek bed and, due to its elevation above Coquelin Run, was not affected by the flood and subsequent erosion caused by this burst pipe.

The exposure risk of bursting water pipes at locations that could affect Kenk's amphipod sites is increasing given the age of the water pipe infrastructure (see table 2 above). As an example, there is one very-large-diameter (30-in (76-cm)) water pipe within 130 ft (39.6 m) of Sherrill Drive Spring that was installed more than 60 years ago. The significant erosion resulting from a large break, should the break occur near Kenk's amphipod habitat, could eliminate the seep and all associated amphipods.

The best available data indicate that there are smaller pipes near three of the sites (Sherrill Drive Spring, Burnt Mill #6 Spring, Coquelin Run Spring) (WSSC GIS Web site, *http://gisweb.wsscwater.com/WERI/Account/Login?ReturnUrl=%2fweri*, last accessed 12/21/2015) (see table 2 above). Although less likely to eliminate habitat of springs, breakage of smaller pipes (less than 1 ft (0.3 m) in diameter) is even more frequent (Water Research Foundation 2016, p. 2) and still may result in erosion or sedimentation at the spring site. Coquelin Run Spring is within 250 ft of a 6- to 8-in (15- to 20-cm) water pipe installed in 1954 (WSSC GIS Web site). Given the overall age of the infrastructure and the District of Columbia and Maryland utilities' inability to keep up with the needed replacements (Shaver 2011, entire; Kiely 2013, entire), additional breaks are predicted to occur.

At the Virginia sites, we have no information indicating water pipeline breaks may affect the species.

Summary of Water Pipe Breaks—In total, large water pipeline breaks are a concern at 10 percent (1 of 10) of the species' sites, while smaller water pipeline breaks are a concern for 30 percent (3 of 10) of the sites.

Other Habitat Considerations

Compared to the stressors to the Kenk's amphipod habitat in the Washington metropolitan area, the stressors to the species' habitat at Fort A.P. Hill are likely minimal. Little or no development is expected to occur near the spring sites (J. Applegate, pers. comm., 05/5/2016). However, military training exercises may be conducted in areas surrounding the springs, which may result in disturbance of the spring recharge areas. Live-fire exercises may result in uncontrolled burns that reduce canopy cover that shades the seep sites, moderates water temperature, and provides leaf litter for food. Timber harvests and other forest management activities such as timber stand improvement, prescribed burns, and possible pesticide application for forest-destroying pests such as gypsy moths may occur in the general vicinity of the springs (Fort A.P. Hill 2016, pp. 751–754). Fort A.P. Hill has included a 100-ft (30.5-m) buffer around the springs in the installation's Integrated Natural Resources Management Plan (INRMP) (2016, pp. 9–22), but it is unknown whether this buffer distance is sufficient to protect the sites and recharge areas from all of the activities (*e.g.*, forest management, live-fire exercises) outlined in the INRMP. However, staff at Fort A.P. Hill have indicated a willingness to work with the Service to delineate recharge areas based on topography, and, if needed, institute more protective buffers (J. Applegate, pers. comm., 06/15/2016).

Summary of Factor A—Habitat modification, in the form of degraded water quality and quantity, is one of the primary drivers affecting Kenk's amphipod viability, despite the discussed ongoing conservation measures. Reductions in water quality are occurring primarily as a result of urbanization, which increases the amount of impervious cover in the watersheds surrounding Kenk's amphipod sites. Impervious cover increases storm water flow velocities and increases erosion and sedimentation. Impervious cover can also increase the transport of contaminants and nutrients common in urban environments, such as heavy metals (zinc, cadmium), nitrogen, phosphorus, and fecal coliform bacteria. The Washington metropolitan area sites have narrow riparian buffers separating them from the surrounding development, increasing the sites' exposure to poor water quality runoff. Poor water quality has been documented at Sherrill Drive Spring but is likely affecting all six sites in the Washington metropolitan area, whereas the Virginia sites are not thought to be affected by poor water quality because of the larger forested buffers on Fort A.P. Hill.

Excessive storm water runoff from heavy rain events can result in flooding, which can cause erosion and sedimentation. Habitat degradation due to excessive storm water flows is having significant effects at two sites—Sherrill Drive Spring and Coquelin Run Spring—but has also been observed at the other four springs in Rock Creek Park, and may increase in the future. At the Virginia sites, we have no information indicating excessive storm water flows may affect the species.

Sewer and water line breaks and leaks are a concern at the Washington metropolitan area sites because most of them are located in the same riparian areas that contain the habitats of the Kenk's amphipod. While leaks and breaks of these pipelines have not yet been known to directly affect the species or its habitat, the pipeline systems are subjected to chronic leaks and breaks, the frequency of which is likely to increase given the age of the infrastructure, and thus the exposure risk of the species to this stressor will continue to increase. Coquelin Run Spring, Burnt Mill Spring #6, and Sherrill Drive Spring are most vulnerable to sewage spills and water pipe breaks due to the pipe's proximity to each site and the age of the pipes. At the Virginia sites, we have no information indicating sewer or water pipeline breaks may affect the species.

Potential stressors to Kenk's amphipod habitat are lesser in scope and severity at Fort A.P. Hill, as opposed to the Washington metropolitan area habitat, and are associated with disturbance to the surface habitat.

TABLE 3—RELATIVE VULNERABILITY OF KENK'S AMPHIPOD SEEP HABITAT SITES

Site name	Location	Current seep status	Current biological status of the Kenk's amphipod
Sherrill Drive Spring	Rock Creek Park, Washington, DC.	Approximately 50′ to road, documented decrease in water quality (chemical and sedimentation), within 10′ of 1924 sewer pipe and 130′ of 1955 30″ water pipe.	Extirpated? Not found in recent surveys. No other *Stygobromus* present. Last detected 2001 (8 surveys since and none found).
East Spring	Rock Creek Park, Washington, DC.	Approximately 300–500′ buffer of protected forest, within 560′ of 6–8″ 1921 water pipe.	Unknown. Not found in recent surveys but other *Stygobromus* present. Last detected 2001 (7 surveys in 2015–2016 and none found).
Kennedy Street Spring	Rock Creek Park, Washington, DC.	Approximately 500′ buffer of protected forest, within 860′ of 6–8″ 1911 water pipe.	Unknown. Not found in recent surveys but other *Stygobromus* present. Last detected 2001 (5 surveys since and none found).
Holsinger Spring	Rock Creek Park, Washington, DC.	Approximately 700–1,000′ buffer of protected forest	Historical? Not documented since 1967. 1 survey in 2003 and 3 surveys in 2015 and none found.
Burnt Mill Spring #6	Northwest Branch Park, Montgomery County, MD.	In county park protected from further development, within 186′ of unknown age sewer pipe and 394′ of 6–8″ 1959 water pipe.	Unknown. Not found in recent surveys but other *Stygobromus* present. Last detected in 2005 (10 surveys since and none found).

TABLE 3—RELATIVE VULNERABILITY OF KENK'S AMPHIPOD SEEP HABITAT SITES—Continued

Site name	Location	Current seep status	Current biological status of the Kenk's amphipod
Coquelin Run Spring	Private land, Montgomery County, MD.	Erosion problems are already apparent, site has been modified with a plastic pipe and plastic material, and riparian forest is very narrow, within 220′ of 1952 sewer pipe and 250′ of 6–8″ 1954 water pipe.	Present in upslope portion of seep (1 individual found in last survey); lower portion has some erosion and species absent in recent surveys (3 surveys and none found).
Fort A.P. Hill (4 seeps)	Department of Defense, Caroline County, VA.	Good habitat quality, sites unaffected by urbanization. Military exercises and forest management could affect surface habitat if protective areas encompassing the recharge area are not established and implemented.	Recently discovered. 1 individual each found at Upper Mill 2, Mill 4, and Mount 2; 4 individuals found at Mill 5.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Overutilization is not known to be a factor affecting the Kenk's amphipod. The Kenk's amphipod is a Maryland State endangered species under its Nongame and Endangered Species Conservation Act (Section 10–2A–01–09 of the Maryland Code). This designation makes "taking, possession, transportation, exportation, processing, sale, offer for sale, or shipment within the State" of a State-listed species unlawful. Kenk's amphipod is considered a species of greatest conservation need in the District of Columbia's State Wildlife Action Plan (*http://doee.dc.gov/sites/default/files/dc/sites/ddoe/service_content/attachments/03%202015%20WildlifeActionPlan%20%20Ch2%20SGCN.pdf*; last accessed 8/10/2016), but this status does not confer any regulatory protection; the species is not State-listed in Virginia.

Distribution surveys for the species are coordinated with the Service and, where required, collection is permitted through the Service, NPS, and the MDDNR. Whether specifically permitted or not, all amphipod surveys are conducted using consistent methodology and collection protocols. The target species of *Stygobromus* is collected based on size, and the number of individuals collected at each spring has been limited to 10 or fewer individuals in the target species' size range. However, the Service has allowed larger numbers to be collected during 2016 surveys in the Washington metropolitan area since none of the specimens of appropriate size collected in the 2015 surveys have been identified to be Kenk's amphipod. These protocols are followed to minimize effects to the species. Because the occurrence of subterranean invertebrates at spring emergence sites likely represents only a portion of the actual underground population, the Service has considered the collecting procedures (Feller 1997, p. 2) to be nondetrimental to the populations.

Factor C. Disease or Predation

We have no information that indicates that either disease or predation is affecting the Kenk's amphipod.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

The following existing regulatory mechanisms were specifically considered and discussed as they relate to the stressors, under the applicable Factors, affecting the Kenk's amphipod: The CWA's National Pollutant Discharge Elimination System, Rock Creek Park enabling legislation of 1890, and National Park Service Organic Act of 1916 (Factor A) and Nongame and Endangered Species Conservation Act (Factor B). In Factor A we conclude that habitat modification, in the form of degraded water quality and quantity, is one of the primary drivers affecting Kenk's amphipod viability. In Factor B we conclude that overutilization is not known to be affecting the species. There are no existing regulatory mechanisms to address the stressors affecting the species under Factor E (see below).

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

Small Population Dynamics

The observed small size of each of the 10 Kenk's amphipod populations makes each one vulnerable to natural environmental stochasticity and human-caused habitat disturbance, including relatively minor impacts in their spring recharge areas. Each population is also vulnerable to demographic stochasticity, including loss of genetic variability and adaptive capacity. Unless the populations are larger than we know or are hydrologically connected such that individuals can move between sites, we conclude that these small populations are vulnerable to the effects of small population dynamics.

Species that are restricted in range and population size are more likely to suffer loss of genetic diversity due to genetic drift, potentially increasing their susceptibility to inbreeding depression, and reducing the fitness of individuals (Soule 1980, pp. 157–158; Hunter 2002, pp. 162–163; Allendorf and Luikart 2007, pp. 117–146). Small population sizes and inhibited gene flow between populations may increase the likelihood of local extirpation (Gilpin and Soulé 1986, pp. 32–34). With the exception for the Mount Creek #2 and Mount Creek #5 populations at Fort A.P. Hill, which are separated by only approximately 360 ft (110 m), all the other populations of the Kenk's amphipod are isolated from other existing populations and known historical habitats by long distances, inhospitable upland habitat, and terrain that creates barriers to amphipod movement. The level of isolation and the restricted range seen in this species, based on our current knowledge of known habitat, make natural repopulation of historical habitats (*e.g.*, the District of Columbia sites and Burnt Mill Spring #6 where the species' presence has not been recently confirmed) and other potentially suitable habitat virtually impossible without human intervention.

Effects of Climate Change

Climate change may result in changes in the amount and timing of precipitation, the frequency and intensity of storms, and air temperatures. All of these changes could affect the Kenk's amphipod and its habitat. The amount and timing of precipitation influence spring flow, which is an important feature of the habitat of this groundwater species. Also, the frequency and intensity of storms affects the frequency, duration, and intensity of runoff events, and runoff transport of sediment and contaminants (see Factor A above) into catchment areas of Kenk's amphipod sites, especially in the Washington metropolitan area, where there is a substantial amount of impervious cover in close proximity to the habitat. Below we discuss the best available climate predictions for the areas supporting the Kenk's amphipod.

The 2014 National Climate Assessment (Melillo *et al.* 2014, entire) predicts increasing ambient temperatures, increasing winter and spring precipitation, increasing frequency of heavy downpours, and increasing summer and fall drought risk as higher temperatures lead to greater evaporation and earlier winter and spring snowmelt (Horton *et al.* 2014, p. 374 *In* Melillo *et al.* 2014). These droughts may result in the drying up of springs and mortality of the Kenk's amphipod, while the increase in heavy downpours will likely result in increased runoff and resulting erosion of surface features at spring sites, based on previously documented events. The 2014 National Climate Assessment further indicates that overall warming in the Northeast, including Maryland and the District of Columbia, but not Virginia, will be from 3 to 10 degrees Fahrenheit (°F) (1.7 to 5.6 degrees Celsius (°C)) by the 2080s (Horton *et al.* 2014, p. 374 *In* Melillo *et al.* 2014).

Data specific to the District of Columbia from NOAA's National Climate Data Center (*http://www.ncdc.noaa.gov/cag/time-series/us/49/USW00093738/tavg/1/5/1895-2016?base_prd=true&firstbaseyear=1901&lastbaseyear=2000&trend=true&trend_base=10&firsttrendyear=1895&lasttrendyear=2016*, last accessed 07/20/2016) shows that the average annual air temperature in the District of Columbia area has already increased by approximately 3 °F (1.7 °C) from 1960, the decade corresponding to the first Kenk's amphipod surveys, to 2015. This higher rate of change in the District of Columbia area may be due to the urban heat island effect (Oke 1995, p. 187), which is an increase in ambient temperature due to heating of impervious surfaces. This activity also results in an increase in temperature of rainwater that falls on heat-absorbing roads and parking lots. A sudden thunderstorm striking a parking lot that has been sitting in hot sunshine can easily result in a 10 °F (5.6 °C) increase in the rainfall temperature. Menke *et al.* (2010, pp. 147–148) showed that these temporary increases in temperature of storm water can still result in a shift in the biotic community composition and even accelerate changes in species distributions. Based on the work of Menberg *et al.* (2014, entire), we expect these changes in air temperature to be reflected in the temperature of the shallow ground water within a few years, but at a lower magnitude. While we do not have specific temperature tolerance information for the Kenk's amphipod, there are studies of other amphipod species that indicate sensitivity to elevated temperatures, exhibited by reduced or eliminated egg survival at water temperatures above 75 °F (24 °C) to 79 °F (26 °C) (Pockl and Humpesch 1990, pp. 445–449).

In summary, it is highly probable that by the 2080s some increase in ground water temperatures will occur at sites occupied by the Kenk's amphipod, but the magnitude and significance of these changes is difficult to predict.

Change in Species Composition

At most of the Washington metropolitan area sites supporting the Kenk's amphipod, numbers of the Potomac groundwater amphipod, which is the most widely distributed and abundant *Stygobromus* species in the lower Potomac drainage (Kavanaugh 2009, p. 6), have increased as numbers of observed Kenk's amphipod have declined (D. Feller, pers. comm., 03/16/2016; D. Feller, pers. comm., 04/22/2016). The exact cause of this change is not known, but it may be an indication that some stressor has led to a competitive advantage for the Potomac groundwater amphipod (Culver et al. 2012, p. 29). Other than at Coquelin Run Spring, there are no obvious physical changes at these sites indicating a cause for the decline. However, as described above in Factor A, impaired water quality could favor a more common species over a rare species. Culver and Sereg (2004, pp. 72–73) indicated that there is a possibility that the Kenk's amphipod is a poor competitor with other *Stygobromus* species, which may be a factor promoting the Kenk's amphipod's natural rarity, and that in cave locations *Stygobromus* species strongly compete with each other. While the Kenk's amphipod may have always been naturally rare, we conclude that the species may be getting rarer due to the stressors discussed above.

Summary of Factor E—Small population size at all of the sites makes each one of them vulnerable to natural environmental stochasticity and human-caused habitat disturbance, including relatively minor impacts in their spring recharge areas. The small size and isolation of sites also make each population vulnerable to demographic stochasticity, including loss of genetic variability and adaptive capacity.

The best available climate data indicate that the areas supporting the Kenk's amphipod will see increasing ambient temperatures, increasing winter and spring precipitation, increasing frequency of heavy downpours, and increasing summer and fall drought risk as higher temperatures lead to greater evaporation and earlier winter and spring snowmelt. Droughts could result in drying up of spring sites, while the increase in heavy downpours could result in erosion and sedimentation of sites. Ambient air temperature has increased by 3 °F (1.7 °C) since 1960, and is expected to increase by 10 °F (5.6 °C) by the 2080s. It is highly probable that by the 2080s some increase in ground water temperatures will occur at sites occupied by the Kenk's amphipod, but the magnitude and significance of these changes is difficult to predict.

Cumulative Effects

Many of the factors discussed above are cumulatively and synergistically affecting the Kenk's amphipod. For example, Kenk's amphipod habitat can be degraded by storm water runoff, which is likely to increase with more frequent and intense storms and precipitation levels in the future. Species with larger populations are naturally more resilient to the stressors affecting individuals or local occurrences, while smaller populations or individuals are more susceptible to demographic or stochastic events. Below we discuss the Kenk's amphipod's viability as expressed through the conservation biology principles of representation, redundancy, and resiliency, which illustrate how the cumulative and synergistic effects are affecting the species as a whole.

Redundancy—The species has some redundancy given its known distribution is 10 sites across 3 municipal jurisdictions and multiple streams. For example, the isolation of the two Montgomery County, MD, populations from other Washington metropolitan area populations and their occurrence along different tributary streams make it unlikely that a single catastrophic adverse event (*e.g.*, a spill) will eliminate more than one occurrence at a time. In addition, the Virginia sites occur in two stream areas, Mill Creek and Mount Creek, making it unlikely that a single military training event or other catastrophic event will eliminate more than one occurrence at a time.

Representation—Based on the information about historical changes to the landscape across the Washington metropolitan area, we conclude it is likely that the species' historical distribution was larger than the current distribution; therefore, the species may have previously experienced a significant loss in representation. Also, because we do not yet have any information on the genetics of these populations, we cannot determine whether the species possesses a single genetic identity or has genetic variability across populations. Therefore, we conclude that the species' representation has likely been reduced, and may currently be limited.

Resiliency—Given the range of the species, the small number of seeps and individuals at those seeps, and each seep's vulnerability to stressors, the Kenk's amphipod's overall resiliency is low. Based on the best available data, we conclude that the stressors to the species are not decreasing and, in most cases, are expected to increase in the future. Furthermore, the small size of each of the 10 habitat areas makes each population vulnerable to natural environmental stochasticity and human-caused habitat disturbance, including relatively minor effects in the spring recharge area. As a result of habitat fragmentation/isolation there is a lack of connectivity and genetic exchange between populations and, we assume, a lack of ability to recolonize extirpated sites, leading to an overall reduced resiliency for the species.

Determination

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations in title 50 of the Code of Federal Regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species based on (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future stressors to the Kenk's amphipod and find that several of those stressors rise to the level of threats to the species as a whole. Habitat loss and degradation (Factor A) from poor water quality parameters associated with urban runoff in Maryland and the District of Columbia has decreased water quality and increased erosion and sedimentation at several shallow ground water habitat sites. These parameters are likely to be exacerbated in the future by the increasing risk of exposure to breaks and leaks from the aging sewer and water pipe infrastructure (Factor A), as well as more frequent and intense rainfall events, due to the effects of climate change (Factor E). In addition, all 10 sites are characterized by small numbers of the Kenk's amphipod that appear to be declining and affected by the inherent vulnerabilities associated with small population dynamics (Factor E). Overutilization (Factor B), disease (Factor C), and predation (Factor C) are not considered threats to the Kenk's amphipod. The existing regulatory mechanisms (Factor D) for the stressors and threats affecting the species have been evaluated under Factors A, B, and E. While the Kenk's amphipod has some redundancy and representation, the resiliency of each individual site is compromised, making the species' overall resiliency low.

The Act defines an endangered species as any species that is "in danger of extinction throughout all or a significant portion of its range" and a threatened species as any species "that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future." We find that the Kenk's amphipod is presently in danger of extinction throughout its entire range based on the severity and immediacy of threats currently affecting the species. The best available data indicate that, while the species may have always been represented by small numbers of individuals found at the surface of each seep site, the species' abundance appears to be declining. In addition, each of the 10 known seep sites are vulnerable to varying levels of stressors and threats: 1 Seep (Sherrill Drive Spring), based on repeated negative survey results combined with documented poor water quality, may be extirpated, and another seep (Coquelin Run Spring) has visible erosion and sedimentation. The Kenk's amphipod has some redundancy and representation, but those two conservation parameters are compromised due to each site's low resiliency, all of which makes the species' overall resiliency low. The primary drivers affecting the species' viability (water quality and habitat degradation and small population dynamics) are difficult to manage because either they are caused by factors outside the control of the landowner's jurisdiction (*e.g.,* poor water quality or risk of sewer/water line spills at NPS-controlled sites) or there are no apparent management actions to minimize or control them (*e.g.,* small population dynamics), and some of those threats and additional stressors are likely to increase in the future.

Therefore, on the basis of the best available scientific and commercial information, we propose listing the Kenk's amphipod as endangered in accordance with sections 3(6) and 4(a)(1) of the Act. We find that a threatened species status is not appropriate for the Kenk's amphipod based on the high magnitude and imminence of the threats across the species' range. If additional Kenk's amphipod sites are found and those sites are individually resilient and add to the species' overall representation, redundancy, and resiliency, then a threatened species status may be appropriate at that time.

Under the Act and our implementing regulations, a species may warrant listing if it is endangered or threatened throughout all or a significant portion of its range. Because we have determined that the Kenk's amphipod is an endangered species throughout all of its range, no portion of its range can be "significant" for purposes of the definitions of "endangered species" and "threatened species." See the Final Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species" (79 FR 37578; July 1, 2014).

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition, through listing, results in public awareness and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline shortly after a species is listed and preparation of a draft and final recovery plan. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan also identifies recovery criteria for review of when a species may be ready for downlisting or delisting, and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our Web site (*http://www.fws.gov/endangered*), or from our Chesapeake Bay Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.*, restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands. If this species is listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State of Maryland, Commonwealth of Virginia, and the District of Columbia would be eligible for Federal funds to implement management actions that promote the protection or recovery of the Kenk's amphipod. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants*.

Although the Kenk's amphipod is only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a), and in particular section 7(a)(1), of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Federal agency actions within the species' habitat that may require conference or consultation or both as described in the preceding paragraph include management and any other landscape-altering activities on Federal lands administered by the National Park Service (Rock Creek Park) and U.S. Army (Fort A.P. Hill); issuance of section 404 CWA permits by the Army Corps of Engineers; and construction and maintenance of roads or highways by the Federal Highway Administration.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered wildlife. The prohibitions of section 9(a)(1) of the Act, codified at 50 CFR 17.21 make it illegal for any person subject to the jurisdiction of the United States to take (which includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these) endangered wildlife within the United States or on the high seas. In addition, it is unlawful to import; export; deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity; or sell or offer for sale in interstate or foreign commerce any listed species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to employees of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22. With regard to endangered wildlife, a permit may be issued for the following purposes: For scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities. There are also certain statutory exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of the species proposed for listing. At this time, we are unable to identify specific activities that would not be considered to result in a violation of section 9 of the Act because the Kenk's amphipod occurs in seep habitats that are influenced by the surrounding environment and it is likely that site-specific conservation measures may be needed for activities that may directly or indirectly affect the species.

Based on the best available information, the following activities may potentially result in a violation of section 9 of the Act; this list is not comprehensive:

(1) Unauthorized handling or collecting of the species;

(2) Destruction/alteration of the species' habitat by discharge of fill material, use of motorized vehicles such as all-terrain vehicles or creation of trails that would increase foot traffic through the spring area, draining, or diversion or alteration of surface or ground water flow into or out of the seepage springs or catchment basins;

(3) Forest management practices that alter the seepage spring sites or remove canopy cover from above the seepage spring sites;

(4) Discharge of chemicals, storm water, or runoff into the seepage springs or catchment basins.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Chesapeake Bay Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Critical Habitat for the Kenk's amphipod (*Stygobromus Kenki*)

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features:

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the species is determined to be endangered or threatened. Our regulations (50 CFR 424.12(a)(1)) state that the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species.

There is currently no imminent threat of take attributed to collection or vandalism under Factor B for the Kenk's amphipod. Identification and mapping of critical habitat is not likely to increase any such threat. In the absence of finding that the designation of critical habitat would increase threats to a species, if there are any benefits to a critical habitat designation, then a prudent finding is warranted. The potential benefits of designation include: (1) Triggering consultation under section 7 of the Act, in new areas for actions in which there may be a Federal nexus where it would not otherwise occur because, for example, it is or has become unoccupied or the occupancy is in question; (2) focusing conservation activities on the most essential features and areas; (3) providing educational benefits to State or county governments or private entities; and (4) preventing people from causing inadvertent harm to the species. Therefore, because we have determined that the designation of critical habitat will not likely increase the degree of threat to this species and may provide some measure of benefit, we find that designation of critical habitat is prudent for the Kenk's amphipod.

Critical Habitat Determinability

Having determined that designation is prudent, under section 4(a)(3) of the Act we must find whether critical habitat for the species is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist: (i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or (ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

As discussed above, we have reviewed the available information pertaining to the biological needs of the Kenk's amphipod and habitat characteristics where the species is located. Because we are awaiting the results of hydrology studies that support the species' physical and biological features, and additional surveys in new habitat areas (*e.g.*, accessible areas within steep, sloped, forested habitat overlaying the Calvert formation in Maryland and Virginia), we conclude that the designation of critical habitat is not determinable for the Kenk's amphipod at this time. We will make a determination on critical habitat no later than 1 year following any final listing determination.

Required Determinations

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with listing a species as an endangered or threatened species under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* and upon request from the Chesapeake Bay Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Chesapeake Bay Field Office and the Northeast Regional Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245; unless otherwise noted.

■ 2. In § 17.11(h), add an entry for "Amphipod, Kenk's" to the List of Endangered and Threatened Wildlife in alphabetical order under CRUSTACEANS to read as set forth below:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
* * * * * * *				
CRUSTACEANS				
* * * * * * *				
Amphipod, Kenk's	*Stygobromus kenki*	Wherever found	E	[**Federal Register** citation when published as a final rule]
* * * * * * *				

Dated: September 7, 2016.

Stephen Guertin,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2016–23103 Filed 9–29–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

RIN 0648–BG17

Fisheries Off West Coast States; Amendment 27 to the Pacific Coast Groundfish Fishery Management Plan

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of availability of proposed fishery management plan amendment; request for comments.

SUMMARY: NMFS announces that the Pacific Fishery Management Council (Council) has submitted Amendment 27 to the Pacific Coast Groundfish Fishery Management Plan (PCGFMP) for Secretarial review. Amendment 27 would add deacon rockfish to the FMP, reclassifies big skate as an actively managed stock, add a new inseason management process for commercial and recreational in California, and several clarifications.

DATES: Comments on Amendment 27 must be received on or before November 29, 2016.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2016–0094, by any of the following methods:

- *Federal e-Rulemaking Portal:* Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2016-0094,* click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to William Stelle, Regional Administrator, West Coast Region, NMFS, 7600 Sand Point Way NE., Seattle, WA 98115–0070.

Instructions: NMFS may not consider comments if they are sent by any other method, to any other address or individual, or received after the comment period ends. All comments received are a part of the public record and NMFS will post for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender is publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

Information relevant to Amendment 27, which includes a draft environmental assessment (EA), a regulatory impact review (RIR), and an initial regulatory flexibility analysis (IRFA) are available for public review during business hours at the NMFS West Coast Regional Office at 7600 Sand Point Way NE., Seattle, WA 98115.

FOR FURTHER INFORMATION CONTACT: Gretchen Hanshew, phone: 206–526–6147, fax: 206–526–6736, or email: *Gretchen.hanshew@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Electronic Access

This notice is accessible via the Internet at the Office of the Federal Register Web site at *http://www.access.gpo.gov/su_docs/aces/aces140.html.* Background information and documents are available at the NMFS West Coast Region Web site at *http://www.westcoast.fisheries.noaa.gov/fisheries/groundfish/index.html* and at the Council's Web site at *http://www.pcouncil.org.*

Background

The Magnuson-Stevens Act requires that each regional fishery management council submit any FMP or plan amendment it prepares to NMFS for review and approval, disapproval, or partial approval. The Magnuson-Stevens Act also requires that NMFS, upon receiving an FMP or amendment, immediately publish a notice that the FMP or amendment is available for public review and comment. NMFS will consider the public comments received during the comment period described above in determining whether to approve Amendment 27 to the PCGFMP.

Amendment 27 consists of 5 components: (1) Reclassify big skate from an Ecosystem Component Species to "in the fishery", (2) add deacon rockfish to the list of species in the FMP, (3) establish a new inseason management process in California for black, canary, and yelloweye rockfish, (4) make updates to clarify several stock assessment descriptions, and (5) update several sections because canary rockfish and petrale sole are rebuilt.

1. Reclassify Big Skate as "in the fishery"

Amendment 24 to PCGFMP classified several species, including big skate, as Ecosystem Component (EC) Species. However, when big skate was classified as an EC species it was not known that a majority of the skate species that were landed and described as "unspecified skate" in the Shorebased IFQ Program landings was actually big skate. In order for a stock to be classified as an EC species (according to National Standard Guideline 1), (a) it may not be determined to be subject to overfishing, approaching overfished, or overfished; (b) it must not be likely to become subject to overfishing or overfished, according to the best available information, in the absence of conservation and management measures; and (c) it may not generally be retained for sale or personal use. As big skate are being targeted and therefore generally retained for sale, it can no longer be considered an EC species. Therefore, Amendment 27 reclassifies big skate as in the fishery and this rule proposes species specific harvest specifications.

2. New California Inseason Process

The objective of any inseason management system is to be responsive to the needs of fishing participants while keeping catch with the established harvest specifications. The scope and magnitude of options available to address management issues is highly dependent on the amount of time between when an issue is identified and when corrective action(s) can be implemented. The summer months tend to be the busiest times for both the commercial and recreational fisheries in California and mortality tends to accumulate more quickly during these times The Council meets in June and September of each year. If an action is not warranted based on information available at the June meeting, there is a lag of up to four months before additional inseason actions can be implemented. Because fisheries are ongoing during this time, overages identified at the September meeting tend to be of a higher magnitude requiring more severe corrective actions (*e.g.*, closing a fishery). Therefore, a new inseason process for only black rockfish, canary rockfish, and yelloweye rockfish, and only in California was developed. This system would allow NMFS to take inseason action outside of a Council meeting when a Federal harvest specification for one of these species was projected to be attained or had been attained prior to the start of a Council meeting. Allowing NMFS to take inseason action outside a Council meeting can reduce the severity of management actions and reduce negative economic impacts to the fleets and to the coastal communities which depend on the revenues generated from these fisheries. Similar inseason management processes were not explored for Washington or Oregon because they have rapid inseason management processes sufficient for their inseason management needs.

3. Updates to the PCGFMP

Minor edits are included in Amendment 27 which clarify several stock assessment procedures and categories resulting from Amendment 23 that were inadvertently omitted. Amendment 23 modified the PCGFMP consistent with the revised National Standard Guidelines in 2011.

4. Updates Based on New Science for Deacon Rockfish, Canary Rockfish, and Petrale Sole

Deacon rockfish (*Sebastes diaconus*) was recently described and adopted as a new *Sebastes* species by the American Fisheries Society based on evidence of the presence of two genetically distinct cryptic species in central California. Deacon rockfish is therefore acknowledged as an FMP species that is "in the fishery" based on the FMP provision, "The category "rockfish" includes all genera and species of the family Scorpaenidae, even if not listed, that occur in the Washington, Oregon, and California area. The Scorpaenidae genera are Sebastes, Scorpaena, Sebastolobus, and Scorpaenodes.

Finally, canary rockfish and petrale sole were declared rebuilt on August 4, 2015; therefore all references to them as overfished stocks must be updated.

Public Comments

NMFS welcomes comments on the proposed FMP amendment through the end of the comment period. A proposed rule to implement Amendment 27 has been submitted for Secretarial review and approval. NMFS expects to publish and request public review and comment on proposed regulations to implement Amendment 27, along with the groundfish specifications and management measures for 2017 and 2018, in the near future. Public comments on the proposed rule must be received by the end of the comment period on the amendment to be considered in the approval/disapproval decision on the amendment. All comments received by the end of the comment period for the amendment, whether specifically directed to the amendment or the proposed rule, will be considered in the approval/disapproval decision.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: September 27, 2016.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–23684 Filed 9–29–16; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 81, No. 190
Friday, September 30, 2016

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Payette National Forest, Idaho; Huckleberry Landscape Restoration Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Payette National Forest will prepare an Environmental Impact Statement (EIS) for the Huckleberry Landscape Restoration Project. The Huckleberry Landscape Restoration Project is located approximately 15 miles west of New Meadows, Idaho. Proposed treatments include timber harvest, thinning, prescribed fire, road treatments and road decommissioning, and recreation improvements. The Huckleberry project area is approximately 67,000 acres within the Council Ranger District on the Payette National Forest. The project is located in the Indian, Lick, and Bear Creek subwatersheds within the Brownlee Reservoir Subbasin.

DATES: Comments concerning the scope of the analysis must be received by November 14, 2016. The draft environmental impact statement is expected late April 2017 and the final environmental impact statement is expected January 2018.

ADDRESSES: Send written comments to: Keith Lannom, Forest Supervisor, 500 N. Mission Street, Building 2, McCall, Idaho 83638. Comments may also be sent via email to *comments-intermtn-payette@fs.fed.us,* or via facsimile to 208–634–0744.

Comments may also be submitted through the Huckleberry Landscape Restoration Project Web page at *http://www.fs.usda.gov/project/?project=50218.* To submit comments using the web form select "Comment/Object on Project" under "Get Connected" on the right panel of the project's Web page.

A public meeting will be held October 18th, 2016, from 4 to 6 p.m. at the Council Ranger District Office, 2092 Highway 95, Council, Idaho, 208–253–0100.

FOR FURTHER INFORMATION CONTACT: Kim Pierson, New Meadows District Ranger, 208–347–0300, *kpierson@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

The purpose of the Huckleberry Landscape Restoration Project is to: A. Move vegetation toward the desired conditions defined in the Forest Plan and the most recent science addressing restoration and management of wildlife habitat, with an emphasis on: (1) Improving habitat for specific wildlife species of concern such as the Endangered Species Act (ESA)-listed northern Idaho ground squirrel (NIDGS) and species dependent on dry coniferous forests (*e.g.* white-headed woodpecker), while maintaining habitat for other Forest sensitive and ESA-listed species; (2) Maintaining and promoting large tree forest structure, early seral species composition (*e.g.* example aspen, western larch, ponderosa pine, and Douglas-fir) and forest resiliency; (3) Reducing the risk of uncharacteristic and undesirable wildland fire, with an emphasis on restoring and maintaining desirable plant community attributes including fuel levels, fire regimes, and other ecological processes. (4) Moving forest stands toward desired conditions as described in the Forest Plan by returning fire to the ecosystem; promoting the development of large tree forest structures mixed with a mosaic of size classes; and improving growth, species composition, and resiliency to insects, disease, and fire.

B. Support the development of fire-adapted rural communities by: (1) Creating conditions that provide firefighters a higher probability of successfully suppressing fire in the wildland urban interface by reducing potential fire behavior near values at risk (*e.g.,* homes, communication towers, and power lines) and primary ingress/egress routes, essential to firefighter access and the public. (2) Creating conditions where rural communities are less reliant on suppression forces.

C. Move all subwatersheds within the project area toward the desired conditions for soil, water, riparian, and aquatic resources (SWRA) as described in the Forest Plan and the Watershed Condition Framework (WCF) (USDA 2011) by: (1) Reducing overall road density, road-related accelerated sediment, and other road related impacts across the project area; restoring riparian vegetation and floodplain function. (2) Restoring fish habitat connectivity across the project area, especially in streams occupied by ESA Listed bull trout, (Salvelinus confluentus) and in or adjacent to bull trout Critical Habitat.

D. Manage recreation use with an emphasis on hardening (where needed) dispersed recreation sites for resource improvement, and improving existing trail opportunities.

E. Contribute to the economic vitality of the communities adjacent to the Payette National Forest.

The need for the project is based on the difference between the existing and desired conditions. These differences include: (1) Less large tree size class than desired and higher canopy cover; (2) Fewer early seral species (*i.e.* ponderosa pine and western larch); (3) Fewer fire resilient species than desired; (4) Increase in ground, surface, and canopy fuels; (5) Less than desired watershed function and integrity.

The desired conditions for this project are based upon the Payette National Forest Plan (USDA Forest Service 2003), and the Watershed Condition Framework (USDA Forest Service 2011).

Proposed Action

The Proposed Action includes: Vegetative Treatments: The Forest Service proposes approximately 42,600 acres of vegetative treatments in the project area. This acreage includes the treatments designed to benefit Northern Idaho Ground Squirrels (NIDGS) and treatments within Riparian Conservation Areas (RCAs). Of the acres proposed for vegetative treatment, 1,400 acres are within RCAs. Approximately 9,000 acres are in areas designed to mitigate fire risk to values at risk. *Commercial Vegetative Treatments:* The Forest Service proposes to treat up to

23,800 acres with commercial harvests (a combination of Free Thin, Free Thin–Patch Cut-Selection Harvest, Aspen Restoration, and Mature Plantation Harvest). Combined commercial and non-commercial vegetation treatments include up to 11,800 acres of meadow restoration, 1,500 acres Restoration of Low Density Timber Stands and 600 acres of Whitebark pine restoration. These acreages includes treatments designed for and within RCAs. Approximately, 1,400 acres are commercial treatments (as described below) within RCAs. *Non-Commercial Treatments*—approximately 42,500 acres. Non-commercial thinning would be completed in areas of commercial harvest as well as outside of commercial harvest. This would consist of trees generally less than ten inches DBH and include plantations. Non-commercial thinning would be completed to improve wildlife habitat, increase growth rates and tree vigor, improve stand resiliency to natural disturbance, reduce density-related competition, reduce potential fire behavior and fire effects given a wildland fire.

Prescribed Fire Treatments: The entire project area, (approximately 67,000 acres, excluding the Bear Creek RNA), would be treated with prescribed fire over the next 20 years (see Prescribed Fire and Community Wildfire Mitigation Map). Commercial activities would generally be completed prior to the application of fire, except where the application of fire prior to thinning does not affect commercial activities. Reintroducing 500 to 10,000 acres of fire annually would move forested and non-forested vegetation towards conditions that more closely represent historic distribution, structure, and function as well as limit potential fire behavior. A mosaic-like application of fire would reintroduce fire to approximately 75 percent of primary target acres, and 50 percent of secondary target acres. These percentages recognize the variability in the spread of fire across a landscape due to various environmental influences. All acres targeted for the application of fire would be available for noncommercial thinning in order to minimize mortality from prescribed fire and aid in moving towards restored conditions.

Watershed Improvement and Restoration Treatments: (1) System road treatments proposed throughout the project area include maintenance and/or improvement of Forest system roads where needed. Approximately 57.7 miles of system roads would be decommissioned. All roads closed to the public would receive implementation of effective closure to motorized use. All unauthorized routes not needed for future management would also be evaluated for some level of restoration treatments. (2) Unauthorized Route Treatments—Restoration treatments are proposed for unauthorized routes, although the exact mileage of unauthorized route treatments have not been determined at this time. It is anticipated that between 60 and 80 miles would be treated. (3) Aquatic Organism Passage/Fish Habitat Connectivity—Improvements to Fish Passage are needed to address the purpose and need of the project. Thirteen road-crossings have been identified in the project area to improve fish passage and improve hydrologic connectivity. In the Indian Creek subwatershed, of which the upper portion is identified as a restoration priority under and ACS, 6 crossings would be improved (crossings would be replaced with appropriate structures or removed with the associated road restoration treatments. These proposed improvements would address all of the known man-made barriers on fish bearing streams in the subwatershed. In the Bear Creek subwatershed, (of which the upper portion is identified as an ACS priority), one crossing is identified for improvement. This would address the only known man-made barrier on a fish-bearing stream in the portion of the Bear Creek subwatershed included in the project area. Past restoration activities have addressed many of the fish passage barriers in the Bear Creek subwatershed. In the Lick Creek subwatershed, 6 crossings are identified for improvement on tributaries of Lick Creek. These crossings would be replaced with appropriate structures or removed with other road restoration treatments. Crossings should be replaced as road work and project activities occur in these areas to improve fish habitat connectivity, and improve hydrologic connectivity. (4) Trail Bridges for Fish Habitat Improvement—In the Bear Creek subwatershed, 2 trail bridges are proposed on FS Trail 228 where the trail crosses Mickey Creek and Wesley Creek. Both of these streams are Bull Trout Critical Habitat. Bridges over these streams would reduce impacts of trail use (from 2-wheeled motorized, non-motorized and stock) to bull trout and their critical habitat. A trail bridge currently is in place near the FS 228 Trailhead where the trail crosses Bear Creek, which is also critical habitat.

Recreation Improvements: The recreation proposal focuses on improving existing developed and dispersed recreation opportunities and facilities, trail maintenance and relocation to improve watershed conditions and the recreational user's experience. The Huckleberry Landscape Restoration Project would: (1) Developed and Dispersed Recreation: (a) Improve the potable water well, increase the radius of the turnaround loop to accommodate larger trailers and RVs, and replace the entire fence with split rail/buck and rail at the Huckleberry Campground; (b) Coordinate dispersed camping along roads open to motorized travel 300 feet off the road, with wildlife in areas where there is a conflict with the NIDGS: (c) On Forest Road 143 (Lick Creek Road) where it enters the Forest, add a travel management sign that state the road is open to dispersed camping using a motorized vehicle in designated sites only; (d) Harden dispersed camping sites identified with resource issues; (e) Place rock barriers in sites identified with a need to restrict further growth; (f) Decommission existing restroom facility and install a new single vault restroom at the Bear trailhead, along with three fire rings and two metal stock hitch rails. (2) Trails: (a) Bring the 33 miles of trails consisting of two-wheel motorized and non-motorized trail up to defined trail class standard for each trail. This includes signing at all trail junctions, new signing at trailheads lacking proper signs, and trail reestablishment and potential relocation where the trail is undefinable; (b) Improve the Hoo Hoo Gulch 50144 road accessing the #231 trail to accommodate the hauling of a stock trailer. This includes brushing both sides of the road, and performing major road maintenance on the road surface. At the trailhead (location of the closed gate) construct a turn-around large enough to accommodate and truck pulling a horse trailer. Add one metal stock hitch rail and an information trailhead kiosk sign to the trailhead. Relocate portions of the #231 trail above the current roadbed; (c) Relocate and reestablish portions of the non-motorized #229 trail that accesses the Lick Creek Lookout. Establish a trailhead to accommodate two vehicles and one horse trailer at the place the 50129 road turns to seasonal use. Install an informational trailhead kiosk and trail sign. (Note: The seasonally open road beyond this gate could be closed year-round as it only goes an additional ½ mile and is not needed for recreational access. It only serves to bring unauthorized motorized use into the closed road system above); (d) Establish a small pullout for parking for the non-motorized #226 trail. Install a trailhead sign.

E. Wildlife Habitat Improvements: Changes in forested conditions, fire regimes, and the presence of roads have altered wildlife habitats. Some modifications to habitat have led to the federal listing of terrestrial wildlife species such as northern Idaho ground squirrel (NIDGS). A primary need Forest-wide and in the project area is to maintain and promote dry, lower elevation, large tree, and old forest habitats for the associated wildlife species including reducing road densities and fragmentation that negatively affect elk and other Forest species of concern. The processes, function, patch size and diversity of forested habitats must all be considered in order to properly address wildlife habitat needs. Examples of habitat improvement include: (1) Enhance habitat components that will support sustainable elk populations consistent with the Forest Plan. This includes the best available science to move the project landscape towards the recommended road density and elk security habitat guidelines (*e.g.* effective seasonal gate closures). One potential method of moving towards effective road densities and enhancing elk security habitat is to target road closures in areas where there is route redundancy. (2) Maintain or restore a representative, resilient and redundant network of habitats for species of greatest conservation concern (*e.g.* northern Idaho ground squirrel, white-headed woodpecker, northern goshawk, etc.).

F. Community Wildfire Mitigation Treatments: Both, fuel loading and fuel continuity would be altered to reduce surface fire potential as well as crown fire potential among the community wildfire mitigation treatment areas (see Prescribed Fire Treatments and Community Wildfire Mitigation Map). This would provide suppression forces a higher probability of successfully attacking a wildland fire within intermix or rural condition while creating a safer working environment. A combination of non-commercial thinning, commercial thinning, limbing to reduce ladder fuels, piling dead and downed material, pile burning, and/or prescribed burning would facilitate the desired condition. More specifically, activities would result in the following: (1) Increased canopy base heights to reduce potential for spotting, torching, and crown fire; (2) Reduced canopy densities to reduce the potential for crown fire spread; (3) Reduced species that are not fire-resilient to promote fire-resilient stands; (4) Reduced ground and surface fuels. Recurrent application of the necessary treatments (primarily prescribed fire) every 5–15 years would maintain the desired condition, which is lower fuel loadings and reduced horizontal fuel continuity.

Responsible Official

The Forest Supervisor of the Payette National Forest is the Responsible Official.

Nature of Decision To Be Made

Based on the purpose and need for the proposed action, the Responsible Official will determine whether to proceed with the action, as proposed, as modified by another alternative or not at all. If an action alternative is selected, the Responsible Official will determine what design features, mitigation measures and monitoring requirements are included in the decision.

Addresses

Additional project information is available on the project page of the Payette National Forest Web site at: *http://www.fs.usda.gov/project/?project=50218.*

Scoping Process

This notice of intent initiates the scoping process, which guides the development of the environmental impact statement. It is important that reviewers provide their comments at such times and in such manner that they are useful to the agency's preparation of the environmental impact statement. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions.

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this project. Comments submitted anonymously however will also be accepted and considered.

Dated: September 26, 2016.

Keith B. Lannom,

Payette National Forest Supervisor.

[FR Doc. 2016–23650 Filed 9–29–16; 8:45 am]

BILLING CODE 3411–15–P

COMMISSION ON CIVIL RIGHTS

Advisory Committees Expiration

AGENCY: United States Commission on Civil Rights.

ACTION: Solicitation of applications.

SUMMARY: Because the terms of the members of the Florida Advisory Committee are expiring on January 28, 2017, the United States Commission on Civil Rights hereby invites any individual who is eligible to be appointed to apply. The memberships are exclusively for the Florida Advisory Committee, and applicants must be residents of Florida to be considered. Letters of interest must be received by the Southern Regional Office of the U.S. Commission on Civil Rights no later than November 15, 2016. Letters of interest must be sent to the address listed below.

Because the terms of the members of the Texas Advisory Committee are expiring on January 28, 2017, the United States Commission on Civil Rights hereby invites any individual who is eligible to be appointed to apply. The memberships are exclusively for the Texas Advisory Committee, and applicants must be residents of the Texas to be considered. Letters of interest must be received by the Western Regional Office of the U.S. Commission on Civil Rights no later than November 15, 2016. Letters of interest must be sent to the address listed below.

Because the terms of the members of the Michigan Advisory Committee are expiring on January 28, 2017, the United States Commission on Civil Rights hereby invites any individual who is eligible to be appointed to apply. The memberships are exclusively for the Michigan Advisory Committee, and applicants must be residents of the Michigan to be considered. Letters of interest must be received by the Midwestern Regional Office of the U.S. Commission on Civil Rights no later than November 15, 2016. Letters of interest must be sent to the address listed below.

DATES:

Letters of interest for membership on the Florida Advisory Committee should be received no later than November 15, 2016.

Letters of interest for membership on the Texas Advisory Committee should be received no later than November 15, 2016.

Letters of interest for membership on the Michigan Advisory Committee should be received no later than November 15, 2016.

ADDRESSES:

Send letters of interest for the Florida Advisory Committee to: U.S. Commission on Civil Rights, Southern Regional Office, 61 Forsyth Street SW., Suite 1840T, Atlanta, GA 30303. Letters can also be sent via email to *jhinton@usccr.gov.*

Send letters of interest for the Texas Advisory Committee to: U.S. Commission on Civil Rights, Western

Regional Office, 300 North Los Angeles Street, Suite 2010, Los Angeles, CA 90012. Letter can also be sent via email to *atrevino@usccr.gov.*

Send letters of interest for the Michigan Advisory Committee to: U.S. Commission on Civil Rights, Midwestern Regional Office, 55 W. Monroe St., Suite 410, Chicago, IL 60603. Letters can also be sent via email to *mwojnaroski@usccr.gov.*

FOR FURTHER INFORMATION CONTACT: David Mussatt, Chief, Regional Programs Unit, 55 W. Monroe St., Suite 410, Chicago, IL 60603, (312) 353–8311. Questions can also be directed via email to *dmussatt@usccr.gov.*

SUPPLEMENTARY INFORMATION: The Florida, Texas, and Michigan Advisory Committees are statutorily mandated federal advisory committees of the U.S. Commission on Civil Rights pursuant to 42 U.S.C. 1975a. Under the charter for the advisory committees, the purpose is to provide advice and recommendations to the U.S. Commission on Civil Rights (Commission) on a broad range of civil rights matters in its respective state that pertain to alleged deprivations of voting rights or discrimination or denials of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or the administration of justice. Advisory committees also provide assistance to the Commission in its statutory obligation to serve as a national clearinghouse for civil rights information.

Each advisory committee consists of not more than 19 members, each of whom will serve a four-year term. Members serve as unpaid Special Government Employees who are reimbursed for travel and expenses. To be eligible to be on an advisory committee, applicants must be residents of the respective state or district, and have demonstrated expertise or interest in civil rights issues.

The Commission is an independent, bipartisan agency established by Congress in 1957 to focus on matters of race, color, religion, sex, age, disability, or national origin. Its mandate is to:

- Investigate complaints from citizens that their voting rights are being deprived,
- study and collect information about discrimination or denials of equal protection under the law,
- appraise federal civil rights laws and policies,
- serve as a national clearinghouse on discrimination laws,
- submit reports and findings and recommendations to the President and the Congress, and
- issue public service announcements to discourage discrimination.

The Commission invites any individual who is eligible to be appointed a member of the Florida, Texas, or Michigan Advisory Committee covered by this notice to send a letter of interest and a resume to the respective address above.

Dated: September 26, 2016.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2016–23594 Filed 9–29–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of the Census

National Advisory Committee; Meetings

AGENCY: Bureau of the Census, Department of Commerce.

ACTION: Notice of public meeting.

SUMMARY: The Bureau of the Census (Census Bureau) is giving notice of a meeting of the National Advisory Committee on Racial, Ethnic and Other Populations (NAC). The NAC will address policy, research, and technical issues relating to a full range of Census Bureau programs and activities, including communications, decennial, demographic, economic, field operations, geographic, information technology, and statistics. The NAC will meet in a plenary session on November 3–4, 2016. Last minute changes to the schedule are possible, which could prevent us from giving advance public notice of schedule adjustments. Please visit the Census Advisory Committees Web site for the most current meeting agenda at: *http://www.census.gov/about/cac.html.* The meeting will be available via webcast at: *http://www.census.gov/newsroom/census-live.html* or at *http://www.ustream.tv/embed/6504322?wmode=direct.*

DATES: November 3–4, 2016. On November 3, the meeting will begin at approximately 8:30 a.m. and end at approximately 5:00 p.m. On November 4, the meeting will begin at approximately 8:30 a.m. and end at approximately 4:00 p.m.

ADDRESSES: The meeting will be held at the U.S. Census Bureau Auditorium, 4600 Silver Hill Road, Suitland, Maryland 20746.

FOR FURTHER INFORMATION CONTACT: Tara Dunlop Jackson, Branch Chief for Advisory Committees, Customer Liaison and Marketing Services Office, at *tara.t.dunlop@census.gov,* Department of Commerce, U.S. Census Bureau, Room 8H177, 4600 Silver Hill Road, Washington, DC 20233, telephone 301–763–5222. For TTY callers, please use the Federal Relay Service 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The NAC was established in March 2012 and operates in accordance with the Federal Advisory Committee Act (Title 5, United States Code, Appendix 2, Section 10). The NAC members are appointed by the Director, U.S. Census Bureau, and consider topics such as hard to reach populations, race and ethnicity, language, aging populations, American Indian and Alaska Native tribal considerations, new immigrant populations, populations affected by natural disasters, highly mobile and migrant populations, complex households, rural populations, and population segments with limited access to technology. The Committee also advises on data privacy and confidentiality, among other issues.

All meetings are open to the public. A brief period will be set aside at the meeting for public comment on November 4. However, individuals with extensive questions or statements must submit them in writing to: *census.national.advisory.committee@census.gov* (subject line "November 2016 NAC Meeting Public Comment"), or by letter submission to Kimberly L. Leonard, Committee Liaison Officer, Department of Commerce, U.S. Census Bureau, Room 8H179, 4600 Silver Hill Road, Washington, DC 20233.

If you plan to attend the meeting, please register by Monday, October 31, 2016. You may access the online registration from the following link: *http://www.regonline.com/nov2016_nac_meeting.* Seating is available to the public on a first-come, first-served basis.

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should also be directed to the Committee Liaison Officer as soon as known, and preferably two weeks prior to the meeting.

Due to increased security and for access to the meeting, please call 301–763–9906 upon arrival at the Census Bureau on the day of the meeting. A photo ID must be presented in order to receive your visitor's badge. Visitors are not allowed beyond the first floor.

Topics of discussion include the following items:

- 2020 Census Program Updates
- Evidence Based Policy Making Commission Overview
- Language Working Group Progress Report

- Integrated Partnership and Communications Working Group Report

Dated: September 22, 2016.

John H. Thompson,

Director, Bureau of the Census.

[FR Doc. 2016–23670 Filed 9–29–16; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 2013]

Reorganization and Expansion of Foreign-Trade Zone 214 Under Alternative Site Framework; Lenoir County, North Carolina

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Board adopted the alternative site framework (ASF) (15 CFR Sec. 400.2(c)) as an option for the establishment or reorganization of zones;

Whereas, the North Carolina Department of Transportation, grantee of Foreign-Trade Zone 214, submitted an application to the Board (FTZ Docket B–20–2016, docketed April 13, 2016) for authority to reorganize and expand under the ASF with a service area of the Counties of Pender, New Hanover, Brunswick, Duplin, Columbus, Bladen, Robeson, Beaufort, Pitt, Hyde, Onslow, Jones, Craven, Pamlico, Lenoir, Carteret, Wilson, Edgecombe, Nash, Wayne, Greene and Cumberland, within and adjacent to the Wilmington, Morehead City and Raleigh-Durham Customs and Border Protection ports of entry. FTZ 214's existing Sites 1, 5, 6 (as modified) and 7 would be categorized as magnet sites and Sites 2, 3 and 4 would be categorized as usage-driven sites, and the grantee proposes three additional magnet sites (Sites 8, 9 and 10);

Whereas, notice inviting public comment was given in the **Federal Register** (81 FR 23456–23457, April 21, 2016) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendation of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied provided that inclusion of Robeson County in the service area is limited to the portion of the county east of Interstate 95 (I–95);

Now, therefore, the Board hereby orders:

The application to reorganize and expand FTZ 214 under the ASF is approved, with the service area described above (*i.e.,* inclusion of Robeson County in the service area is limited to the portion of the county east of I–95), subject to the FTZ Act and the Board's regulations, including Section 400.13, to the Board's standard 2,000-acre activation limit for the zone, to ASF sunset provisions for magnet sites that would terminate authority for Sites 1, 7, 8, 9 and 10 if not activated within five years from the month of approval and for Sites 5 and 6 if not activated within the initial ten years from the month of approval, and to an ASF sunset provision for usage-driven sites that would terminate authority for Sites 2, 3 and 4 if no foreign-status merchandise is admitted for a *bona fide* customs purpose within three years from the month of approval.

Dated: September 15, 2016.

Paul Piquado,

Assistant Secretary of Commerce for Enforcement and Compliance, Alternate Chairman, Foreign-Trade Zones Board.

[FR Doc. 2016–23700 Filed 9–29–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[Docket No. 160713610–6783–02]

RIN 0625–XC020

Cost Recovery Fee Schedule for the EU–U.S. Privacy Shield Framework

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Final notice of implementation of a cost recovery program fee.

SUMMARY: The Department of Commerce published the Cost Recovery Fee Schedule for the EU–U.S. Privacy Shield Framework on July 22, 2016 (81 FR 47752). We gave interested parties an opportunity to comment on the fee schedule. No comments were received and so the fee schedule is considered final until further review one year after implementation of the program. Consistent with the guidelines in OMB Circular A–25,[1] the U.S. Department of Commerce's International Trade Administration (ITA) has implemented a cost recovery program fee to support the operation of the EU–U.S. Privacy Shield Framework (Privacy Shield), which requires that U.S. organizations pay an annual fee to ITA in order to participate in the Privacy Shield. The cost recovery program supports the administration and supervision of the Privacy Shield program and supports the provision of Privacy Shield-related services, including education and outreach. The Privacy Shield fee schedule was effective on August 1, 2016, when ITA began accepting self-certifications under the Privacy Shield Framework.

DATES: This fee schedule was effective August 1, 2016.

FOR FURTHER INFORMATION CONTACT: Requests for additional information regarding the EU–U.S. Privacy Shield Framework should be directed to Grace Harter, Department of Commerce, International Trade Administration, Room 20001, 1401 Constitution Avenue NW, Washington, DC, tel. 202–482–4936 or 202–482–1512 or via email at *privacyshield@trade.gov.* Additional information on ITA fees is available at *trade.gov/fees.*

SUPPLEMENTARY INFORMATION:

Background

Consistent with the guidelines in OMB Circular A–25, federal agencies are responsible for implementing cost recovery program fees.

The role of ITA is to strengthen the competitiveness of U.S. industry, promote trade and investment, and ensure fair trade through the rigorous enforcement of our trade laws and agreements. ITA works to promote privacy policy frameworks to facilitate the flow of data across borders to support international trade.

The United States and the European Union (EU) share the goal of enhancing privacy protection but take different approaches to protecting personal data. Given those differences, the Department of Commerce (DOC) developed the Privacy Shield in consultation with the European Commission, as well as with industry and other stakeholders, to provide organizations in the United States with a reliable mechanism for personal data transfers to the United States from the European Union while ensuring the protection of the data as required by EU law.

In July 2016, the European Commission approved the EU–U.S. Privacy Shield Framework. The published Privacy Shield Principles are available at: [insert link]. The DOC has issued the Privacy Shield Principles under its statutory authority to foster, promote, and develop international commerce (15 U.S.C. 1512). ITA will administer and supervise the Privacy Shield, including by maintaining and making publicly available an authoritative list of U.S. organizations that have self-certified to the DOC. U.S. organizations submit information to ITA to self-certify their compliance with Privacy Shield. ITA will accept self-certification submissions beginning on August 1, 2016. At a future date, ITA will publish for public notice and comment information collections as described in the Privacy Shield Framework consistent with the Paperwork Reduction Act.

---

[1] *https://www.whitehouse.gov/omb/circulars_a025.*

U.S. organizations considering self-certifying to the Privacy Shield should review the Privacy Shield Framework. In summary, in order to enter the Privacy Shield, an organization must (a) be subject to the investigatory and enforcement powers of the Federal Trade Commission (FTC) or the Department of Transportation; (b) publicly declare its commitment to comply with the Principles through self-certification to the DOC; (c) publicly disclose its privacy policies in line with the Principles; and (d) fully implement them.

Self-certification to the DOC is voluntary; however, an organization's failure to comply with the Principles after its self-certification is enforceable under Section 5 of the Federal Trade Commission Act prohibiting unfair and deceptive acts in or affecting commerce (15 U.S.C. 45(a)) or other laws or regulations prohibiting such acts.

ITA has implemented a cost recovery program to support the operation of the Privacy Shield, which requires U.S. organizations to pay an annual fee to ITA in order to participate in the program. The cost recovery program supports the administration and supervision of the Privacy Shield program and supports the provision of Privacy Shield-related services, including education and outreach. The fee a given organization is charged is based on the organization's annual revenue:

Fee Schedule

EU–U.S. PRIVACY SHIELD FRAMEWORK COST RECOVERY PROGRAM

Organization's annual revenue	Annual fee
$0 to $5 million	$250
Over $5 million to $25 million	650
Over $25 million to $500 million	1,000
Over $500 million to $5 billion	2,500
Over $5 billion	3,250

Organizations will have additional direct costs associated with participating in the Privacy Shield. For example, Privacy Shield organizations must provide a readily available independent recourse mechanism to hear individual complaints at no cost to the individual. Furthermore, organizations are required to pay contributions in connection with the arbitral model, as described in Annex I to the Principles.

Method for Determining Fees

ITA collects, retains, and expends user fees pursuant to delegated authority under the Mutual Educational and Cultural Exchange Act as authorized in its annual appropriations acts.

The EU-U.S. Privacy Shield Framework was developed to provide organizations in the United States with a reliable mechanism for personal data transfers that underpin the trade and investment relationship between the United States and the EU.

Fees are set taking into account the operational costs borne by ITA to administer and supervise the Privacy Shield program. The Privacy Shield program requires a significant commitment of resources and staff. The Privacy Shield Framework includes commitments from ITA to:

- Maintain a Privacy Shield Web site;
- verify self-certification requirements submitted by organizations to participate in the program;
- expand efforts to follow up with organizations that have been removed from the Privacy Shield List;
- search for and address false claims of participation;
- conduct periodic compliance reviews and assessments of the program;
- provide information regarding the program to targeted audiences;
- increase cooperation with EU data protection authorities;
- facilitate resolution of complaints about non-compliance;
- hold annual meetings with the European Commission and other authorities to review the program, and
- provide an update of laws relevant to Privacy Shield.

In setting the Privacy Shield fee schedule, ITA determined that the services provided offer special benefits to an identifiable recipient beyond those that accrue to the general public. ITA calculated the actual cost of providing its services in order to provide a basis for setting each fee. Actual cost incorporates direct and indirect costs, including operations and maintenance, overhead, and charges for the use of capital facilities. ITA also took into account additional factors, including adequacy of cost recovery, affordability, and costs associated with alternative options available to U.S. organizations for the receipt of personal data from the EU.

ITA established a 5-tiered fee schedule that promotes the participation of small organizations in Privacy Shield. A multiple-tiered fee schedule allows ITA to offer the organizations with lower revenue a lower fee. In setting the 5 tiers, ITA considered, in conjunction with the factors mentioned above: (1) The Small Business Administration's guidance on identifying SMEs in various industries most likely to participate in the Privacy Shield, such as computer services, software and information services; (2) the likelihood that small companies would be expected to receive less personal data and thereby use fewer government resources; and (3) the likelihood that companies with higher revenue would have more customers whose data they process, which would use more government resources dedicated to administering and overseeing Privacy Shield. For example, if a company holds more data it could reasonably produce more questions and complaints from consumers and the European Union's Data Protection Authorities (DPAs). ITA has committed to facilitating the resolution of individual complaints and to communicating with the FTC and the DPAs regarding consumer complaints. Lastly, the fee increases between the tiers are based in part on projected program costs and estimated participation levels among companies within each tier.

Conclusion

Based on the information provided above, ITA believes that its Privacy Shield cost recovery fee schedule is consistent with the objective of OMB Circular A–25 to "promote efficient allocation of the nation's resources by establishing charges for special benefits provided to the recipient that are at least as great as the cost to the U.S. Government of providing the special benefits . . ." OMB Circular A–25(5)(b). ITA did not receive any public comments on the interim final rule it published on July 22, 2016 (PUT IN FR CITE) and is not revising the fee schedule at this time. ITA will reassess the fee schedule after the first year of implementation and, in accordance with OMB Circular A–25, at least every two years thereafter.

Dated: September 20, 2016.

Edward M. Dean,

Deputy Assistant Secretary for Services, International Trade Administration, U.S. Department of Commerce.

[FR Doc. 2016–23666 Filed 9–29–16; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE891

Fishing Capacity Reduction Program for the Pacific Coast Groundfish Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of sub-loan repayment.

SUMMARY: NMFS issues this notice to inform interested parties that the California Pink Shrimp sub-loan in the Pacific Coast Groundfish Capacity Reduction (Buyback) Program has been repaid. Therefore, Buyback fee collections on California Pink Shrimp sub-loan will cease for all landings after August 31, 2016.

DATES: Comments must be submitted on or before 5 p.m. EST October 17, 2016.

ADDRESSES: Send comments about this notice to Paul Marx, Chief, Financial Services Division, NMFS, Attn: California Pink Shrimp Buyback, 1315 East-West Highway, Silver Spring, MD 20910 (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Michael A. Sturtevant at (301) 427–8799 or *Michael.A.Sturtevant@noaa.gov.*

SUPPLEMENTARY INFORMATION: On November 16, 2004, NMFS published a proposed rule in the **Federal Register** (69 FR 67100) proposing to implement an industry fee system for repaying the California Pink Shrimp Buyback sub-loan. The final rule was published July 13, 2005 (70 FR 40225) and fee collection began on September 8, 2005. Interested persons should review these for further program details.

The California Pink Shrimp Buyback sub-loan in the amount of $674,202.18 will be repaid in full upon receipt of buyback fees on landings through August 31, 2016. NMFS has received $1,182,214.57 to repay the principal and interest on this sub-loan since fee collection began September 8, 2005. Based on Buyback fees received to date, landings after August 31, 2016, will not be subject to the Buyback fee. Therefore, Buyback fees will no longer be collected in the California Pink Shrimp fishery on future landings.

Buyback fees not yet forwarded to NMFS for California Pink Shrimp landings through August 31, 2016, should be forwarded to NMFS immediately. Any overpayment of Buyback fees submitted to NMFS will be refunded on a pro-rata basis to the fish buyers based upon best available fish ticket landings data. The fish buyers should return excess Buyback fees collected to the harvesters, including Buyback fees collected but not yet remitted to NMFS for landings after August 31, 2016. Any discrepancies in fees owed and fees paid must be resolved immediately. After the sub-loan is closed, no further adjustments to fees paid and fees received can be made.

Dated: September 26, 2016.

Brian T. Pawlak,

CFO/Director, Office of Management and Budget, National Marine Fisheries Service.

[FR Doc. 2016–23709 Filed 9–29–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

U.S. Integrated Ocean Observing System (IOOS®) Advisory Committee

AGENCY: National Ocean Service, National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: Notice is hereby given of a meeting of the U.S. Integrated Ocean Observing System (IOOS®) Advisory Committee (Committee) in Seattle, WA and La Push, WA.

DATES: The meeting will be held on Tuesday, October 11, 2016, from 9:00 a.m. to 12:00 p.m. in Seattle, WA. The meeting will continue in La Push, WA on Wednesday, October 12, 2016, from 9:00 a.m.–5:00 p.m., and Thursday October 13, 2016 from 9:00 a.m.–2:30 p.m. These times and the agenda topics described below are subject to change. Refer to the Web page listed below for the most up-to-date meeting agenda.

ADDRESSES: On Tuesday, October 11 the meeting will be held in the Hardisty Conference Room, 6th floor, Henderson Hall, University of Washington Applied Physics Laboratory, 1013 NE 40th Street, Seattle, WA 98105. On Wednesday and Thursday, October 12–13 the meeting will be held at the Quileute Tribal Administration Building, 90 Main Street, La Push, WA 98350.

FOR FURTHER INFORMATION CONTACT: Jessica Snowden, Designated Federal Official, U.S. IOOS Advisory Committee, U.S. IOOS Program, 1315 East-West Highway, Second Floor, Silver Spring, MD 20910; Phone 240–533–9466; Fax 301–713–3281; Email *jessica.snowden@noaa.gov* or visit the U.S. IOOS Advisory Committee Web site at *http://www.ioos.noaa.gov/advisorycommittee.*

SUPPLEMENTARY INFORMATION: The Committee was established by the NOAA Administrator as directed by Section 12304 of the Integrated Coastal and Ocean Observation System Act, part of the Omnibus Public Land Management Act of 2009 (Pub. L. 111–11). The Committee advises the NOAA Administrator and the Interagency Ocean Observation Committee (IOOC) on matters related to the responsibilities and authorities set forth in section 12302 of the Integrated Coastal and Ocean Observation System Act of 2009 and other appropriate matters as the Under Secretary refers to the Committee for review and advice.

The Committee will provide advice on:

(a) Administration, operation, management, and maintenance of the System;

(b) expansion and periodic modernization and upgrade of technology components of the System;

(c) identification of end-user communities, their needs for information provided by the System, and the System's effectiveness in dissemination information to end-user communities and to the general public; and

(d) any other purpose identified by the Under Secretary of Commerce for Oceans and Atmosphere or the Interagency Ocean Observation Committee.

The meeting will be open to public participation with a 15-minute public comment period on October 11, 2016, from 11:45 a.m. to 12:00 p.m., on October 12, 2016, from 4:30 p.m. to 4:45 p.m., and on October 13, 2016 from 2:00 p.m. to 2:15 p.m. (check agenda on Web site to confirm time.) The Committee expects that public statements presented at its meetings will not be repetitive of previously submitted verbal or written statements. In general, each individual or group making a verbal presentation will be limited to a total time of three (3) minutes. Written comments should be received by the Designated Federal Official by October 7, 2016 to provide sufficient time for Committee review.

Written comments received after October 7, 2016, will be distributed to the Committee, but may not be reviewed prior to the meeting date. Seats will be available on a first-come, first-served basis.

Matters to be Considered: The meeting will focus on ongoing committee priorities, as well as learning about ocean observing priorities from tribal, local, and state stakeholders in the Pacific Northwest. The latest version will be posted at *http://www.ioos.noaa.gov/advisorycommittee.*

Special Accomodations: These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Jessica Snowden, Designated Federal Official at 240–533–9466 by October 1, 2016.

Dated: September 12, 2016.

Zdenka Willis,

Director, U.S. IOOS Program, National Ocean Service.

[FR Doc. 2016–23661 Filed 9–29–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE921

Gulf of Mexico Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will hold a four-day meeting to consider actions affecting the Gulf of Mexico fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will take place on Monday, October 17 through Thursday, October 20, 2016.

ADDRESSES: The meeting will be held at the IP Casino hotel, located at 850 Bayview Avenue, Biloxi, MS 39530; telephone: (228) 436–3000.

Council address: Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607; telephone: (813) 348–1630.

FOR FURTHER INFORMATION CONTACT: Douglas Gregory, Executive Director, Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION:

Agenda

Monday, October 17, 2016; 8:30 a.m.–5:30 p.m.

The Full Council will be convened to a review and adopt the proposed 2016–17 Council Committee Roster. The Data Collection Management Committee will receive a presentation on National Fish and Wildlife Foundation's (NFWF) For-Hire Pilot Program; and For-hire reporting Requirements; Cost analysis and Reporting Requirements of Commercial Electronic Reporting Program. After lunch, the Shrimp Management Committee will receive an update on NMFS Turtle Excluder Devise (TED) Rule; Risk Assessment for Threshold Permit Numbers Relative to Sea Turtle Incidental Take Constraints; and review of Revised Options paper for Shrimp Amendment 17B. The Administrative/Budget Committee will review the State, Federal and Council Annual Leave Policies. The Mackerel Management Committee will review a Public Hearing Draft for CMP Amendment 29: Allocation Sharing and Accountability for Gulf King Mackerel; review Final Action—CMP Framework Amendment 5: Modifications to Pelagic Commercial Permit Restrictions in the Gulf of Mexico and Atlantic; and Final Action on CMP Amendment 30: Atlantic Cobia Recreational Fishing Year. The Full Council in a CLOSED SESSION (approximately 4:45 p.m.–5:45 p.m.) will review and select appointments for the Ad Hoc Private Recreational Advisory Panel (AP).

Tuesday, October 18, 2016; 8 a.m.–5:30 p.m.

The Reef Fish Management Committee will review the proposed regulations on the Flower Garden Banks National Marine Sanctuary; SEDAR 47 Goliath Grouper Benchmark Assessment; Draft Framework Action on Mutton Snapper ACL and Management Measures and Gag Commercial Size Limit. Review Draft Amendment 42: Reef Fish Recreational Management for Headboat Survey Vessels; and, Final Action—Referendum Requirements for Amendment 42. Review the preliminary 2016 Red Snapper For-hire Landings Relative to Acceptable Catch Target (ACT); review Draft Amendment 46—Gray Triggerfish Rebuilding Plan and Draft Amendment 41—Red Snapper Management for Federally Permitted Charter Vessels.

Wednesday, October 19, 2016; 8 a.m.–5:30 p.m.

The Reef Fish Management Committee will review draft Amendment 36A—Modifications to Commercial Individual Fishing Quota (IFQ) programs; and receive a summary on the Standing and Special Reef Fish Scientific and Statistical Committee (SSC) and Reef Fish Advisory Panel meetings. The Joint Coral/Habitat Committee will review the Final Draft of 5-year EFH Review and scoping document for Coral Habitat Areas of Particular Concern (HAPCs). The Law Enforcement Committee will review and approve the Law Enforcement Operations and Strategic Plans; and receive a summary from the Law Enforcement Technical Committee meeting.

The Full Council will convene after lunch (approximately 1 p.m.) with Call to Order, Announcements, and Introductions; and review of Exempt Fishing Permit (EFPs) Applications, if any. The Council will receive presentations on Draft Highly Migratory Species (HMS) Amendments 5b and 10; Climate Vulnerability Analysis for Gulf Managed Stocks; Mississippi Law Enforcement Efforts; and NMFS–SERO Landing Summaries. The Council will receive public testimony from 2:45 p.m. until 5:30 p.m. on Agenda Testimony items: Final Action on Framework Action 5: To Remove the Prohibition on Retaining the Recreational King Mackerel Bag Limit with Commercial King Mackerel Permit; Final Action on Referendum Requirements for Reef Fish Amendment 42—Reef Fish Management for Headboat Survey Vessels; on proposed fishing regulations on the Flower Garden Banks National Marine Sanctuary; and Final Action on CMP Amendment 30: Atlantic Cobia Recreational Fishing Year; and, hold an open public testimony period regarding any other fishery issues or concern. Anyone wishing to speak during public comment should sign in at the registration station located at the entrance to the meeting room.

Thursday, October 20, 2016; 8 a.m.–3:30 p.m.

The Full Council will receive committee reports from Data Collection, Mackerel, Shrimp and the Administrative/Budget Management Committees. The Full Council will receive the Closed Session Report on Ad Hoc Private Recreational Angler AP Membership and Discuss the Charge of the AP. The Council will continue to receive committee reports from Law Enforcement, Reef Fish and Joint Coral/Habitat Management Committees; and, vote on Exempted Fishing Permit (EFP) applications, if any. The Council will receive updates from supporting agencies: South Atlantic Fishery Management Council; Gulf States

Marine Fisheries Commission; U.S. Coast Guard; U.S. Fish and Wildlife Service; and, the Department of State.

Lastly, the Council will discuss any Other Business items.

—Meeting Adjourns—

The timing and order in which agenda items are addressed may change as required to effectively address the issue. The latest version will be posted on the Council's file server, which can be accessed by going to the Council's Web site at *http://www.gulfcouncil.org* and clicking on FTP Server under Quick Links. For meeting materials, select the "Briefing Books/Briefing Book 2016–10" folder on Gulf Council file server. The username and password are both "gulfguest". The meetings will be webcast over the internet. A link to the webcast will be available on the Council's Web site, *http://www.gulfcouncil.org.*

Although other non-emergency issues not contained in this agenda may come before this Council for discussion, those issues may not be the subjects of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided that the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kathy Pereira (see **ADDRESSES**) at least 5 days prior to the meeting date.

Dated: September 27, 2016.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–23699 Filed 9–29–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[0648–XE687]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to a Tidal Marsh Restoration Project

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: NMFS has received a request from the California Department of Fish and Wildlife—Central Region (CADFW) for authorization to take marine mammals incidental to construction activities as part of a tidal marsh restoration project within the Minhoto-Hester Marsh in Elkhorn Slough (Monterey, CA). Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to the CADFW to incidentally take marine mammals, by Level B harassment only, during the specified activity.

DATES: Comments and information must be received no later than October 31, 2016.

ADDRESSES: Comments on the applications should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to *ITP.Egger@noaa.gov.*

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments received electronically, including all attachments, must not exceed a 25-megabyte file size. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at *www.nmfs.noaa.gov/pr/permits/incidental/construction.htm* without change. All personal identifying information (*e.g.*, name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Stephanie Egger, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Availability

An electronic copy of the CADFW's application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *www.nmfs.noaa.gov/pr/permits/incidental/construction.htm.* In case of problems accessing these documents, please call the contact listed above.

National Environmental Policy Act

In August 2010, NMFS' Office of Habitat Conservation prepared a Targeted Supplemental Environmental Assessment (TSEA) for a similar tidal restoration project in Parson's Slough, a tidal marsh adjacent to the project area (both in Elkhorn Slough). The TSEA assessed the potential adverse environmental impacts of this project specific to marine mammals. Additional potential impacts to other elements of the human environment from this type of project were incorporated by reference in the TSEA. NMFS has reviewed the TSEA and believes it appropriate to write a Supplemental EA (based on the TSEA) in order to assess the impacts to the human environment of issuance of an IHA to CADFW and subsequently sign our own Finding of No Significant Impact. In addition, information in the CADFW's application, CADFW's Initial Study and Mitigated Negative Declaration (prepared June 2015 pursuant to the CA Environmental Quality Act of 1970 (CEQA)), the Elkhorn Slough National Estuarine Research Reserve (ESNERR) Biological Assessment (prepared September 2015), and this notice collectively provide the environmental information related to the proposed issuance of this IHA for public review and comment. All documents are available at the aforementioned Web site. We will review all comments submitted in response to this notice as we complete the National Environmental Policy Act (NEPA) process prior to a final decision on the incidental take authorization request.

Background

Sections 101(a)(5)(D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as ". . . an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization. Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as "any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment]."

Summary of Requests

On June 2, 2016, we received an application from the CADFW for authorization to take marine mammals incidental to construction activities associated with a 47-acre tidal marsh restoration project within the Minhoto-Hester Marsh in Elkhorn Slough (Monterey, CA) (Phase 1). The overall Elkhorn Slough Tidal Marsh Restoration Project would restore a total of 147 acres; however, future phases are not part of this application as they are currently unfunded and present some additional technical challenges. Another IHA request will be made prior to implementation of any proposed future phases. The CADFW submitted revised versions of the application on July 13, 2016, August 2, 2016, August 29, 2016, and a final application on September 6, 2016 which we deemed adequate and complete.

The proposed activity would begin between October 2016 and February 2017 and last approximately 11 months with built in buffers for adverse weather and other conditions when work is not possible. Pacific harbor seal (*Phoca vitulina richardii*) and southern sea otters (*Enhydra lutris nereis*) are expected to be present during the proposed work. Southern sea otters are managed by the U.S. Fish and Wildlife Service and will not be considered further in this proposed IHA notice. Construction activities are expected to produce noise and visual disturbance that have the potential to result in behavioral harassment of harbor seals. NMFS is proposing to authorize take, by Level B Harassment, of harbor seals as a result of the specified activity.

Description of the Specified Activities

Overview

The CADFW proposes to restore approximately 47 acres of tidal marsh within the Minhoto-Hester Marsh in Elkhorn Slough (Monterey, CA) and additional tidal marsh, upland ecotone, native grasslands restoration within a buffer area (Phase 1). This work would require approximately 170,000 cubic yards (cy) of fill to raise the marsh to an elevation that would allow emergent wetland vegetation to naturally reestablish and persist. The work would also require maintaining or re-excavating existing tidal channels and excavating within the upland buffer area to restore habitat. The slough system has historically faced substantial tidal wetland loss related to prior diking and marsh draining, and is presently facing unprecedented rates of marsh degradation.

The CADFW intends to restore tidal marsh to reduce tidal erosion, improve water quality, provide sea-level rise resilience, increase carbon sequestration, and improve ecosystem function that have been altered by past land use practices.

Dates and Duration

Under the proposed action, 132 days of construction activities and four days of vibratory pile driving (total 136 days of project activities) related to the tidal marsh restoration would occur over an 11-month period. The 11-month period is a conservative estimate and includes ecotone and grassland restoration work as well. Most of the work on the marsh plain would be completed within six to eight months. The construction period assumes that the construction contractors would work between the hours of 5:00 a.m. to 6:00 p.m., Monday through Friday, only during daylight hours. However, some construction activity may also be required during these times on Saturdays. The proposed IHA would be valid for one year from the date of issuance, with project start expected between October 2016 and February 2017.

Specific Geographic Region

The proposed project is located in the Elkhorn Slough estuary, situated 90 miles south of San Francisco and 20 miles north of Monterey, is one of the largest estuaries in CA and contains the State's largest salt marshes south of San Francisco Bay (see Figure 1–1 of the application). The Elkhorn Slough is a network of intertidal marshes, mudflats, and subtidal channels located at the center of the Monterey Bay shoreline. The restoration will occur specifically in the Minhoto-Hester Marsh (project area) within the Slough, and is a low-lying area consisting of marsh, intertidal mudflats, tidal channels and remnant levees. The project area is on land owned and managed by CADFW as part of the ESNERR (see Figure 1–2 of the application). One Marine Protected Area (MPA), a State Marine Reserve is located within the project area. Two additional MPAs are located within one mile of the project area. The Minhoto-Hester Marsh has multiple cross-levees and both natural and dredged channels with a major dredged channel (100+ feet (ft) wide in some locations) that runs north to south through the remnant marsh.

Over the past 150 years, human activities have altered the tidal, freshwater, and sediment processes which are essential to support and sustain Elkhorn Slough's estuarine habitats. Fifty percent of the tidal salt marsh in the Slough has been lost during this time period. This habitat loss is primarily a result of two historic land use changes, (1) construction of a harbor at the mouth of the Slough and the related diversion of the Salinas River, which lead to increased tidal flooding (and subsequent drowning of vegetation) and (2) past diking and draining of the marsh for use as pasture land. The act of draining wetlands led to sediment compaction and land subsidence, from one to six feet. Decades later, the dikes began to fail, reintroducing tidal waters to the reclaimed wetlands. Rather than converting back to salt marsh, the areas converted to poor quality, high elevation intertidal mudflat, as the lowered landscape was inundated too frequently to support tidal marsh, and insufficient sediment supply was available in the tidal waters to rebuild elevation. The loss of riverine sediment inputs, continued subsidence of marsh areas, sea level rise, increased salinity, and increased nutrient inputs may also contribute to marsh loss (Watson *et al.*, 2011). Bank and channel erosion in the Elkhorn Slough are leading to deepening and widening tidal creeks, causing salt marshes to collapse into the channel, and eroding sediments that provide important habitat and support estuarine food webs.

Detailed Description of Activities

The CADFW plans to raise the subsided former marsh plain (currently mostly too low to sustain vegetation) to mid-high marsh plain elevations over an area of approximately 47 acres (see Figure 1–3 of the application). Approximately 167,000 cy of sediment is required for implementation of the proposed project. The CADFW will use 50,000 cy of imported sediment, along with approximately 117,000 cy of sediment excavated from existing upland areas of the project site, to achieve the requisite 167,000 cy necessary for project implementation. Sediment would be placed to a fill elevation slightly higher than the target marsh plain elevation to allow for settlement and consolidation of the underlying soils. The average fill depth would be 2.1 ft, including 25 percent overfill.

Table 1, below, presents the acreages and extents of proposed fill within each marsh sub-area, as well as the volume of fill required for each marsh sub-area to be restored. The stockpiled Pajaro Bench soils and onsite borrow would be used as fill sources. The project would rely primarily on natural vegetation recruitment in the restored marsh areas.

TABLE 1—VOLUME OF FILL REQUIRED IN EACH SUB-AREA

Project component/staging area	Area (acres)	Fill area (acres)	Fill volume (range in cubic yards)
Phase 1			
Sub-area M1	12.1	9.5	28,000 to 43,700.
Sub-area M2	5.6	4.5	10,700 to 17,700.
Sub-area M3	11.1	8.3	27,000 to 41,000.
Sub-area H1	17.8	14.1	42,100 to 65,300.
Subtotal Phase 1	47	36	107,900 to 167,800.
Total Phase 1	47	36	107,900 to 167,800.

Note: Volumes in presented in this table are mid-range estimates; actual volumes may be higher or lower.
Source: Environmental Science Associates, 2014 Final Elkhorn Slough Tidal Marsh Restoration Project Restoration Plan, July 1, 2014.

Water Control and Tidal Channels of the Restoration Area—Work areas on the remnant marsh plain would for the most part be isolated from the tides and dewatered to allow construction in non-tidal conditions. Water control structures such as temporary berms would be utilized to isolate the fill placement area during the construction period. Existing berms would be used, where possible. There are a number of potential configurations to isolate the fill placement area which will depend on the workflow of the contractor chosen. For this application, CADFW has identified the water control option with the greatest potential impact to marine mammals would be a sheet pile wall at the mouth of the project area (see Figure 1–3 of the application). If a sheet pile is required to be installed at the tidal entrance to the project area, four days of vibratory pile driving would occur. It is also possible that the mouth of the project area may be closed with an earthen dam or an inflatable dam; therefore, the sheet pile would not be necessary. The isolated work areas would be drained using a combination of gravity and pumps. Water levels within the blocked areas would be managed to keep them mostly free of water (with some ponded areas remaining) and to allow fill placement at all stages of the tides. To reduce the potential for fish to become entrained in isolated ponded areas, blocking of tidal channels would occur at low tide. When sediment placement is completed, the berms would be lowered to the target marsh elevation, reintroducing tidal inundation.

Remnant historic channels onsite would generally be left in place or filled and re-excavated in the same place. As needed for marsh access, smaller channels would be filled. Avoidance of channel fill, temporary and permanent, is preferred. As much of the existing tidal channel network would be maintained as is feasible, and the post-project channel alignments would be similar to those under existing conditions. The density of channels (length of channel per acre of marsh) after restoration would be comparable to the density in natural reference marshes. Low levees (less than 0.5 ft above the marsh plain) composed of fill material would be constructed along the larger channels to simulate natural channel levees. The project would recreate natural levee features along the sides of the main channel into the Minhoto-Hester Marsh. Fill would be placed as close to the edge of the channel as possible to simulate the form and function of a natural channel bank. Borrow ditches that date from the times of historical wetland reclamation in these areas would be blocked or filled completely if fill is available after raising the marsh plain. Blocking borrow ditches would route more flow through the natural channels and slightly increase hydraulic resistance, which may achieve benefits from reducing tidal prism and associated scour in the Elkhorn Slough system.

To limit trip distances onto the marsh, the project would employ one or more of the following placement approaches. Temporary channel crossings may be constructed, or tidal channels may be temporarily filled and then re-dug with an excavator or backhoe. If re-excavation of the smaller channels proves infeasible, these channels may be permanently filled, the resulting channel extent consisting of the larger channels only. The resulting channel extent would be sufficient to provide drainage and tidal exchange to support natural marsh functions. The number and locations of channel crossings would depend on the tradeoff between haul distances and the ease of installing and removing the crossings. Where tidal channels were maintained in place, turbidity control measures (*i.e.,* Best Management Practices (BMPs), such as hay bales or weed free straw wattles) could be staked down in or adjacent to the channels to be preserved. Bulldozers would push fill up to the hay bales and wattles, but not into the channels. Channel crossings and BMPs would be removed at project completion.

Buffer Area—The buffer area would be graded to increase marsh area and create a gently sloping ecotone band along the edge of the restored marsh. Specifically, excavation would widen the existing marsh (by up to 150 ft) and create a band of gentle slope (*e.g.,* 1:30) on the hillside, fostering creation of a wider ecotone habitat. The remaining buffer area would be restored to native grassland habitat. The north end of the buffer area (adjacent to M4 and M6) would be restored in a later phase so this area could be used to stockpile material for future placement on subareas M4, M5, and M6 (see Figure 1–3 of the application).

Construction Sequencing and Equipment—Construction sequencing would begin with water management and/or turbidity control measures constructed around the work areas prior to placing material on the marsh. After fill placement on the marsh, any temporary features, such as water management berms, sheet pile and culverts, would be removed. Construction equipment would include haul trucks, heavy earthmoving equipment, such as dozers, backhoes, loaders, and excavators to transport dry material out onto the marsh. All heavy equipment used to transport dry material out onto the marsh would be of low ground pressure to prevent sinking in the mud. Mats would be temporarily placed on the marsh, as needed, to spread the weight of the equipment. A conveyor system could also be used to transport dry material from the stockpile out to the marsh, in lieu of dozers pushing the material the full distance. In the latter case, a loader would continuously load the conveyor system with material near the stockpile, and a dozer at the marsh drop off location would spread the material. A conveyor system may increase construction time as it would need to be assembled and taken apart to move it to new areas. A conveyor system is also likely cost prohibitive. At the end of construction in each cell/stage, any elevated haul roads and/or berms constructed to aid in material placement would be excavated to design grades, with the resulting earth used to fill adjacent restoration areas.

Description of Marine Mammals in the Area of the Specified Activity

The marine mammal species under NMFS jurisdiction occurring in the proposed project area is the Pacific harbor seal. In the harbor seal account provided here, we offer a brief introduction to the species and relevant stock as well as available information regarding population trends and threats, and describe any information regarding local occurrence (Table 2). Please also refer to NMFS' Web site (*http://www.fisheries.noaa.gov/pr/species/mammals/seals/harbor-seal.html*) for the generalized harbor seal account and see NMFS' Stock Assessment Reports (SAR), available at *www.nmfs.noaa.gov/pr/sars,* for more detailed accounts of the harbor seal stocks' status and abundance. The harbor seal is assessed in the Pacific SAR (Carretta *et al.,* 2016).

Harbor Seal Overview and Regional Status

Harbor seals inhabit coastal and estuarine waters and shoreline areas of the northern hemisphere from temperate to polar regions. The eastern North Pacific subspecies is found from Baja California north to the Aleutian Islands and into the Bering Sea. Multiple lines of evidence support the existence of geographic structure among harbor seal populations from California to Alaska (O'Corry-Crowe *et al.,* 2003; Temte, 1986; Calambokidis *et al.,* 1985; Kelly, 1981; Brown, 1988; Lamont, 1996; Burg, 1996). Harbor seals are generally non-migratory, and analysis of genetic information suggests that genetic differences increase with geographic distance (Westlake and O'Corry-Crowe, 2002). However, because stock boundaries are difficult to meaningfully draw from a biological perspective, three separate harbor seal stocks are recognized for management purposes along the west coast of the continental United States: (1) Inland waters of Washington; (2) outer coast of Oregon and Washington; and (3) California (Carretta *et al.,* 2016). This IHA addresses seals from the California stock only.

TABLE 2—HARBOR SEAL STATUS INFORMATION

Species	Stock	(ES)/MMPA status; strategic (Y/N)[1]	Stock abundance (CV, N_{min}, most recent abundance survey)[2]	PBR[3]	Annual M/SI[4]	Relative occurrence in Elkhorn Slough; season of occurrence
Family Phocidae (earless seals)						
Harbor seal	California	-; N	30,968 (n/a; 27,348; 2012)	1,641	42.8	Common; year-round.

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR (see footnote 3) or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance. In some cases, CV is not applicable. For certain stocks of pinnipeds, abundance estimates are based upon observations of animals (often pups) ashore multiplied by some correction factor derived from knowledge of the species (or similar species) life history to arrive at a best abundance estimate; therefore, there is no associated CV. In these cases, the minimum abundance may represent actual counts of all animals ashore. The most recent abundance survey that is reflected in the abundance estimate is presented; there may be more recent surveys that have not yet been incorporated into the estimate.

[3] Potential biological removal, defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population size (OSP).

[4] These values, found in NMFS' SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, subsistence hunting, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value. All values presented here are from the final 2015 Pacific SAR. (*http://www.nmfs.noaa.gov/pr/sars/region.htm*).

Local Abundance and Habitat Use

Harbor seals use Elkhorn Slough for hauling out, resting, socializing, foraging, molting and reproduction, but mainly use it as a staging area for foraging in the Monterey Bay, as there is a limited amount of foraging in the Slough (McCarthy, 2010). Harbor seals inhabit Elkhorn Slough year-round and occur individually or in groups, but their abundance may change seasonally depending on prey availability, molting, and reproduction (McCarthy, 2010). Counts of harbor seals in the greater Elkhorn Slough began in 1975 and at that time averaged about 30 seals (Harvey *et al.*, 1995; Oxman, 1995). Counts conducted by Osborn (1985) in 1984 averaged 35 seals, and during 1991, maximum counts reported by Oxman (1995) were five times greater. Oxman also reported a 20 percent increase between 1990 and 1991, from 150 to 180 seals. Average counts remained comparable from 1994 through 1997, with peaks coinciding with pupping and molting seasons (pupping season is April—June with molting in July following the pupping season) (Oxman 1995). A count of 339 seals was reported in 1997 (Jones, 2002; Richman, 1997). The population in the greater Elkhorn Slough is currently estimated at 300 to 500 seals (McCarthy, 2010). Harbor seal count data as reported were collected from a variety of sources using various methodologies. Data sources included former graduate student research, occasional counts by Dr. Jim Harvey, Director at Moss Landing Marine Laboratories, and ESNERR staff observations.

Harbor seals have utilized the Elkhorn Slough as a resting site since the 1970s, but the first births were not recorded until 1991 (Maldini *et al.*, 2010). Harbor seals have used Elkhorn Slough for reproduction for the past two decades. From 1995 to 1997, there was a significant annual increase in pups, from 14 seals in 1995 to 29 seals in 1997 (Richman, 1997). Pupping can occur throughout the year, but generally starts in late March and peaks in May (McCarthy, 2010). Some seals may depart during pupping/breeding season to other breeding areas outside of Elkhorn Slough. Females tend to remove themselves from the group to give birth and return within a week (McCarthy, 2010). In 2010, 50 pups were observed in Elkhorn Slough (J. Harvey unpublished data in McCarthy, 2010). No births have been documented in the project area and it is not likely that neonates will be in the project area as females prefer to keep their pups along the main channel of Elkhorn Slough, which is outside the area expected to be impacted by project activities.

Harbor seals usually occupy areas just beyond the mouth of Elkhorn Slough in the Moss Landing Harbor and in the Salinas River channel south of the Moss Landing bridge and the lower portion of Elkhorn Slough extending up to Parson's Slough and Rubis Creek. They typically use the corridor from the mouth of Elkhorn Slough through the Moss Landing Harbor entrance for nightly feeding in Monterey Bay (J. Harvey, pers. comm. in McCarthy, 2010). In a diet study conducted between 1995 and 1997, 35 species including topsmelt, white croaker, spotted cusk-eel, night smelt, bocaccio, Pacific herring, a brachyuran crustacean, and four genera of mollusks were consumed by harbor seals (Harvey *et al.*, 1995 in McCarthy, 2010).

Seal Haul Outs Potentially Impacted by Project Activities

In the eastern part of Elkhorn Slough, harbor seals primarily use two sub-areas to haul out, the Minhoto-Hester Marsh Complex (project area and the area just outside the project) and the area in and around Parson's Slough (see Figures 4–4 and 4–3 of the application, respectively). Monitoring was completed in 2013 to document the abundance and distribution of harbor seals utilizing the Minhoto-Hester Marsh Complex to determine potential impacts from the proposed project (Beck, 2014). Eight harbor seal haul out sites were identified in the Minhoto-Hester Marsh Complex, which also included haul-outs in portions of the Yampah Marsh adjacent to Minhoto-Hester Marsh (see Figure 4–5 of the application). Four of these haul out sites are within the footprint of the construction area and will be inaccessible during construction, but available again after construction. To better assess which areas of Minhoto-Hester Marsh were used by seals, haul out sites were categorized as either inside or outside the footprint of the construction area. The four haul out sites within the footprint of the construction area are remnant berms on the interior of the marsh, identified as Small Island, M2 North, M3 North and M3 East (see Figure 4–5 of the application). Four haul out sites, just beyond the footprint of the construction area, are on the edge of the marsh nearest the main channel of Elkhorn Slough, and identified as M5 Northeast, M5 Southeast, Yampah Northwest and Yampah Southwest (see Figure 4–5 of the application). In 2013, the maximum number of seals counted from those eight haul out sites totaled 94 seals (Beck, 2014). In the Parson's Slough Complex, adjacent to the project area, approximately 100 seals use the exposed mudflats during low tide to haul out on six haul out sites. The closest haul out in the Parson's Slough Complex is located 1,300 feet northeast of the project area.

Potential Effects of the Specified Activity on Marine Mammals

This section includes a summary and discussion of the ways that components of the specified activity (*e.g.*, construction inclusive of short term pile driving) may impact marine mammals. This discussion also includes reactions that we consider to rise to the level of a take and those that we do not consider to rise to the level of a take (for example, with acoustics, we may include a discussion of studies that showed animals not reacting at all to sound or exhibiting barely measurable avoidance). This section is intended as a background of potential effects and does not consider either the specific manner in which this activity will be carried out or the mitigation that will be implemented, and how either of those will shape the anticipated impacts from this specific activity.

The Estimated Take by the Incidental Harassment section later in this document will include a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis section will include the analysis of how this specific activity will impact marine mammals and will consider the content of this section, the Estimated Take by Incidental Harassment section, the Proposed Mitigation section, and the Anticipated Potential Effects on Marine Mammal Habitat section to draw conclusions regarding the likely impacts of this activity on the reproductive success or survivorship of individuals and from that on the affected marine mammal populations or stocks.

Description of Sound Sources

Harbor seals that use the four haul out sites, just beyond the footprint of the construction, area (M5 Northeast, M5 Southeast, Yampah Northwest and Yampah Southwest) (described in the previous of section, Description of Marine Mammals in the Area of the Specified Activity) and in other nearby areas may potentially experience behavioral disruption rising to the level of harassment from construction activities, which may include visual disturbance due to the presence and activity of heavy equipment and construction workers, airborne noise from the equipment, and from underwater noise during the brief period of sheet pile installation. Disturbed seals are likely to experience any or all of these stimuli, and take may occur due to any of these in isolation or in combination with the others.

A significant body of past monitoring evidence indicates that activities, such as construction, conducted in close proximity to hauled out harbor seals, have the potential to disturb seals that are present. Some or all of the seals present would be expected to move or flush in response to the presence of crew and equipment, though some may remain hauled out. Seals typically exhibit a continuum of responses, beginning with alert movements (*e.g.*, raising the head), which may then escalate to movement away from the stimulus and possible flushing into the water. Flushed seals typically re-occupy the haul out within minutes to hours of the stimulus. In a previous study at Elkhorn Slough, harassment by humans (from recreational boating and fishermen) within 100 meter (m) was documented for harbor seals (Osborn, 1985b in Oxman 1995). Allen *et al.* (1984 in McCarthy, 2010) reported a similar distance for disturbance (mostly by non-powered boats) in Bolinas Lagoon (a similar tidal estuary in Bolinas, CA). During the Parson's Slough project, most of the harbor seal disturbances were land-based and occurred at distances of approximately 150 m or more and involved head raises or body repositioning. Some seals showed no disturbance reactions at all. Movement of vessels associated with the project was the construction activity most frequently associated with disturbance (38 percent), followed by vibratory driving of sheet piles (13 percent) and other construction activities (13 percent) (ESNERR, 2011). The disparity between the disturbance distances of the studies within Elkhorn Slough may be due to the fact that the Osborn (1985) was monitoring seals near Seal Bend, and seals in this area are likely more exposed to vessel traffic as the haul out is along the edge of the main channel and more habituated to that type of disturbance. Seals monitored during the Parson's Slough project (ESNERR, 2011) are not likely exposed as frequently to vessel traffic as their haul outs are within areas that are more sheltered and where watercraft is not allowed. During that project, seals showed disturbance to vessel movement at further distances (150 m or greater) and were more frequently disturbed from moving vessels than from pile driving activities. These seals may be habituated to some anthropogenic sounds (*e.g.*, Union Pacific Railroad trains (UPRR)), but not to disturbance from moving vessels and therefore exhibited behavioral reactions at a greater distance away. There may also be seasonal variability in disturbance reactions, such as during the pupping season, as well as variation within different populations (Gunvalson, 2011).

Airborne background sound (anthropogenic) of Elkhorn Slough is likely dominated by recreational vessel activities, UPRR trains, and other human activity in the area. Recreational vessels are restricted to the main channel of Elkhorn Slough (just outside the project area). Trains along the UPRR likely generate fairly high noise levels in the vicinity of Minhoto-Hester Marsh within the eastern portion of the project area. Approximately 15 to 20 trains pass along the UPRR each day, which is located 400 ft from the furthest eastern portion of the project area (Vinnedge Environmental Consulting, 2010). Noise levels from the UPRR trains were monitored during the construction of the Parson's Slough project, adjacent to the Minhoto-Hester Marsh, and estimated at 108 dBC Lmax (dBC can be defined as decibel (dB) with C-weighting which is a standard weighting of the audible frequencies commonly used for the measurement of peak sound pressure Level (SPL) and Lmax is defined as the maximum sound level during a single noise event). Noise is also generated from the Pick-n-Pull, a vehicle dismantling and recycling yard, and located approximately 300 ft from the project area. Agricultural equipment is operated occasionally within the existing uplands, including haul trucks that regularly travel across adjacent agricultural lands and may produce other back ground noise.

Noise levels from the previous Parson's Slough project were monitored in 2010 and 2011. Background noise during that project was approximately 57dBC Lmax measured at 20 and 40 m northeast of the pile installation site and approximately 1.5 m above the ground (ESNERR, 2011). Although no specific measurements have been made at the proposed project area, it is reasonable to believe that levels may generally be similar to the previous project at Parson's Slough as there is a similar type and degree of activity within the same type of environment (tidal salt marsh). Known sound levels and frequency ranges associated with anthropogenic sources similar to those associated to this project are summarized in Table 3. Details of the source types are described in the following table.

TABLE 3—REPRESENTATIVE AIRBORNE SOUND LEVELS OF ANTHROPOGENIC SOURCES—dB re: 20μPa

Sound source	Airborne sound level	Reference
Vibratory driving of steel sheet piles	97 dBA at 10 m 90 dBA at 30 m	ESNERR, 2011 (Parson's Slough).
Heavy Earth Moving Equipment (*i.e.*, excavators, backhoes, and front loaders).	80–90 dB at 15.24 m	FHWA, 2015.
UPRR trains	108 dBC Lmax at 20m and 40 m (northeast of the pile installation).	ESNERR, 2011 (Parson's Slough).

Airborne noise associated with this project includes noise from construction activities (including vibratory pile driving) during the restoration of the tidal marsh. Airborne noise produced from earth moving equipment (*i.e.*, backhoes, front end loaders) for construction, may produce sound levels at 80–90 dB at 15.24 m (FHWA, 2015) (Table 3). The construction activity may generate noise above ambient levels or create a visual disturbance for a period of 11 months. Although the exact distance of disturbance from noise is unknown, it is anticipated that the disturbance area would be smaller than the sheet pile installation impact area since construction equipment does not generate as much noise as pile driving. Trains along the UPRR likely generate fairly high noise levels in the eastern portion of the project area, so earth moving equipment operated in this area may not elevate ambient noise levels when trains are present. For this project, vibratory pile driving will only occur over four days of the 136 total days of construction and conducted at low tide, to the extent practicable, when minimal water is present to minimize underwater sound impacts.

Acoustic Effects

Marine mammals that occur in the project area could be exposed to airborne or underwater sounds associated with construction activities that have the potential to cause harassment, depending on their distance from construction activities. Although there is some potential that seals in the water could be exposed to underwater sound during the proposed four days of vibratory sheet pile driving, the underwater footprint of acoustic effect would likely be very small due to acoustic shadowing within the sinuous marsh area at the project site and the low source level, and seals would likely be disturbed by other stimuli associated with the project activities. Therefore, we do not separately consider underwater sound and do not discuss it further in this document.

Anthropogenic airborne sound could cause hauled out pinnipeds to exhibit changes in their normal behavior, such as reduction in vocalizations, or cause them to temporarily abandon their habitat and move further from the source. Studies by Blackwell *et al.* (2004) and Moulton *et al.* (2005) indicate a tolerance or lack of response to unweighted airborne sounds as high as 112 dB peak and 96 dB root mean square (rms).

Visual Disturbance

Visual stimuli due to the presence of construction activities during the project have the potential to result in take of harbor seals at nearby haul out sites through behavioral disturbance. Harbor seals can exhibit a behavioral response to visual stimuli (*e.g.,* including alert behavior, movement, vocalizing, or flushing). NMFS does not consider the lesser reactions (*e.g.,* alert behavior) to constitute harassment. Upon the occurrence of low-severity disturbance (*i.e.,* the approach of a vessel or person as opposed to an explosion or sonic boom), pinnipeds typically exhibit a continuum of responses, beginning with alert movements (*e.g.,* raising the head), which may then escalate to movement away from the stimulus and possible flushing into the water. Flushed pinnipeds typically re-occupy the haul out within minutes to hours of the stimulus.

Due to the likely constant combination of visual and acoustic stimuli resulting from the presence and use of heavy equipment and work crews, we assume that harbor seals present in the areas adjacent to the footprint of the construction area may be disturbed and do not consider acoustic effects separately from the effects of potential disturbance due to visual stimuli.

Anticipated Potentials Effects on Marine Mammal Habitat

The primary potential impact to marine mammal habitat associated with the construction activity is the exclusion from the accustomed haul out areas. However, other potential impacts to the surrounding habitat from physical disturbance are also possible.

Physical Impacts to Haul Out Habitat

Eight harbor seal haul out sites were identified in the Minhoto-Hester Marsh Complex, which also included haul outs in portions of Yampah Marsh adjacent to Minhoto-Hester Marsh (see Figure 4–5 of the application). Four of the eight haul out sites are within the footprint of the construction area and identified as Small Island, M2 North, M3 North and M3 East. Only the edge of the M2 North haul out site will be converted back to tidal marsh as it borders a borrow ditch that was previously excavated to create a berm (straight north south ditch) and is not a natural or historical marsh feature. The haul out sites of Small Island, M3 North and M3 East will remain intact. These four haul out sites will be temporarily unavailable to harbor seals, but once construction is complete, those sites will be available again (see Figure 4–4 of the application). During the restoration, the inability of seals to use suitable habitat within the footprint of the construction area would temporarily remove less than two percent of the potential haul out areas in the Slough (see Figure 4–4 of the application). Although the proposed action would permanently alter habitat within the footprint of the construction area, harbor seals haul out in many locations throughout the estuary, and the proposed activities are not expected to have any habitat-related effects that could cause significant or long-term consequences for individual harbor seals or their population. The restoration of the marsh habitat will have no adverse effect on marine mammal habitat, but possibly a long-term beneficial effect on harbor seals by improving ecological function of the slough, inclusive of higher species diversity, increased species abundance, larger fish, and improved habitat.

Pile Driving Effects on Potential Foraging Habitat

The area likely impacted by the project is relatively small compared to the available habitat in estuary waters in the Elkhorn Slough and the region. Avoidance by potential prey (*i.e.,* fish) of the immediate area due to the temporary loss of this foraging habitat is also possible. The duration of fish avoidance of this area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated. Any impact would be short term and site-specific, and habitat conditions would return to their pre-disturbance state shortly after the cessation of in-water construction activities. Any behavioral avoidance by fish of the disturbed area would still leave significantly large areas of fish and marine mammal foraging habitat in the nearby vicinity.

In addition, primary foraging habitat for harbor seals may be mostly outside of the project area as they primarily use the Minhoto-Hester Marsh Complex for hauling out. Research by Oxman (1995) and Harvey *et al.* (1995) compared catch rates from trawls conducted in the Elkhorn Slough to species detected in seal scat and found that seals primarily feed between Seal Bend and the oceanic nearshore shelf in Monterey Bay. Oxman (1995) also radio-tagged seals and found that they all spent their nights diving within 0.5 to 7 km of shore, most (88 percent) 1.25 km south of the Elkhorn Slough entrance, with the others (12 percent) either 4 km north at the Pajaro River mouth, or 7.25 km north at Sunset Beach, Santa Cruz.

In summary, given the short daily duration of sound associated with individual pile driving events (four days) and the relatively small areas being affected, pile driving activities associated with the proposed action are not likely to have a permanent, adverse effect on the foraging habitat. Harbor seals may forage mostly in the nearshore oceanic shelf; therefore, NMFS does not expect the proposed action to have habitat-related effects on harbor seal foraging success that could cause significant long-term consequences for individual harbor seals or their population.

Proposed Mitigation

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses.

The primary purposes of these mitigation measures are to minimize disturbance from construction activities and to monitor marine mammal behavioral response to any potential sound and visual disturbances.

Here we provide a description of the mitigation measures we propose to require as part of the proposed Authorization.

Timing Restrictions

Construction work shall occur only during daylight hours when visual monitoring of marine mammals can be implemented. No in-water work will be conducted at night.

Construction Activities

After sheet piles are installed, harbor seals would no longer be able to access the project area and would temporarily be displaced from using those four haul outs. It would be unlikely for seals to enter the construction area as they would need to traverse a minimum 7ft high berm into an area without water. However, if a seal did enter the project area, CADFW shall notify NMFS immediately and further action would be determined. In addition, to reduce the risk of potentially startling marine mammals with a sudden intensive sound, the contractor shall begin construction activities gradually each day by moving around the project area and starting tractor one at a time.

Pupping Season

While CADFW does not anticipate any pupping within the project area, should a pup less than one week old (neonate) come within 20 m of where heavy machinery is working, construction activities in that area would be delayed until the pup has left the area. In the event that a pup less than one week old remains within those 20 m, NMFS would be consulted to determine the appropriate course of action.

Vibratory Pile Driving

An exclusion zone of 15 m shall be established during the four days of pile driving to prevent the unlikely potential for physical injury of harbor seals due to close approach to construction equipment. Pile extraction or driving shall not commence (or re-commence following a shutdown) until marine mammals are not sighted within the exclusion zone for a 15-minute period. If a marine mammal enters the exclusion zone during sheet pile work, work shall stop until the animal leaves the exclusion zone or is not observed for a minimum of 15 minutes.

Based on our evaluation of the proposed measures, as well as any other potential measures that may be relevant to the specified activity, we have preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth "requirements pertaining to the monitoring and reporting of such taking". The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for incidental take authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area.

Any monitoring requirement we prescribe should improve our understanding of one or more of the following:

- Occurrence of marine mammal species in the action area (*e.g.*, presence, abundance, distribution, density).
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.*, source characterization, propagation, ambient noise); (2) Affected species (*e.g.*, life history, dive patterns); (3) Co-occurrence of marine mammal species with the action; or (4) Biological or behavioral context of exposure (*e.g.*, age, calving or feeding areas).
- Individual responses to acute stressors, or impacts of chronic exposures (behavioral or physiological).
- How anticipated responses to stressors impact either: (1) Long-term fitness and survival of an individual; or (2) Population, species, or stock.
- Effects on marine mammal habitat and resultant impacts to marine mammals.
- Mitigation and monitoring effectiveness.

Proposed Monitoring—Visual Marine Mammal Observations

Qualified Protected Species Observer (PSO) (a NMFS approved biologist) shall be used to detect, document, and minimize impacts to marine mammals. Monitoring would be conducted before, during, and after construction activities. In addition, PSOs shall record all incidents of marine mammal occurrence, regardless of distance from activity, and document any behavioral reactions in concert with distance from construction activities.

Important qualifications for PSOs for visual monitoring include:

- Visual acuity in both eyes (correction is permissible) sufficient for discernment of harbor seals on land or in the water with ability to estimate target size and distance; use of binoculars may be necessary to correctly identify the target;
- Advanced education in biological science or related field (undergraduate degree or higher required);
- Experience and ability to conduct field observations and collect data according to assigned protocols (this may include academic experience);
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when construction activities were conducted; dates and times when construction activities were suspended, if necessary; and marine mammal behavior; and
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

PSOs shall be placed at the best vantage point(s) (*e.g.*, Yampah Island, see Figure 2 of the monitoring plan in the application) practicable to monitor for marine mammals. PSOs shall also conduct mandatory biological resources awareness training for construction personnel. The awareness training shall be provided to brief construction personnel on marine mammals (inclusive of identification as needed, *e.g.*, neonates) and the need to avoid and minimize impacts to marine mammals. If new construction personnel are added to the project, the contractor shall ensure that the personnel receive the mandatory training before starting work. The PSO would have authority to stop construction if marine mammals appear distressed (evasive maneuvers, rapid breathing, inability to flush) or in danger of injury.

The CADFW has developed a monitoring plan based on discussions between the CADFW and NMFS. The CADFW will collect sighting data and behavioral responses to construction activities for marine mammal species observed in the region of activity during the period of activity. All PSOs will be trained in marine mammal identification and behaviors and are required to have no other construction-related tasks while conducting monitoring.

The monitoring plan involves PSOs surveying and conducting visual counts beginning prior to construction activities (beginning at least 30 minutes prior to construction activities), hourly monitoring during construction activities, and post-activity monitoring (continuing for at least 30 minutes after construction activities have ended). PSOs will conduct monitoring from a vantage point in the marsh (*e.g.*, Yampah Island) such that all seal haul outs (see Figure 2 of the monitoring plan in the application) are in full view. During construction activities, monitoring shall assess behavior and potential behavioral responses to noise and visual disturbance due to the proposed activities. To document disturbance and possible incidental take during construction activities, the monitoring protocols will be implemented at *all times* when work is occurring (1) in-water, (2) north of a line starting at 36°48′38.91 N., 121°45′08.03 W., and ending 36°48′38.91 N., 121°45′27.11 W., (see Figure 1 of the monitoring plan in the application), and (3) within 30.5 m (100 ft) of tidal waters. When work is occurring in other areas, monitoring will occur for the first three days of construction and anytime there is a significant change in activities or location of construction activities within the project area. If disturbance is noted at any time, then monitoring will continue until there are three successive days of no disturbance. If there is a gap in construction activities of more than one week, the monitoring protocols will again be implemented for the first three days that construction resumes.

Counts will be performed for harbor seals hauled out and observed in the water. Total counts, sex, and age (adult, juvenile, pup) will be recorded. Behavioral monitoring will be conducted for the duration of the construction activities to document any behavioral responses to visual (or other) disturbance, according to the disturbance scale shown in Table 4 below. When responses are observed, the degree of response (*i.e.*, alert and flush, movement of more than one m, or change in direction of movement) and the assumed cause (whether related to construction activities or not) will be noted. Only responses at Level 2 and 3 are considered to be take under the MMPA.

TABLE 4—SEAL RESPONSE TO DISTURBANCE

Level	Type of response	Definition
1	Alert	Seal head orientation or brief movement in response to disturbance, which may include turning head towards the disturbance, craning head and neck while holding the body rigid in a u-shaped position, changing from a lying to a sitting position, or brief movement of less than twice the animal's body length. Alerts would be recorded, but not counted as a 'take'.
2	Movement	Movements away from the source of disturbance, ranging from short withdrawals at least twice the animal's body length to longer retreats, or if already moving a change of direction of greater than 90 degrees. These movements would be recorded and counted as a 'take'.
3	Flush	All retreats (flushes) to the water. Flushing into the water would be recorded and counted as a 'take'.

Additional parameters will be recorded including: Atmospheric conditions, cloud cover, visibility conditions, air and water temperature, tide height, and any other disturbance (visual or noise) that may be noted. We require that PSOs use approved data forms. Among other pieces of information, CADFW will record detailed information about any implementation of shutdowns, including the distance of animals to construction activities and description of specific actions that ensued and resulting behavior of the animal, if any. In addition, CADFW will attempt to distinguish between the number of individual animals taken and the number of incidents of take. Additional requirements of PSOs include:

(1) The PSO shall be selected prior to construction activities;

(2) The PSO shall attend the project site prior to, during, and after construction activities cease each day that the construction activities occur;

(3) The PSO shall search for marine mammals on the seal haul outs, other suitable haul out habitat, and within the waters of this area from the observation site. PSOs will use binoculars and the naked eye to search continuously for marine mammals;

(4) The PSO shall be present during construction activities to observe for the presence of marine mammals in the vicinity of the specified activity. All such activity would occur during daylight hours. If inclement weather limits visibility within the area of effect, the PSO would perform visual scans to the extent conditions allow. For pile driving activities, if the 15 m area around the pile driving is obscured by fog or poor lighting conditions, pile driving will not be initiated until that area is visible;

(5) If marine mammals are sighted by the PSO, the PSO shall record the number of marine mammals and the duration of their presence while the construction activity is occurring. The PSO would also note whether the marine mammals appeared to respond to the noise/visual disturbance and, if so, the nature of that response. The PSO shall record the following information: Date and time of initial sighting, tidal stage, weather conditions, species, behavior (activity (*e.g.*, foraging, mating, etc.), group cohesiveness, direction and speed of travel, etc.), number, tagged animals, whether the animal(s) are in the water or hauled out, group composition, distance between construction activities and marine mammal(s), number of animals impacted, location, construction activities occurring at time of sighting (earth moving equipment, construction personnel walking/talking, pile driving etc.), and monitoring and mitigation measures implemented or not implemented). The observations would be reported to NMFS; and

(6) A final report would be submitted summarizing all effects from construction activities and marine mammal monitoring during the time of the authorization.

A written log of dates and times of monitoring activity will be kept. The log shall report the following information:

- Time of PSO arrival on site;
- Time of the commencement of construction activities;
- Distances to all marine mammals relative to the disturbance;
- Observations, notes on marine mammal behavior during construction activities, as described above, and on the number and distribution observed in the project vicinity;
- For observations of all other marine mammals (if observed) the time and

duration of each animal's presence in the project vicinity; the number of animals observed; the behavior of each animal, including any response to construction activities;

- Time of the cessation of construction activities; and
- Time of PSO departure from site.

Individuals implementing the monitoring protocol will assess its effectiveness using an adaptive approach. PSOs will use their best professional judgment throughout implementation and seek improvements to these methods when deemed appropriate. Any modifications to protocol will be coordinated between NMFS and the CADFW.

Proposed Reporting

A draft report will be submitted to NMFS within 90 days of the completion of marine mammal monitoring, or sixty days prior to the issuance of any subsequent IHA for this project (if required), whichever comes first. The report will include marine mammal observations pre-activity, during-activity, and post-activity of construction, and will also provide descriptions of any behavioral responses by marine mammals due to disturbance from construction activities and a complete description of total take estimate based on the number of marine mammals observed during the course of construction. A final report must be submitted within thirty days following resolution of comments on the draft report.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines "harassment" as: ". . . Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment]."

All anticipated takes would be by Level B harassment resulting from construction activities involving temporary changes in behavior. It is unlikely that injurious or lethal takes would occur even in the absence of the planned mitigation and monitoring measures. Further, the proposed mitigation and monitoring measures are expected to minimize the possibility of take by Level A harassment, such that it is considered discountable.

Given the many uncertainties in predicting the quantity and types of impacts of sound or visual disturbance on marine mammals, it is common practice to estimate how many animals are likely to be present within a particular distance of a given activity, or exposed to a particular level of sound or visual disturbance. In practice, depending on the amount of information available to characterize daily and seasonal movement and distribution of affected marine mammals, it can be difficult to distinguish between the number of individuals harassed and the instances of harassment and, when duration of the activity is considered, it can result in a take estimate that overestimates the number of individuals harassed. In particular, for stationary activities, it is more likely that some smaller number of individuals may accrue a number of incidences of harassment per individual than for each incidence to accrue to a new individual, especially if those individuals display some degree of residency or site fidelity and the impetus to use the site (*e.g.,* because of foraging opportunities) is stronger than the deterrence presented by the harassing activity.

In order to estimate the potential incidents of take that may occur incidental to the specified activity, we must first estimate the area subject to the disturbance that may be produced by the construction activities and then consider in combination information about harbor seals present and the number of days animals would be disturbed during the project. We then provide information to estimate potential incidents of take from disturbance as related to construction activities.

Introduction to Acoustic Criteria

We use generic sound exposure thresholds to determine when an activity that produces sound might result in impacts to a marine mammal such that a take by harassment might occur. To date, no studies have been conducted that explicitly examine impacts to marine mammals from pile driving sounds or from which empirical sound thresholds have been established. The generic thresholds described below (Table 5) are used to estimate when harassment may occur (*i.e.,* when an animal is exposed to levels equal to or exceeding the relevant criterion) in specific contexts. However, useful contextual information that may inform our assessment of effects is typically lacking and we consider these thresholds as step functions.

TABLE 5—CURRENT ACOUSTIC EXPOSURE CRITERIA FOR PINNIPEDS

Criterion	Definition	Threshold
Level B harassment (underwater) ...	Behavioral disruption	120 dB (non-impulse, continuous source, *i.e.,* vibratory pile driving) (rms).
Level B harassment (airborne)	Behavioral disruption	90 dB (harbor seals).

Sound Produced From Construction Activities

Any underwater noise produced during pile driving in Minhoto-Hester Marsh would attenuate according to the shoreline topography. In a narrow and relatively shallow slough, bends and topographic changes in the bottom would act to reflect sound and attenuate sound levels. Seals within the project area, from the sound source (vibratory pile driving) to the north bank of the main channel of Elkhorn Slough (approximately 525–600 m; see Figure 6–4 in the application), may be impacted by noise and were used as the area to define Level B take estimates. Seals may be exposed to underwater noise that could cause behavioral harassment (*i.e.,* above NMFS' 120-dB [rms re 1 μPa] behavioral harassment criterion) only within a small area (see Figure 6–4 of the application). This small section of channel defines the extent of the potential Level B harassment zone for underwater noise.

Restoration activities would produce airborne noise that could potentially harass harbor seals that are hauled out near the activities. For example, airborne noise produced from earth moving equipment (*i.e.,* backhoes, front end loaders) for construction, may produce sound levels at 80–90 dB at 15.24 m (FHWA, 2015) (Table 3). However, disturbance resulting from use of heavy equipment or other aspects of the proposed work could occur due to visual stimuli or airborne noise, and the likely range within which seals may be disturbed would be larger than the range to the 90-dB airborne noise disturbance criterion. Therefore, we do not evaluate takes specifically due to exposure to airborne noise and do not discuss airborne noise further in this document.

Description of Take Calculation

The following sections are descriptions of how take was determined for impacts to harbor seals from noise and visual disturbance related to construction activities.

Incidental take is calculated for each species by estimating the likelihood of a marine mammal being present within the project area during construction activities. Expected marine mammal presence is determined by past observations and general abundance during the construction window. For this project, the take requests were estimated using local marine mammal data sets, and information from state and federal agencies.

The calculation for marine mammal exposures is estimated by:

Exposure estimate = N (number of animals in the area) * 132 days of construction activities or 4 days of pile driving activity

All estimates proposed by the applicant and accepted by NMFS, are considered conservative. Construction activities will occur in sections, and some sections (*e.g.,* M1) are further away from seal haul outs (approximately 420 m and greater). Noise from construction activities in more southern sections of the footprint of the construction area may cause fewer disturbances to seals. Not all seals that previously used the haul outs within the footprint of the construction area will use the haul outs just outside the project. The channel is small and the available habitat would likely not be able to support all 100 seals of the Minhoto-Hester Marsh Complex. Some seals may seek alternative haul out habitat in other parts of Elkhorn Slough. Pile driving will only occur for a short duration (four days) and would not be continuous during the day (daylight hours only). Using this approach, a summary of estimated takes of harbor seals incidental the project activities are provided in Table 6. Estimates include Level B harassment as a result of exposure to noise and visual disturbance during construction activities.

The best scientific information available was considered for use in the harbor seal take assessment calculations. It is difficult to estimate the number of harbor seals that could be affected by construction activities because the animals are mainly either in the project area or venture near the project area to haul out during the day when the tide is low. Once the tidal channel is blocked and four haul out sites (Small Island, M2 North, M3 North and M3 East) are inaccessible, some seals will be able to use the alternative four hauls outs (M5 Northeast, M5 Southeast, Yampah Northwest and Yampah Southwest). Seals that use these alternative four haul outs may be potentially impacted from noise and visual disturbance from construction activities of the tidal marsh restoration, but seals that normally use areas in the interior tidal channel may use haul outs that are outside the expected area of influence of the construction activity.

Various types of construction equipment (in addition to pile drivers) would be utilized for project activities such as dozers, loaders, and backhoes that may generate sound that can cause both noise and visual disturbance to harbor seals. Although the exact distance of all noise disturbances from construction activities is unknown, it is anticipated that the disturbance area for airborne noise would be small as earth moving equipment (*i.e.,* backhoes, front end loaders) produce sound levels at 80–90 dB at 15.24 m and vibratory driving of sheet piles at 90 dBA at 30 m (Table 3) (dBA can be defined as dB with A-weighting designed to match the average frequency response of human hearing and enables comparison of the intensity of noise with different frequency characteristics). The closest haul outs that will be available to seals are 43–131 m outside the footprint of the construction area. If seals are in the water near the project or on available haul outs there is a chance that seals could be exposed to noise and/or visual disturbance from the construction activities. Construction activities may impact seals using haul outs M5 Northeast, M5 Southeast, Yampah Northwest and Yampah Southwest.

We assume that an average of 50 harbor seals will potentially occupy the alternate haul outs based on the size of the haul out habitat that is available. Four haul outs (out of eight) will be temporarily inaccessible during the construction; therefore, half of the seals (approximately 50 out of the 100 seals) of the Minhoto-Hester Marsh Complex will likely use the alternate four haul outs and experience disturbance from construction activities. It is presumed that the other half of the seals (50 seals) of the Minhoto-Hester March Complex will utilize other suitable haul out habitat within Elkhorn Slough and are not considered available to be "taken" during construction activities (Monique Fountain, ESNERR, pers. comm. 2016). We multiply this estimate of the number of harbor seals potentially available to be taken by the total number of days (132 days) the applicant expects construction activities to occur. Therefore, CADFW requests, and NMFS proposes, authorization of 132 instances of takes per seal for 50 harbor seals (total of 6,600 instances) by Level B harassment incidental to construction activities (airborne noise and visual disturbance) over the course of the proposed action if all of the estimated harbor seals present are taken by incidental harassment each day (Table 6).

While the pile driving activities are planned to take place during slack tide to the extent possible (when harbor seals are less likely to be present), and only for a short duration, there may still be animals exposed to disturbance from pile driving even if the number of individual harbor seals expected to be encountered is very low. There are approximately 100 harbor seals that utilize Minhoto-Hester Marsh Complex that may be disturbed during pile driving activities. Additionally, there is some potential that an additional 100 harbor seals that occur in the adjacent Parson's Slough Complex and Yampah Marsh and 50 harbor seals that may be present in the main channel of Elkhorn Slough could also be disturbed. CADFW requests, and NMFS proposes, authorization of four instances of take per seal for 250 harbor seals (total of 1,000 instances) by Level B harassment incidental to pile driving activities over the course of the proposed action if all of the estimated harbor seals present are taken by incidental harassment each day. This is an estimate based on the average number of harbor seals that potentially occupy the project area (and surrounding areas) (250 seals) multiplied by the total number of days (four days) the applicant expects pile driving activities to occur (Table 6). This is a very conservative estimate, as not all the seals are likely in or near the project area at the same time, some of which are due to environmental variables such as tide level and the time of day. In the Minhoto-Hester Marsh Complex, a maximum daily average of 40 seals were present in the project area (on Small Island, M2 North, M3 North, and M3 East haul out sites) and 41 seals outside the project area (on M5 Northeast, M5 Southeast, Yampah Northwest and Yampah Southwest haul out sites) during the 2013 surveys, which is slightly less than the proposed 100 seals that may be taken. In addition, noise attenuates quickly due to shallow water, tidal influence and sinewy channels of Elkhorn Slough. NMFS considers this to be an conservative estimate by the applicant for the following reasons: (1) It would be unlikely that all 250 individual seals would be in the vicinity of the project area daily as there are other areas of the Slough that they likely use to haul out (see Figure 4–4 of the application); (2) as mentioned above, the haul out sites within the footprint of the construction area would be inaccessible to harbor seals and NMFS would not expect harbor seals to be affected by pile driving activities during the days/times when pile driving and high tide events co-occur; (3) harbor seals begin to leave the project area at night when they are likely foraging in Monterey Bay and will not be exposed to sound generated during pile driving that may take place during early evening hours; and, (4) based on previous survey effort conducted for the adjacent Parson's Slough project, some harbor seals moved out of the disturbance area when construction activities were initiated and moved west (downstream) towards Seal Bend or other areas of suitable habitat along the main channel of Elkhorn Slough (see Figure 4–4 of the application).

TABLE 6—SUMMARY OF THE PROPOSED AUTHORIZED INCIDENTAL TAKE BY LEVEL B HARASSMENT OF HARBOR SEALS FROM PILE DRIVING AND CONSTRUCTION ACTIVITIES

Species	Estimated number of individuals taken per day of activity (seals)	Proposed take authorization (number of exposures from construction activities—132 days)	Abundance	Approximate percentage of estimated stock (takes authorized/ population) (%)	Population trend
Pacific harbor seal	50	6,600	30,968—California stock	19.37	Increased in California 1981 to 2004.
Species		Proposed Take Authorization (Number of Exposures from Pile Driving—4 days).	Abundance		Population Trend.
Pacific harbor seal	250	1,000	30,968—California stock	3.2	Increased in California 1981 to 2004.
Total	300	7,600		24.54	

No takes by Level A harassment, serious injury, or mortality are expected from the disturbance associated with the construction activities. It is unlikely a stampede (a potentially dangerous occurrence in which large numbers of animals succumb to mass panic and rush away from a stimulus) would occur or abandonment of pups. There is no pupping expected within the footprint of the construction area and most pups are along the main channel of Elkhorn Slough. Pacific harbor seals have been hauling out in the project area and within the greater Elkhorn Slough throughout the year for many years (including during pupping season and while females are pregnant) while being exposed to anthropogenic sound sources such as recreational vessel traffic, UPRR, and other stimuli from human presence. The number of harbor seals disturbed would likely also fluctuate depending on time day and tidal stage. Fewer harbor seals will be present in the early morning and approaching evening hours as seals leave the haul out site to feed and they are also not present when the tide is high and the haul out is inundated.

The following assumptions are made when estimating potential incidences of take:

- All marine mammal individuals potentially available are assumed to be present within the relevant area, and thus incidentally taken;
- An individual can only be taken once during a 24-h period;
- There were will be 136 total days of activity for project (four days of pile driving and 132 construction activities); and
- Exposures to sound levels at or above the relevant thresholds equate to take, as defined by the MMPA.

Analyses and Preliminary Determinations

Negligible Impact Analysis

NMFS has defined "negligible impact" in 50 CFR 216.103 as ". . . an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival." A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.*, population-level effects). An estimate of the number of Level B harassment takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be "taken" through behavioral harassment, we consider other factors, such as the likely nature of any responses (*e.g.*, intensity, duration), the context of any responses (*e.g.*, critical reproductive time or location, migration), as well as the number and nature of estimated Level A harassment takes, the number of estimated mortalities, and effects on habitat.

Construction activities associated with this project have the potential to disturb or displace marine mammals. No serious injury or mortality would be expected at all, and with mitigation we expect to avoid any potential for Level A harassment as a result of the Minhoto-Hester Marsh construction activities, and none are proposed for authorization by NMFS. The specified activities may result in take, in the form of Level B harassment (behavioral disturbance) only, from visual disturbance and/or noise from construction activities. The project area is within a portion of the local habitat for harbor seals of the greater Elkhorn Slough and seals are present year-round. Behavioral disturbances that could result from anthropogenic sound or visual disturbance associated with these activities are expected to affect only a small amount of the total population (*i.e.*, likely maximum of 250 individual seals), although those effects could be recurring over the life of the project if the same individuals remain in the project vicinity. Harbor seals may avoid the area or halt any behaviors (*e.g.*, resting) when exposed to anthropogenic noise or visual disturbance. Due to the abundance of suitable haul out habitat available in the greater Elkhorn Slough, the short-term displacement of resting harbor seals is not expected to affect the overall fitness of any individual animal.

Effects on individuals that are taken by Level B harassment, on the basis of reports in the literature as well as monitoring from other similar activities, will likely be limited to reactions such as displacement from the area or disturbance during resting. The construction activities analyzed here are similar to, or less impactful than for Parson's Slough (and other projects) which have taken place with no reported injuries or mortality to marine mammals, and no known long-term adverse consequences from behavioral harassment. Repeated exposures of individuals to levels of noise or visual disturbance that may cause Level B harassment are unlikely to result in hearing impairment or to significantly disrupt foraging behavior. Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (*i.e.*, 24 hour cycle). Behavioral reactions (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.*, 2007). However, Pacific harbor seals have been hauling out at Elkhorn Slough during the year for many years (including during pupping season and while females are pregnant) while being exposed to anthropogenic sound and visual sources such as vessel traffic, UPRR trains, and human voices from kayaking. Harbor seals have repeatedly hauled out to rest (inside and outside the project area) or pup (outside of the project area) despite these potential stimuli. The proposed activities are not expected to result in the alteration of reproductive or feeding behaviors. No births have been documented in the project area and it is not likely that neonates will be in the project area as females prefer to keep their pups along the main channel of Elkhorn Slough, which is outside the area expected to be impacted by project activities. Seals are primarily foraging outside of Elkhorn Slough and at night in Monterey Bay, outside the project area, and during times when construction activities are not occurring.

Pacific harbor seals, as the potentially affected marine mammal species under NMFS jurisdiction in the action area, are not listed as threatened or endangered under the ESA and NMFS SARs for this stock have shown that the population is increasing and is considered stable (Carretta *et al.*, 2016). Even repeated Level B harassment of some small subset of the overall stock is unlikely to result in any significant realized decrease in viability for the affected individuals, and thus would not result in any adverse impact to the stock as a whole. The restoration of the marsh habitat will have no adverse effect on marine mammal habitat, but possibly a long-term beneficial effect on harbor seals by improving ecological function of the slough, inclusive of higher species diversity, increased species abundance, larger fish, and improved habitat.

In summary, this negligible impact analysis is founded on the following factors: (1) The possibility of injury, serious injury, or mortality may reasonably be considered discountable; (2) the anticipated incidents of Level B harassment consist of, at worst, temporary modifications in behavior; (3) primary foraging and reproductive habitat are outside of the project area and the construction activities are not expected to result in the alteration of habitat important to these behaviors or substantially impact the behaviors themselves (4) there is alternative haul out habitat just outside the footprint of the construction area, along the main channel of Elkhorn Slough, and in Parson's Slough that would be available for seals while some of the haul outs are inaccessible; (5) restoration of the marsh habitat will have no adverse effect on marine mammal habitat, but possibly a long-term beneficial effect (6) and the presumed efficacy of the proposed mitigation measures in reducing the effects of the specified activity to the level of least practicable impact. In addition, these stocks are not listed under the ESA or considered depleted under the MMPA. In combination, we believe that these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activities will have only short-term effects on individuals. The specified activities are not expected to impact rates of recruitment or survival and will therefore not result in population-level impacts.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, we preliminarily find that the total marine mammal take from the construction activities will have a negligible impact on the affected marine mammal species or stocks.

Small Numbers Analyses

The number of incidents of take proposed for authorization for harbor seals would be considered small relative to the relevant stock and populations (see Table 6) even if each estimated taking occurred to a new individual. This is an extremely unlikely scenario as, for pinnipeds in estuarine/inland waters, there is likely to be some overlap in individuals present day-to-day. As noted above, we assume that a maximum of 250 individual seals would be impacted during the course of this specified activity. We preliminarily find that small numbers of marine mammals will be taken relative to the populations of the affected species or stocks.

Impact on Availability of Affected Species for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by these actions. Therefore, we have determined that the total taking of harbor seals would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act (ESA)

No ESA-listed species under NMFS' jurisdiction are expected to be affected by these activities. Therefore, NMFS has determined that a section 7 consultation under the ESA is not required.

National Environmental Policy Act

Pursuant to NEPA, NMFS is currently conducting an analysis to determine whether or not this proposed IHA may have a significant effect on the quality of the human environment. This analysis will be completed prior to the issuance or denial of the final IHA.

Proposed Authorization

As a result of these preliminary determinations, we propose to issue an IHA to the CADFW for conducting the described tidal restoration activities in the Minhoto-Hester Marsh of Elkhorn Slough, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. The proposed IHA language is provided next.

1. This IHA is valid for one year from the date of issuance, with the project

start date expected between October 2016 and February 2017.

2. This IHA is valid only for construction activities (inclusive of vibratory pile driving) for tidal marsh restoration associated within the Minhoto-Hester Marsh Restoration Project (Phase 1) in Elkhorn Slough (Monterey, CA).

3. *General Conditions*

(a) A copy of this IHA must be in the possession of, its designees, and work crew personnel operating under the authority of this IHA.

(b) The species authorized for taking is the Pacific harbor seal (*Phoca vitulina richardii*).

(c) The taking, by Level B harassment only, is limited to the species listed in condition 3(b). See Table 6 (above) for numbers of take authorized.

(d) The taking by injury (Level A harassment), serious injury, or death of the species listed in condition 3(b) of the Authorization or any taking of any other species of marine mammal is prohibited and may result in the modification, suspension, or revocation of this IHA.

(e) The taking of any marine mammal in a manner prohibited under this IHA must be reported immediately to the Office of Protected Resources, NMFS.

(f) CADFW shall conduct briefings between construction supervisors and crews, marine mammal monitoring team, and CADFW staff prior to the start of all construction activities for tidal marsh restoration, and when new personnel join the work, in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures.

4. *Mitigation Measures*

The holder of this Authorization is required to implement the following mitigation measures:

(a) *Timing Restrictions:* Construction work shall occur only during daylight hours.

(b) *Construction Activities:* If a seal enters the project area after installation of barriers, CADFW shall notify NMFS immediately. In addition, the construction contractor shall begin construction activities gradually each day (*e.g.,* by moving around the project area and starting equipment sequentially).

(c) *Pupping Season:* If a pup less than one week old (neonate) comes within 20 m of where heavy machinery is working, construction activities in that area would be delayed until the pup has left the area. In the event that a pup less than one week old remains within those 20 m, NMFS would be consulted to determine the appropriate course of action.

(d) *Vibratory Pile Driving:* An exclusion zone (shutdown zone) of 15 m shall be established during pile driving. Pile extraction or driving shall not commence (or re-commence following a shutdown) until marine mammals are not sighted within the exclusion zone for a 15-minute period. If a marine mammal enters the exclusion zone during sheet pile work, work shall stop until the animal leaves the exclusion zone or until 15 minutes has elapsed without observation of the animal within the zone.

5. *Monitoring*

The holder of this Authorization is required to abide by the following monitoring conditions:

(a) *Visual Monitoring*

Qualified Protected Species Observer (PSO) (a NMFS approved biologist) shall be used to detect, document, and minimize impacts to marine mammals. Qualifications for PSOs for visual monitoring include:

(i) Visual acuity in both eyes (correction is permissible) sufficient for discernment of harbor seals on land or in the water with ability to estimate target size and distance; use of binoculars may be necessary to correctly identify the target;

(ii) Advanced education in biological science or related field (undergraduate degree or higher required);

(iii) Experience and ability to conduct field observations and collect data according to assigned protocols (this may include academic experience);

(iv) Experience or training in the field identification of marine mammals, including the identification of behaviors;

(v) Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;

(vi) Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when construction activities were conducted; dates and times when construction activities were suspended to avoid potential incidental injury from construction sound or visual disturbance of marine mammals observed; and marine mammal behavior; and

(vii) Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

(b) *PSO Monitoring and Data Collection*

Monitoring shall be conducted before, during, and after construction activities. In addition, PSOs shall record all incidents of marine mammal occurrence, regardless of distance from activity, and shall document any behavioral reactions in concert with distance from construction activities. PSOs will be placed at the best vantage point(s) practicable to monitor for marine mammals.

The PSO shall also conduct biological resources awareness training for construction personnel. The awareness training will be provided to brief construction personnel on identification of marine mammals (including neonates) and the need to avoid and minimize impacts to marine mammals. If new construction personnel are added to the project, the contractor shall ensure that the personnel receive the mandatory training before starting work. The PSO would have authority to stop construction if marine mammals appear distressed (evasive maneuvers, rapid breathing, inability to flush) or in danger of injury. Monitoring requirements also include:

(i) The holder of this Authorization must designate at least one biologically-trained, on-site individual(s), approved in advance by NMFS, to monitor marine mammal species. The PSO will be trained in marine mammal identification and behaviors and are required to have no other construction-related tasks while conducting monitoring.

(ii) PSOs shall be provided with the equipment necessary to effectively monitor for marine mammals in order to record species, behaviors, and responses to construction activities.

(iii) *Pre-activity Monitoring:* At least 30 minutes prior to the start of all construction activities, the PSO(s) must conduct observations on the number, type(s), location(s), and behavior(s) of marine mammals.

(iv) *Monitoring during Construction Activity:* To document disturbance and possible incidental take during construction activities, the monitoring protocols shall be implemented at *all times* when work is occurring (1) in-water, (2) north of a line starting at 36°48′38.91 N., 121°45′08.03 W., and ending 36°48′38.91 N., 121°45′27.11 W., (see Figure 1 of the monitoring plan in the application), and (3) within 30.5 m (100 feet) of tidal waters. When work is occurring in other areas, the monitoring protocols shall be implemented for the first three days of construction and anytime there is a significant change in activities or location of construction activities within the project area. If disturbance is noted at any time, then monitoring shall continue until there are three successive days of no disturbance. If there is a gap in construction activities of more than one week the monitoring protocols shall again be implemented for the first three days that construction resumes.

Data collection during marine mammal monitoring shall consist of hourly counts of all marine mammals by species, number, sex, age class, a description of behavior (if possible), location, direction of movement, type of construction that is occurring, time construction activities starts and ends, any noise or visual disturbance, and time of the observation. When responses are observed, the type of take (*i.e.*, alert and flush, movement of more than one m, or change in direction of movement) and the assumed cause (whether related to construction activities or not) shall be noted. Environmental conditions such as weather, visibility, temperature, tide level, current, and sea state shall also be recorded. A written log of dates and times of monitoring activity will be kept. The log shall report the following information:

- Time of PSO arrival on site;
- Time of the commencement of construction activities;
- Distances to all marine mammals relative to the disturbance;
- Observations, notes on marine mammal behavior during construction activities, as described above, and on the number and distribution observed in the project vicinity;
- For observations of all other marine mammals (if observed) the time and duration of each animal's presence in the project vicinity; the number of animals observed; the behavior of each animal, including any response to construction activities;
- Time of the cessation of construction activities;
- Time of PSO departure from site; and
- An estimate of the number (by species) of marine mammals that are known to have been disturbed by construction activities (based on visual observation) with a discussion of any specific behaviors those individuals exhibited. Disturbance must be recorded according to NMFS' three-point scale.

Individuals implementing the monitoring protocol will assess its effectiveness using an adaptive approach. PSOs will use their best professional judgment throughout implementation and seek improvements to these methods when deemed appropriate. Any modifications to protocol will be coordinated between NMFS and the CADFW.

(v) *Post-activity Monitoring:* At least 30 minutes following the cessation of all construction activities, the PSO(s) must conduct observations on the number, type(s), location(s), and behavior(s) of marine mammals.

6. *Reporting*

(a) The CADFW shall submit a draft report to NMFS within 90 days of the completion of marine mammal monitoring, or sixty days prior to the issuance of any subsequent IHA for this project (if required), whichever comes first. The report shall include marine mammal observations pre-activity, during-activity, and post-activity of construction, and shall also provide descriptions of any behavioral responses by marine mammals due to disturbance from construction activities and a complete description of total take estimate based on the number of marine mammals observed during the course of construction. If comments are received from the NMFS Office of Protected Resources on the draft report, a final report shall be submitted to NMFS within 30 days thereafter following resolution of comments on the draft report from NMFS. If no comments are received from NMFS, the draft report will be considered to be the final report. This report must contain the informational elements described above and in the monitoring plan of the application and at minimum shall also include:

(b) Reporting injured or dead marine mammals:

(i) In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by this IHA, such as an injury (Level A harassment), serious injury, or mortality, CADFW shall immediately cease the specified activities and report the incident to the NMFS' Office of Protected Resources and the West Coast Regional Stranding Coordinator. The report must include the following information:

1. Time and date of the incident;
2. Description of the incident;
3. Environmental conditions (*e.g.*, wind speed and direction, tidal conditions, cloud cover, and visibility);
4. Description of all marine mammal observations and active sound source use in the 24 hours preceding the incident;
5. Species identification or description of the animal(s) involved;
6. Fate of the animal(s); and
7. Photographs or video footage of the animal(s).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with CADFW to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. CADFW may not resume their activities until notified by NMFS.

(ii) In the event that CADFW discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.*, in less than a moderate state of decomposition), CADFW shall immediately report the incident to the NMFS' Office of Protected Resources and the West Coast Regional Stranding Coordinator.

The report must include the same information identified in 6(b)(i) of this IHA. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with the CADFW to determine whether additional mitigation measures or modifications to the activities are appropriate.

(iii) In the event that the CADFW discovers an injured or dead marine mammal, and the lead PSO determines that the injury or death is not associated with or related to the activities authorized in the IHA (*e.g.*, previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), the CADFW shall report the incident to the NMFS' Office of Protected Resources and the West Coast Regional Stranding Coordinator within 24 hours of the discovery. CADFW shall provide photographs or video footage or other documentation of the stranded animal sighting to NMFS.

This Authorization may be modified, suspended or withdrawn if the holder fails to abide by the conditions prescribed herein, or if NMFS determines the authorized taking is having more than a negligible impact on the species or stock of affected marine mammals.

Request for Public Comments

We request comment on our analysis, the draft authorization, and any other aspect of this Notice of Proposed IHA for CADFW's tidal marsh restoration activities. Please include with your comments any supporting data or literature citations to help inform our final decision on the CADFW's request for an MMPA authorization.

Dated: September 26, 2016.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2016–23617 Filed 9–29–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE812

Pacific Island Fisheries; Aquaculture

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of intent to prepare a Programmatic Environmental Impact Statement; public meetings; request for comments.

SUMMARY: NMFS, in coordination with the Western Pacific Fishery Management Council, intends to prepare a Programmatic Environmental Impact Statement (PEIS) to analyze the potential environmental impacts of a proposed Pacific Islands Region aquaculture management program and alternatives. The PEIS would support offshore aquaculture development, including appropriate management unit species for aquaculture, reasonably foreseeable types of offshore aquaculture operations, and permitting and reporting requirements for persons conducting aquaculture activities in Federal waters.

DATES: NMFS must receive written comments by October 31, 2016. The meeting dates are:

1. October 18, 2016, 6 p.m. to 9 p.m., Saipan.
2. October 20, 2016, 6 p.m. to 9 p.m., Guam.

ADDRESSES: The meeting locations are:

1. Saipan—October 18, 2016, 6 p.m. to 9 p.m., Northern Marianas College, As Terlaje Campus, Building S, Room S–1, Saipan, MP 96950.
2. Guam—October 20, 2016, 6 p.m. to 9 p.m., Hilton Guam Resort & Spa, 202 Hilton Road, Tumon Bay, Guam 96913.

You may submit comments on this action, identified by NOAA–NMFS–2016–0111, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *http://www.regulations.gov/docket?D=NOAA-NMFS-2016-0111,* click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.
- *Mail:* Send written comments to Michael D. Tosatto, Regional Administrator, NMFS Pacific Islands Regional Office, 1845 Wasp Blvd., Bldg. 176, Honolulu, HI 96818.
- *Scoping Meeting:* Submit written comments at a scoping meeting held by NMFS for this action.

Instructions: You must submit comments by the above methods to ensure that NMFS receives, documents, and considers your comments. NMFS may not consider comments sent by any other method, to any other address or individual, or received after the end of the comment period. NMFS will consider all comments received as part of the public record and will generally post comments for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: David Nichols, NMFS, Pacific Islands Regional Office, (808) 725–5180.

SUPPLEMENTARY INFORMATION: NMFS previously published a Notice of Intent to prepare a PEIS to analyze the potential environmental impacts of a proposed Pacific Islands aquaculture management program and alternatives (81 FR 57567, August 23, 2016). Details regarding development of the PEIS may be found in that Notice of Intent, and are not repeated here.

NMFS is holding two additional public scoping meetings in Guam and Saipan (see **DATES** and **ADDRESSES**) to help identify alternatives and determine the scope of environmental issues for consideration in the PEIS.

NMFS will again ask for additional public comments once NMFS publishes the Draft PEIS, probably in late spring 2017. You may find more information about the NMFS aquaculture program and the progress of the PEIS at *www.fpir.noaa.gov/SFD/SFD_aq.html.*

Dated: September 27, 2016.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–23691 Filed 9–29–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE916

New England Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Scallop Committee to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Monday, October 17, 2016 at 10:30 a.m.

ADDRESSES: The meeting will be held at the Hilton Garden Inn, Boston Logan, 100 Boardman Street, Boston, MA 02128; phone: (617) 567–6789; fax: (617) 461–0798.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Committee will review Framework 28 (FW28) alternatives and analyses. The Committee will review any concepts or recommendations that come out of the joint Scallop PDT/AP meeting being held on October 13, 2016. The primary focus of this meeting will be to provide input on the range of specification alternatives. FW28 will set specifications including ABC/ACLs, DAS, access area allocations for LA and LAGC, hard-TAC for NGOM management area, target-TAC for LAGC incidental catch and set-asides for the observer and research programs for fishing year 2017 and default specifications for fishing year 2018. Management measures in FW28 include: (1) Measures to restrict the possession of shell stock inshore of 42°20′ N.; (2) measures to apply spatial management to fishery specifications (ACL flowchart); (3) measures to modify the Closed Area I access area boundary, consistent with potential changes to habitat and groundfish mortality closed areas. The Committee may discuss scallop related issues under consideration in groundfish Framework 56. Other business will be discussed as necessary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: September 27, 2016.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–23698 Filed 9–29–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE671

Taking of Marine Mammals Incidental to Specified Activities; Construction of the East Span of the San Francisco-Oakland Bay Bridge

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that we have issued an incidental harassment authorization (IHA) to California Department of Transportation (CALTRANS) to incidentally harass, by Level B harassment only, seven species of marine mammals during activities associated with the East Span of the San Francisco-Oakland Bay Bridge (SFOBB) in the San Francisco Bay (SFB), California.

DATES: This authorization is effective from September 19, 2016 through September 18, 2017.

FOR FURTHER INFORMATION CONTACT: Shane Guan, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as ". . . an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for a one-year authorization to incidentally take small numbers of marine mammals by harassment, provided that there is no potential for serious injury or mortality to result from the activity. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

Summary of Request

On March 11, 2016, CALTRANS submitted a request to NMFS for the potential harassment of a small number of marine mammals incidental to the dismantling of the East Span of the original SFOBB in SFB, California, between July 16, 2016, and July 15, 2017. On May 16, 2016, CALTRANS submitted a revision of its IHA application based on NMFS comments. NMFS determined that the IHA application was complete on May 19, 2016.

Description of the Specified Activity

CALTRANS proposes removal of the East Span of the original SFOBB by mechanical dismantling and by use of controlled charges to implode the pier into its open cellular chambers below mudline. Activities associated with dismantling the original East Span potentially may result in incidental take of marine mammals. These activities include vibratory pile driving, vibratory pile extraction/removal, impact pile driving, and the use of highly controlled charges to dismantle the Pier E4 and Pier E5 marine foundations.

A one-year IHA was previously issued to CALTRANS for pile driving/removal and mechanical dismantling activities on July 17, 2015 (80 FR 43710; July 23, 2015), based on activities described on CALTRANS' IHA application dated April 13, 2013. This IHA is valid until July 16, 2016. On September 9, 2015, NMFS issued another IHA to CALTRANS for demolition of Pier E3 of the original SFOBB by highly controlled explosives (80 FR 57584; September 24, 2015). This IHA expired on December 30, 2015. Since the construction activities related with the original SFOBB dismantling will last for another two years, CALTRANS is requesting an IHA that covers take of marine mammals from both pile driving/removal and confined explosion.

Construction activities for the replacement of the SFOBB east span commenced in 2002 and are expected to be completed in 2016 with the completion of the bike/pedestrian path and eastbound on ramp from Yerba Buena Island. The new east span is now open to traffic. On November 10, 2003, NMFS issued the first project-related IHA to CALTRANS, authorizing the take of small numbers of marine mammals incidental to the construction of the SFOBB Project. Over the years, CALTRANS has been issued a total of nine IHAs for the SFOBB Project to date, excluding the application currently under review.

The demolition of Piers E4 and E5 through controlled implosion are planned to occur in October, November, or December 2016, and pile driving and pile removal activities may occur at any time of the year.

The SFOBB project area is located in the central San Francisco Bay (SFB or Bay), between Yerba Buena Island (YBI) and the city of Oakland. The western limit of the project area is the east portal of the YBI tunnel, located in the city of San Francisco. The eastern limit of the project area is located approximately 1,312 ft (400 m) west of the Bay Bridge toll plaza, where the new and former spans connect with land at the Oakland Touchdown in the city of Oakland. Detailed description of CALTRANS East Span Removal Project is provided in the **Federal Register** notice for the proposed IHA (81 FR 48745; July 24, 2016). No changes have been made since the publication of that notice. A summary of CALTRANS activities is provided below.

1. Vibratory and Impact Driving of Temporary Piles

CALTRANS anticipates temporary access trestles, in-water falsework, and cofferdams may be required to dismantle the existing bridge. Temporary access trestles, supported by temporary marine piles, and cofferdams may be needed to provide construction access. CALTRANS estimates that a maximum of 200 temporary piles may be installed during the 1-year period of IHA coverage. Types of temporary piles to be installed may include sheet piles, 14-in (0.34-m) H-piles, and steel pipe piles, equal to or less than 36-in (0.91-m) in diameter. A maximum of 132 days of pile driving may be required to install and/or remove piles during the one-year period of IHA coverage.

2. Removal of Piers E4 and E5

CALTRANS proposes the removal of Piers E4 and E5 of the original East Span by use of controlled charges to implode each pier into its open cellular chambers below the mudline. A Blast Attenuation System (BAS) will be used to minimize potential impacts on biological resources in the Bay. Both NMFS and CALTRANS believe that the results from the Pier E3 Demonstration Project support the use of controlled charges as a more expedient method of removal that will cause less environmental impact as compared to approved mechanical methods using a dry (fully dewatered) cofferdam.

Piers E4 and E5 of the original East Span are located between the OTD area and YBI, and just south of the SFOBB new East Span. These piers are concrete cellular structures that occupy areas deep below the mudline, within the water column, and above the water line of the Bay.

Comments and Responses

A notice of NMFS' proposal to issue an IHA was published in the **Federal Register** on July 24, 2016 (81 FR 48745). During the 30-day public comment period, NMFS received a comment letter from the Marine Mammal Commission (Commission). Specific comments and responses are provided below.

Comment 1: The Commission states that the method used to estimate the numbers of takes, which sums fractions of takes for each species across days, does not account for NMFS's 24-hour reset policy. The Commission states that instead of summing fractions of takes across days and then rounding to estimate total takes, NMFS should have calculated a daily take estimate (determined by multiplying the estimated density of marine mammals in the area by the daily ensonified area) and then rounding that to a whole number before multiplying it by the number of days that activities would occur. Thus, the Commission recommends that NMFS (1) follow its policy of a 24-hour reset for enumerating the number of each species that could be taken, (2) apply standard rounding rules before summing the numbers of estimated takes across days, and (3) for species that have the potential to be taken but model-estimated or calculated takes round to zero, use group size to inform the take estimates—these methods should be used consistently for all future incidental take authorizations.

Response: While for certain projects NMFS has rounded to the whole number for daily takes, the circumstance for projects like this one when the objective of take estimation is to provide more accurate assessments for potential impacts to marine mammals for the entire project, the rounding in the middle of calculation will introduce large errors into the process. In addition, while NMFS uses a 24-hour reset for its take calculation to ensure that individual animals are not counted as a take more than once per day, that fact does not make the calculation of take across the entire activity period inherently incorrect. There is no need for daily (24-hour) rounding in this case because there is no daily limit of takes, so long as total authorized takes of marine mammal are not exceeded. In short, the calculation of predicted take is not an exact science and there are arguments for taking different mathematical approaches in different situations, and for making qualitative adjustments in other situations. NMFS is currently engaged in developing a protocol to guide more consistent take calculation given certain circumstances. We believe, however, that the prediction for this action remains appropriate.

Comment 2: The Commission notes that in the proposed IHA NMFS would require protected species observers (PSOs) to implement 100 percent monitoring for Level A harassment zones of all pile driving, but only 20 percent monitoring for Level B harassment zones for vibratory pile driving and removal. The Commission recommends that NMFS require CALTRANS to implement full-time monitoring of Level A and B harassment zones during all pile driving and pile removal activities.

Response: NMFS agrees with the Commission's recommendation, and discussed it with CALTRANS. CALTRANS agrees that 100 percent monitoring is feasible and will conduct visual monitoring for all pile driving and pile removal activities. The IHA issued to CALTRANS includes such measures.

Description of Marine Mammals in the Area of the Specified Activity

Seven species of marine mammals regularly inhabit or rarely or seasonally enter the San Francisco Bay (Table 1). The two most common species observed are the Pacific harbor seal (*Phoca vitulina richardii*) and the California sea lion (*Zalophus californianus*). Juvenile northern elephant seals (*Mirounga angustirostris*) seasonally enter the Bay (spring and fall), while harbor porpoises (*Phocoena phocoena*) may enter the western side of the Bay throughout the year, but rarely occur near the SFOBB east span. Gray whales (*Eschrichtius robustus*) may enter the Bay during their northward migration in the late winter and spring. In addition, though rare, northern fur seals (*Callorhinus ursinus*) and bottlenose dolphins (*Tursiops truncatus*) have also been sighted in the Bay. None of these species are listed as endangered or threatened under the Endangered Species Act (ESA), or as depleted or a strategic stock under the MMPA.

TABLE 1—MARINE MAMMAL SPECIES POTENTIALLY PRESENT IN REGION OF ACTIVITY

Common name	Scientific name	Status	Occurrence	Seasonality	Range	Abundance
Harbor seal	*Phoca vitulina richardii*		Common	Year round	California	30,968
California sea lion	*Zalophus californianus*		Common	Year round	California	296,750
Northern fur seal	*Callorhinus ursinus*		Rare	Year round	California	12,844
Northern elephant seal	*Mirounga angustirostris*		Occasional	Spring & fall	California	179,000
Gray whale	*Eschrichtius robustus*	(*)	Rare	Spring & fall	Mexico to the U.S. Arctic Ocean.	20,990

TABLE 1—MARINE MAMMAL SPECIES POTENTIALLY PRESENT IN REGION OF ACTIVITY—Continued

Common name	Scientific name	Status	Occurrence	Seasonality	Range	Abundance
Harbor porpoise	*Phocoena phocoena*		Rare	Year round	California	9,886
Coastal Bottlenose dolphin.	*Tursiops truncatus*		Rare	Year round	California	323

* The E. North Pacific population is not listed under the ESA.

More detailed information on the marine mammal species found in the vicinity of the SFOBB construction site can be found in CALTRANS IHA application, and in NMFS stock assessment report (Caretta *et al.*, 2015), which is available at the following URL: *http://www.nmfs.noaa.gov/pr/sars/pdf/pacific_sars_2014_final_noaa_swfsc_tm_549.pdf.* Refer to these documents for additional information on these species.

Potential Effects of the Specified Activity on Marine Mammals

This section includes a summary and discussion of the ways that the types of stressors associated with the specified activity (*e.g.*, pile removal and pile driving) have been observed to impact marine mammals. This discussion may also include reactions that we consider to rise to the level of a take and those that we do not consider to rise to the level of a take (for example, with acoustics, we may include a discussion of studies that showed animals not reacting at all to sound or exhibiting barely measurable avoidance). This section is intended as a background of potential effects and does not consider either the specific manner in which this activity will be carried out or the mitigation that will be implemented, and how either of those will shape the anticipated impacts from this specific activity. The "Estimated Take by Incidental Harassment" section later in this document will include a quantitative analysis of the number of individuals that are expected to be taken by this activity. The "Analysis and Determinations" section will include the analysis of how this specific activity will impact marine mammals and will consider the content of this section, the "Estimated Take by Incidental Harassment" section, the "Mitigation" section, and the "Anticipated Effects on Marine Mammal Habitat" section to draw conclusions regarding the likely impacts of this activity on the reproductive success or survivorship of individuals and from that on the affected marine mammal populations or stocks.

When considering the influence of various kinds of sound on the marine environment, it is necessary to understand that different kinds of marine life are sensitive to different frequencies of sound. Based on available behavioral data, audiograms have been derived using auditory evoked potentials, anatomical modeling, and other data, NMFS (2016) designate "marine mammal hearing groups" for marine mammals and estimate the lower and upper frequencies of hearing of the groups. The marine mammal groups and the associated frequencies are indicated below (though animals are less sensitive to sounds at the outer edge of their functional range and most sensitive to sounds of frequencies within a smaller range somewhere in the middle of their hearing range):

- Low frequency cetaceans (13 species of mysticetes): Functional hearing is estimated to occur between approximately 7 hertz (Hz) and 35 kilohertz (kHz);
- Mid-frequency cetaceans (32 species of dolphins, seven species of larger toothed whales, and 19 species of beaked and bottlenose whales): Functional hearing is estimated to occur between approximately 150 Hz and 160 kHz;
- High frequency cetaceans (eight species of true porpoises, seven species of river dolphins, Kogia, the franciscana, and four species of cephalorhynchids): Functional hearing is estimated to occur between approximately 275 Hz and 160 kHz;
- Phocid pinnipeds in Water: Functional hearing is estimated to occur between approximately 50 Hz and 86 kHz; and
- Otariid pinnipeds in Water: Functional hearing is estimated to occur between approximately 60 Hz and 39 kHz.

As mentioned previously in this document, seven marine mammal species (three cetacean and four pinniped species) are likely to occur in the vicinity of the SFOBB pile driving/removal and controlled pier detonation area. Of the two cetacean species, one belongs to low-frequency cetacean (gray whale), one mid-frequency cetacean (bottlenose dolphin), and one high-frequency cetacean (harbor porpoise). two species of pinniped are phocid (Pacific harbor seal and northern elephant seal), and two species of pinniped is otariid (California sea lion and northern fur seal). A species' functional hearing group is a consideration when we analyze the effects of exposure to sound on marine mammals.

Potential Effects From In-Water Pile Driving and Pile Removal

The CALTRANS SFOBB construction work using in-water pile driving and pile removal could adversely affect marine mammal species and stocks by exposing them to elevated noise levels in the vicinity of the activity area.

Exposure to high intensity sound for a sufficient duration may result in auditory effects such as a noise-induced threshold shift—an increase in the auditory threshold after exposure to noise (Finneran *et al.*, 2005). Factors that influence the amount of threshold shift include the amplitude, duration, frequency content, temporal pattern, and energy distribution of noise exposure. The magnitude of hearing threshold shift normally decreases over time following cessation of the noise exposure. The amount of threshold shift just after exposure is the initial threshold shift. If the threshold shift eventually returns to zero (*i.e.*, the threshold returns to the pre-exposure value), it is a temporary threshold shift (Southall *et al.*, 2007).

Threshold Shift (noise-induced loss of hearing)—When animals exhibit reduced hearing sensitivity (*i.e.*, sounds must be louder for an animal to detect them) following exposure to an intense sound or sound for long duration, it is referred to as a noise-induced threshold shift (TS). An animal can experience temporary threshold shift (TTS) or permanent threshold shift (PTS). TTS can last from minutes or hours to days (*i.e.*, there is complete recovery), can occur in specific frequency ranges (*i.e.*, an animal might only have a temporary loss of hearing sensitivity between the frequencies of 1 and 10 kHz), and can be of varying amounts (for example, an animal's hearing sensitivity might be reduced initially by only 6 decibel (dB) or reduced by 30 dB). PTS is permanent, but some recovery is possible. PTS can also occur in a specific frequency range and amount as mentioned above for TTS.

For marine mammals, published data are limited to the captive bottlenose dolphin, beluga, harbor porpoise, and Yangtze finless porpoise (Finneran *et al.*, 2000, 2002, 2003, 2005, 2007, 2010a, 2010b; Finneran and Schlundt, 2010; Lucke *et al.*, 2009; Mooney *et al.*, 2009a, 2009b; Popov *et al.*, 2011a, 2011b; Kastelein *et al.*, 2012a; Schlundt *et al.*, 2000; Nachtigall *et al.*, 2003, 2004). For pinnipeds in water, data are limited to measurements of TTS in harbor seals, an elephant seal, and California sea lions (Kastak *et al.*, 1999, 2005; Kastelein *et al.*, 2012b).

Lucke *et al.* (2009) found a threshold shift (TS) of a harbor porpoise after exposing it to airgun noise with a received sound pressure level (SPL) at 200.2 dB (peak-to-peak) re: 1 micropascal (μPa), which corresponds to a sound exposure level of 164.5 dB re: 1 μPa^2 s after integrating exposure. NMFS currently uses the root-mean-square (rms) of received SPL at 180 dB and 190 dB re: 1 μPa as the threshold above which permanent threshold shift (PTS) could occur for cetaceans and pinnipeds, respectively. Because the airgun noise is a broadband impulse, one cannot directly determine the equivalent of rms SPL from the reported peak-to-peak SPLs. However, applying a conservative conversion factor of 16 dB for broadband signals from seismic surveys (McCauley, *et al.*, 2000) to correct for the difference between peak-to-peak levels reported in Lucke *et al.* (2009) and rms SPLs, the rms SPL for TTS would be approximately 184 dB re: 1 μPa, and the received levels associated with PTS (Level A harassment) would be higher. This is still above NMFS' current 180 dB rms re: 1 μPa threshold for injury. However, NMFS recognizes that TTS of harbor porpoises is lower than other cetacean species empirically tested (Finneran & Schlundt, 2010; Finneran *et al.*, 2002; Kastelein and Jennings, 2012).

Marine mammal hearing plays a critical role in communication with conspecifics, and interpretation of environmental cues for purposes such as predator avoidance and prey capture. Depending on the degree (elevation of threshold in dB), duration (*i.e.*, recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious (similar to those discussed in auditory masking, below). For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that occurs during a time where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during time when communication is critical for successful mother/calf interactions could have more serious impacts. Also, depending on the degree and frequency range, the effects of PTS on an animal could range in severity, although it is considered generally more serious because it is a permanent condition. Of note, reduced hearing sensitivity as a simple function of aging has been observed in marine mammals, as well as humans and other taxa (Southall *et al.*, 2007), so one can infer that strategies exist for coping with this condition to some degree, though likely not without cost.

In addition, chronic exposure to excessive, though not high-intensity, noise could cause masking at particular frequencies for marine mammals that utilize sound for vital biological functions (Clark *et al.*, 2009). Acoustic masking is when other noises such as from human sources interfere with animal detection of acoustic signals such as communication calls, echolocation sounds, and environmental sounds important to marine mammals. Therefore, under certain circumstances, marine mammals whose acoustical sensors or environment are being severely masked could also be impaired from maximizing their performance fitness in survival and reproduction.

Masking occurs at the frequency band that the animals utilize. Therefore, since noise generated from vessels dynamic positioning activity is mostly concentrated at low frequency ranges, it may have less effect on high frequency echolocation sounds by odontocetes (toothed whales). However, lower frequency man-made noises are more likely to affect detection of communication calls and other potentially important natural sounds such as surf and prey noise. It may also affect communication signals when they occur near the noise band and thus reduce the communication space of animals (*e.g.*, Clark *et al.*, 2009) and cause increased stress levels (*e.g.*, Foote *et al.*, 2004; Holt *et al.*, 2009).

Unlike TS, masking, which can occur over large temporal and spatial scales, can potentially affect the species at population, community, or even ecosystem levels, as well as individual levels. Masking affects both senders and receivers of the signals and could have long-term chronic effects on marine mammal species and populations. Recent science suggests that low frequency ambient sound levels have increased by as much as 20 dB (more than three times in terms of sound pressure level) in the world's ocean from pre-industrial periods, and most of these increases are from distant shipping (Hildebrand 2009). For CALTRANS' SFOBB construction activities, noises from vibratory pile driving contribute to the elevated ambient noise levels in the project area, thus increasing potential for or severity of masking. Baseline ambient noise levels in the Bay are very high due to ongoing shipping, construction and other activities in the Bay.

Finally, marine mammals' exposure to certain sounds could lead to behavioral disturbance (Richardson *et al.*, 1995), such as: Changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where noise sources are located; and/or flight responses (*e.g.*, pinnipeds flushing into water from haulouts or rookeries).

The onset of behavioral disturbance from anthropogenic noise depends on both external factors (characteristics of noise sources and their paths) and the receiving animals (hearing, motivation, experience, demography) and is also difficult to predict (Southall *et al.*, 2007). Currently NMFS uses a received level of 160 dB re 1 μPa (rms) to predict the onset of behavioral harassment from impulse noises (such as impact pile driving), and 120 dB re 1 μPa (rms) for continuous noises (such as vibratory pile driving). For the CALTRANS SFOBB construction activities, both of these noise levels are considered for effects analysis because CALTRANS plans to use both impact and vibratory pile driving, as well as vibratory pile removal.

The biological significance of many of these behavioral disturbances is difficult to predict, especially if the detected disturbances appear minor. However, the consequences of behavioral modification could be biologically significant if the change affects growth, survival, and/or reproduction, which depends on the severity, duration, and context of the effects.

Potential Effects From Controlled Pier Implosion

It is expected that an intense impulse from the Piers E4 and E5 controlled implosion would have the potential to impact marine mammals in the vicinity. The majority of impacts would be startle behavior and temporary behavioral modification from marine mammals.

However, a few individual animals could be exposed to sound levels that would cause TTS.

The underwater explosion would send a shock wave and blast noise through the water, release gaseous by-products, create an oscillating bubble, and cause a plume of water to shoot up from the water surface. The shock wave and blast noise are of most concern to marine animals. The effects of an underwater explosion on a marine mammal depends on many factors, including the size, type, and depth of both the animal and the explosive charge; the depth of the water column; and the standoff distance between the charge and the animal, as well as the sound propagation properties of the environment. Potential impacts can range from brief effects (such as behavioral disturbance), tactile perception, physical discomfort, slight injury of the internal organs and the auditory system, to death of the animal (Yelverton *et al.*, 1973; DoN, 2001). Non-lethal injury includes slight injury to internal organs and the auditory system; however, delayed lethality can be a result of individual or cumulative sublethal injuries (DoN, 2001). Immediate lethal injury would be a result of massive combined trauma to internal organs as a direct result of proximity to the point of detonation (DoN, 2001). Generally, the higher the level of impulse and pressure level exposure, the more severe the impact to an individual.

Injuries resulting from a shock wave take place at boundaries between tissues of different density. Different velocities are imparted to tissues of different densities, and this can lead to their physical disruption. Blast effects are greatest at the gas-liquid interface (Landsberg 2000). Gas-containing organs, particularly the lungs and gastrointestinal tract, are especially susceptible (Goertner 1982; Hill 1978; Yelverton *et al.*, 1973). In addition, gas-containing organs including the nasal sacs, larynx, pharynx, trachea, and lungs may be damaged by compression/expansion caused by the oscillations of the blast gas bubble. Intestinal walls can bruise or rupture, with subsequent hemorrhage and escape of gut contents into the body cavity. Less severe gastrointestinal tract injuries include contusions, petechiae (small red or purple spots caused by bleeding in the skin), and slight hemorrhaging (Yelverton *et al.*, 1973).

Because the ears are the most sensitive to pressure, they are the organs most sensitive to injury (Ketten 2000). Sound-related damage associated with blast noise can be theoretically distinct from injury from the shock wave, particularly farther from the explosion. If an animal is able to hear a noise, at some level it can damage its hearing by causing decreased sensitivity (Ketten 1995). Sound-related trauma can be lethal or sublethal. Lethal impacts are those that result in immediate death or serious debilitation in or near an intense source and are not, technically, pure acoustic trauma (Ketten 1995). Sublethal impacts include hearing loss, which is caused by exposures to perceptible sounds. Severe damage (from the shock wave) to the ears includes tympanic membrane rupture, fracture of the ossicles, damage to the cochlea, hemorrhage, and cerebrospinal fluid leakage into the middle ear. Moderate injury implies partial hearing loss due to tympanic membrane rupture and blood in the middle ear. Permanent hearing loss also can occur when the hair cells are damaged by one very loud event, as well as by prolonged exposure to a loud noise or chronic exposure to noise. The level of impact from blasts depends on both an animal's location and, at outer zones, on its sensitivity to the residual noise (Ketten 1995).

However, the above discussion concerning underwater explosion only pertains to open water detonation in a free field. CALTRANS' Pier E4 and E5 demolition project using controlled implosion uses a confined detonation method, meaning that the charges would be placed within the structure. Therefore, most energy from the explosive shock wave would be absorbed through the destruction of the structure itself, and would not propagate through the open water. Measurements and modeling from confined underwater detonation for structure removal showed that energy from shock waves and noise impulses were greatly reduced in the water column (Hempen *et al.*, 2007; CALTRANS 2016). Therefore, with monitoring and mitigation measures discussed above, CALTRANS Pier E4 and E5 controlled implosions are not likely to cause injury or mortality to marine mammals in the project vicinity. Instead, NMFS believes that CALTRANS' Pier E4 and E5 controlled implosions in the San Francisco Bay are most like to cause Level B behavioral harassment and maybe TTS in a few individual of marine mammals, as discussed below.

Changes in marine mammal behavior are expected to result from an acute stress response. This expectation is based on the idea that some sort of physiological trigger must exist to change any behavior that is already being performed. The exception to this rule is the case of auditory masking, which is not likely since the CALTRANS' controlled implosion is only two short, sequential detonations that last for approximately 3–4 seconds.

Potential Effects on Marine Mammal Habitat

The removal of the SFOBB East Span is not likely to negatively affect the habitat of marine mammal populations because no permanent loss of habitat will occur, and only a minor, temporary modification of habitat will occur. The original SFOBB area is not used as a haul-out site by pinnipeds or as a major foraging area. Therefore, demolition of the concrete marine foundations and pile installation and removal activities are unlikely to permanently decrease fish populations in the area and are unlikely to affect marine mammal populations.

Project activities will not affect any pinniped haul-out sites or pupping sites. The YBI harbor seal haul-out site is on the opposite site of the island from the SFOBB Project area. Because of the distance and the island blocking the sound, underwater noise and pressure levels from the SFOBB Project will not reach the haul-out. Other haul-out sites for sea lions and harbor seals are at a sufficient distance from the SFOBB Project area that they will not be affected. The closest recognized harbor seal pupping site is at Castro Rocks, approximately 8.7 mi (14 km) from the SFOBB Project area. No sea lion rookeries are found in the Bay.

The addition of underwater sound from SFOBB Project activities to background noise levels can constitute a potential cumulative impact on marine mammals. However, these potential cumulative noise impacts will be short in duration.

SPLs from impact pile driving and pier implosion have the potential to injure or kill fish in the immediate area. During previous pier implosion and pile driving activities, CALTRANS has reported mortality to marine mammals' prey species, including northern anchovies and Pacific herring (CALTRANS 2016). These few isolated fish mortality events are not anticipated to have a substantial effect on prey species population or their availability as a food resource for marine mammals.

Studies also suggest that larger fish are generally less susceptible to death or injury than small fish. Moreover, elongated forms that are round in cross section are less at risk than deep-bodied forms. Orientation of fish relative to the shock wave may also affect the extent of injury. Open water pelagic fish (*e.g.*, mackerel) seem to be less affected than reef fishes. The results of most studies are dependent upon specific biological, environmental, explosive, and data recording factors.

The huge variation in fish populations, including numbers, species, sizes, and orientation and range from the detonation point, makes it very difficult to accurately predict mortalities at any specific site of detonation. Most fish species experience a large number of natural mortalities, especially during early life-stages, and any small level of mortality caused by the CALTRANS' two controlled implosions will likely be insignificant to the population as a whole.

Mitigation Measures

In order to issue an incidental take authorization under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses.

1. Mitigation Measures for In-Water Pile Driving and Pile Removal

For the CALTRANS SFOBB construction activities, NMFS requires the following mitigation measures to minimize the potential impacts to marine mammals in the project vicinity. The primary purpose of these mitigation measures is to detect marine mammals within or about to enter designated exclusion zones corresponding to NMFS current injury thresholds and to initiate immediate shutdown or power down of the piling hammer, making it very unlikely potential injury or TTS to marine mammals would occur, and to reduce the intensity of Level B behavioral harassment.

Use of Noise Attenuation Devices

To reduce impact on marine mammals, CALTRANS shall use a marine pile driving energy attenuator (*i.e.*, air bubble curtain system), or other equally effective sound attenuation method (*e.g.*, dewatered cofferdam) for all impact pile driving, with the exception of pile proofing and H-piles.

Establishment of Exclusion and Level B Harassment Zones

Before the commencement of in-water construction activities, which include impact pile driving and vibratory pile driving, CALTRANS shall establish "exclusion zones" where received underwater SPLs are higher than 180 dB (rms) and 190 dB (rms) re 1 μPa for cetaceans and pinnipeds, respectively, and "Level B behavioral harassment zones" where received underwater sound pressure levels (SPLs) are higher than 160 dB (rms) and 120 dB (rms) re 1 μPa for impulse noise sources (impact pile driving) and non-impulses noise sources (vibratory pile driving), respectively. Before the sizes of actual zones are determined based on hydroacoustic measurements, CALTRANS shall establish these zones based on prior measurements conducted during SFOBB constructions, as described in Table 2 of this document.

TABLE 2—TEMPORARY EXCLUSION AND LEVEL B HARASSMENT ZONES FOR VARIOUS PILE DRIVING ACTIVITIES

Pile driving/dismantling activities	Pile size (m)	Distance to 120 dB re 1 μPa (rms) (m)	Distance to 160 dB re 1 μPa (rms) (m)	Distance to 180 dB re 1 μPa (rms) (m)	Distance to 190 dB re 1 μPa (rms) (m)
Vibratory Driving	24	2,000	NA	NA	NA
	36	2,000	NA	NA	NA
	Sheet pile	2,000	NA	NA	NA
Attenuated Impact Driving	24	NA	1,000	235	95
	36	NA	1,000	235	95
Unattenuated Proofing	24	NA	1,000	235	95
	36	NA	1,000	235	95
Unattenuated Impact Driving	H-pile	NA	1,000	235	95

Once the underwater acoustic measurements are conducted during initial test pile driving, CALTRANS shall adjust the size of the exclusion zones and Level B behavioral harassment zones, and monitor these zones accordingly.

NMFS-approved protected species observers (PSO) shall conduct initial survey of the exclusion zones to ensure that no marine mammals are seen within the zones before impact pile driving of a pile segment begins. If marine mammals are found within the exclusion zone, impact pile driving of the segment would be delayed until they move out of the area. If a marine mammal is seen above water and then dives below, the contractor would wait 15 minutes for pinnipeds and small cetaceans (harbor porpoises and bottlenose dolphins), and 30 minutes for gray whales. If no marine mammals are seen by the observer in that time it can be assumed that the animal has moved beyond the exclusion zone.

If pile driving of a segment ceases for 30 minutes or more and a marine mammal is sighted within the designated exclusion zone prior to commencement of pile driving, the observer(s) must notify the Resident Engineer (or other authorized individual) immediately and continue to monitor the exclusion zone. Operations may not resume until the marine mammal has exited the exclusion zone.

Soft Start

In order to provide additional protection to marine mammals near the project area by allowing marine mammals to vacate the area prior to receiving a higher noise exposure, CALTRANS and its contractor will also "soft start" the hammer prior to operating at full capacity. This should expose fewer animals to loud sounds both underwater and above water. This would also ensure that, although not expected, any pinnipeds and cetaceans that are missed during the initial exclusion zone monitoring will not be injured.

Shut-Down Measure

CALTRANS shall implement shutdown measures if a marine mammal is sighted approaching the Level A exclusion zone, or within 10 m of the pile driving and pile removal equipment, whichever is smaller. In-water construction activities shall be suspended until the marine mammal is sighted moving away from the exclusion zone, or if a pinniped, harbor porpoise, or bottlenose dolphin is not sighted for 15 minutes after the shutdown, or if a gray whale is not sighted for 30 minutes after the shutdown.

CALTRANS shall implement shutdown if a species for which authorization has not been granted (including but not limited to Guadalupe fur seals) or if a species for which authorization has been granted but the authorized takes are met, approaches or is observed within the Level B harassment zone.

2. Mitigation Measures for Confined Implosion

For CALTRANS' Piers E4 and E5 controlled implosion, NMFS requires the following mitigation measures to minimize the potential impacts to marine mammals in the project vicinity. The primary purposes of these mitigation measures are to minimize sound levels from the activities, to monitor marine mammals within designated exclusion zones and zones of influence (ZOI). Specific mitigation measures are described below.

Time Restriction

Implosion of Piers E4 and E5 would only be conducted during daylight hours and with enough time for pre and post implosion monitoring, and with good visibility when the largest exclusion zone can be visually monitored.

Installation of Blast Attenuation System

Prior to the Piers E4 and E5 demolition, CALTRANS shall install a Blast Attenuation System (BAS) as described above to reduce the shockwave from the implosion.

Establishment of Level A Exclusion Zone

Due to the different hearing sensitivities among different taxa of marine mammals, NMFS has established a series of take thresholds from underwater explosions for marine mammals belonging to different functional hearing groups (Table 3). Under these criteria, marine mammals from different taxa will have different impact zones (exclusion zones and zones of influence).

CALTRANS will establish an exclusion zone for both the mortality and Level A harassment zone (permanent hearing threshold shift or PTS, GI track injury, and slight lung injury) using the largest radius estimated harbor and northern elephant seals. CALTRANS will use measured distances to marine mammal threshold distances from the implosion of Pier E3 as predicted distances to the thresholds for the implosions of Piers E4 and E5 (Table 4). The use of measured peak pressure, cumulative sound exposure level (SEL), and impulse levels from the Pier E3 implosion provide a conservative estimate for the implosions of Piers E4 and E5. The Piers E4 and E5 caisson structures are smaller than the Pier E3 caisson structure and will require fewer explosive charges to implode. The maximum charge weight for the implosions of Piers E4 and E5 is 35 pounds/delay, the same as used for the implosion of Pier E3. However, the total explosive weight, number of individual detonations, and total time of implosion event will be less for these smaller piers.

TABLE 3—NMFS TAKE THRESHOLDS FOR MARINE MAMMALS FROM UNDERWATER IMPLOSIONS

Group	Species	Level B harassment		Level A harassment	Serious injury		Mortality
		Behavioral	TTS	PTS	Gastro-intestinal tract	Lung	
Mid-freq cetacean.	Bottlenose dolphin.	167 dB SEL	172 dB SEL or 224 dB SPL_{pk}.	187 dB SEL or 230 dB SPL_{pk}.	237 dB SPL or 104 psi.	39.1M ⅓ (1+[D/10.081]) ½ Pa-sec. where: M = mass of the animals in kg. D = depth of animal in m.	91.4M ⅓ (1+[D/10.081]) ½ Pa-sec where: M = mass of the animals in kg D = depth of animal in m.
High-freq cetacean.	Harbor porpoise.	141 dB SEL	146 dB SEL or 195 dB SPL_{pk}.	161 dB SEL or 201 dB SPL_{pk}.			
Phocidae	Harbor seal & northern elephant seal.	172 dB SEL	177 dB SEL or 212 dB SPL_{pk}.	192 dB SEL or 218 dB SPL_{pk}.			
Otariidae	California sea lion & northern fur seal.	195 dB SEL	200 dB SEL or 212 dB_{pk}.	215 dB SEL or 218 dB SPL_{pk}.			

* **Note:** All dB values are referenced to 1 µPa. SPL_{pk} = Peak sound pressure level; psi = pounds per square inch.

TABLE 4—MEASURED DISTANCES TO UNDERWATER BLASTING THRESHOLD CRITERIA FOR LEVELS A AND B HARASSMENT AND MORTALITY FROM THE PIER E3 IMPLOSION

Species	Level B criteria		Level A criteria			Mortality
	Behavioral response	TTS dual criteria *	PTS dual criteria *	Gastro-intestinal track	Lung injury	
Harbor Seal	2,460 ft (750 m)	**1,658 ft (505 m)** 104 ft (32 m)	**507 ft (155 m)** 65 ft (20 m).	<100 ft (30 m)	<100 ft (30 m)	<100 ft (30 m).
California Sea Lion	387 ft (118 m)	**261 ft (80 m)** 104 ft (32 m)	**80 ft (24 m)** 65 ft (20 m).	<100 ft (30 m)	<100 ft (30 m)	<100 ft (30 m).
Northern Elephant Seal.	2,460 ft (750 m)	**1,658 ft (505 m)** 104 ft (32 m)	**507 ft (155 m)** 65 ft (20 m).	<100 ft (30 m)	<100 ft (30 m)	<100 ft (30 m).
Northern fur seal	387 ft (118 m)	**261 ft (80 m)** 104 ft (32 m)	**80 ft (24 m)** 65 ft (20 m).	<100 ft (30 m)	<100 ft (30 m)	<100 ft (30 m).

TABLE 4—MEASURED DISTANCES TO UNDERWATER BLASTING THRESHOLD CRITERIA FOR LEVELS A AND B HARASSMENT AND MORTALITY FROM THE PIER E3 IMPLOSION—Continued

Species	Level B criteria		Level A criteria			Mortality
	Behavioral response	TTS dual criteria *	PTS dual criteria *	Gastro-intestinal track	Lung injury	
Harbor Porpoise	8,171 ft (2,491 m)	**5,580 ft (1,701 m)** 400 ft (122 m)	**1,777 ft (542 m)** 249 ft (76 m).	<100 ft (30 m)	<100 ft (30 m)	<100 ft (30 m).
Bottlenose Dolphin	1,255 ft (383 m)	**855 ft (261 m)** 202 ft (62 m)	**271 ft (83 m)** 112 ft (34 m).	<100 ft (30 m)	<100 ft (30 m)	<100 ft (30 m).

Note: * For the TTS and PTS criteria thresholds with dual criteria, the largest criteria distances (*i.e.*, more conservative) are shown in bold.

Establishment of Level B Temporary Hearing Threshold Shift (TTS) Zone of Influence

As shown in Table 3, for harbor and northern elephant seals, this will cover the area out to 212 dB peak SPL or 177 dB SEL, whichever extends out the furthest. Hydroacoustic modeling indicates this isopleth would extend out to 1,658 ft (505 m) from the pier. For harbor porpoises, this will cover the area out to 195 dB peak SPL or 146 dB SEL, whichever extends out the furthest, to 5,580 ft (1,701 m) from the pier. As discussed previously, the presence of harbor porpoises in this area is unlikely but monitoring will be employed to confirm their absence. For California sea lions, the distance to the Level B TTS zone of influence will cover the area out to 212 dB peak SPL or 200 dB SEL. This distance was calculated at 261 ft (80 m) from Pier E3, well within the exclusion zone previously described. Hearing group specific Level B TTS zone of influence ranges are provided in Table 4.

Establishment of Level B Behavioral Zone of Influence

As shown in Table 3, for harbor seals and northern elephant seals, this will cover the area out to 172 dB SEL. Hydroacoustic measurement indicates this isopleth would extend out to 2,460 ft (750 m) from the pier. For harbor porpoises, this will cover the area out to 141 dB SEL. Hydroacoustic measurement indicates this isopleth would extend out to 8,171 ft (2,941 m) from the pier. As discussed previously, the presence of harbor porpoises in this area is unlikely but monitoring will be employed to confirm their absence. For California sea lions, the distance to the Level B behavioral harassment ZOI will cover the area out to 195 dB SEL. This distance was calculated at 387 ft (118 m) from the pier, well within the exclusion zone previously described. Hearing group specific Level B TTS zone of influence ranges are provided in Table 4.

Communication

All PSOs will be equipped with mobile phones and a VHF radio as a backup. One person will be designated as the Lead PSO and will be in constant contact with the Resident Engineer on site and the blasting crew. The Lead PSO will coordinate marine mammal sightings with the other PSOs. PSOs will contact the other PSOs when a sighting is made within the exclusion zone or near the exclusion zone so that the PSOs within overlapping areas of responsibility can continue to track the animal and the Lead PSO is aware of the animal. If it is within 30 minutes of blasting and an animal has entered the exclusion zone or is near it, the Lead PSO will notify the Resident Engineer and blasting crew. The Lead PSO will keep them informed of the disposition of the animal.

Mitigation Conclusions

NMFS has carefully evaluated the mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals.
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned.
- The practicability of the measure for applicant implementation.

Any mitigation measure(s) prescribed by NMFS should be able to accomplish, have a reasonable likelihood of accomplishing (based on current science), or contribute to the accomplishment of one or more of the general goals listed below:

(1) Avoidance or minimization of injury or death of marine mammals wherever possible (goals 2, 3, and 4 may contribute to this goal).

(2) A reduction in the numbers of marine mammals (total number or number at biologically important time or location) exposed to received levels of pile driving and pile removal or other activities expected to result in the take of marine mammals (this goal may contribute to 1, above, or to reducing harassment takes only).

(3) A reduction in the number of times (total number or number at biologically important time or location) individuals would be exposed to received levels of pile driving and pile removal, or other activities expected to result in the take of marine mammals (this goal may contribute to 1, above, or to reducing harassment takes only).

(4) A reduction in the intensity of exposures (either total number or number at biologically important time or location) to received levels of pile driving, or other activities expected to result in the take of marine mammals (this goal may contribute to (1) above, or to reducing the severity of harassment takes only).

(5) Avoidance or minimization of adverse effects to marine mammal habitat, paying special attention to the food base, activities that block or limit passage to or from biologically important areas, permanent destruction of habitat, or temporary destruction/disturbance of habitat during a biologically important time.

(6) For monitoring directly related to mitigation—an increase in the probability of detecting marine mammals, thus allowing for more effective implementation of the mitigation.

Based on our evaluation of the applicant's proposed mitigation measures, as well as other measures considered by NMFS, NMFS has determined that the mitigation measures provide the means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

In order to issue an incidental take authorization (ITA) for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth, "requirements pertaining to the monitoring and reporting of such taking." The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. CALTRANS has proposed marine mammal monitoring measures as part of the IHA application. It can be found at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.*

Monitoring measures prescribed by NMFS should accomplish one or more of the following general goals:

(1) An increase in the probability of detecting marine mammals, both within the mitigation zone (thus allowing for more effective implementation of the mitigation) and in general to generate more data to contribute to the analyses mentioned below;

(2) An increase in our understanding of how many marine mammals are likely to be exposed to levels of pile driving that we associate with specific adverse effects, such as behavioral harassment, TTS, or PTS;

(3) An increase in our understanding of how marine mammals respond to stimuli expected to result in take and how anticipated adverse effects on individuals (in different ways and to varying degrees) may impact the population, species, or stock (specifically through effects on annual rates of recruitment or survival) through any of the following methods:

- Behavioral observations in the presence of stimuli compared to observations in the absence of stimuli (need to be able to accurately predict received level, distance from source, and other pertinent information);
- Physiological measurements in the presence of stimuli compared to observations in the absence of stimuli (need to be able to accurately predict received level, distance from source, and other pertinent information);
- Distribution and/or abundance comparisons in times or areas with concentrated stimuli versus times or areas without stimuli;

(4) An increased knowledge of the affected species; and

(5) An increase in our understanding of the effectiveness of certain mitigation and monitoring measures.

Monitoring Measures

1. Monitoring for Pile Driving and Pile Removal

(1) Visual Monitoring

NMFS made changes to the visual monitoring protocol during CALTRANS' pile driving and pile removal activities based, on a comment from the Marine Mammal Commission. Specifically, the revised visual monitoring protocol requires that PSOs conduct 100 percent visual monitoring of marine mammals during all pile driving and pile removal activities. In the proposed IHA, only 20 percent visual monitoring would have been required for Level B harassment zones during vibratory pile driving and pile removal activities. A complete description of the monitoring measure is provided below.

Besides using monitoring for implementing mitigation (ensuring exclusion zones are clear of marine mammals before pile driving begins and after shutdown measures), marine mammal monitoring will also be conducted to assess potential impacts from CALTRANS construction activities. CALTRANS will implement onsite marine mammal monitoring for all unattenuated impact pile driving of H-piles for 180– and 190–dB re 1 μPa exclusion zones and 160–dB re 1 μPa Level B harassment zone and attenuated impact pile driving (except pile proofing) for 180– and 190–dB re 1 μPa exclusion zones. CALTRANS will also monitor all attenuated impact pile driving for the 160–dB re 1 μPa Level B harassment zone, and all vibratory pile driving for the 120–dB re 1 μPa Level B harassment zone.

(2) Protected Species Observers

Monitoring of the pinniped and cetacean exclusion zones shall be conducted by a minimum of three qualified NMFS-approved PSOs. Observations will be made using high-quality binoculars (*e.g.,* Zeiss, 10 × 42 power). PSOs will be equipped with radios or cell phones for maintaining contact with other observers and CALTRANS engineers, and range finders to determine distance to marine mammals, boats, buoys, and construction equipment.

(3) Data Collection

Data on all observations will be recorded and will include the following information:

- Location of sighting;
- Species;
- Number of individuals;
- Number of calves present;
- Duration of sighting;
- Behavior of marine animals sighted;
- Direction of travel; and
- When in relation to construction activities did the sighting occur (*e.g.,* before, "soft-start", during, or after the pile driving or removal).

2. Monitoring for Confined Implosion of Piers E4 and E5

Monitoring for implosion impacts to marine mammals will be based on the SFOBB pile driving monitoring protocol. Pile driving has been conducted for the SFOBB construction project since 2000 with development of several NMFS-approved marine mammal monitoring plans (CALTRANS 2004; 2013). Most elements of these marine mammal monitoring plans are similar to what would be required for underwater implosions. These monitoring plans would include monitoring an exclusion zone and ZOIs for TTS and behavioral harassment described above.

(1) Protected Species Observers

A minimum of 8–10 PSOs would be required during the Piers E4 and E5 controlled implosion so that the exclusion zone, Level B Harassment TTS and Behavioral ZOIs, and surrounding area can be monitored. One PSO would be designated as the Lead PSO and would receive updates from other PSOs on the presence or absence of marine mammals within the exclusion zone and would notify the Environmental Compliance Manager of a cleared exclusion zone prior to the implosion.

(2) Monitoring Protocol

Implosions of Piers E4 and E5 will be conducted only during daylight hours and with enough time for pre and post-implosion monitoring, and with good weather (*i.e.,* clear skies and no high winds). This work will be conducted so that PSOs will be able to detect marine mammals within the exclusion zones and beyond. The Lead PSO will be in contact with other PSOs. If any marine mammals enter an exclusion zone within 30 minutes of blasting, the Lead PSO will notify the Environmental Compliance Manager that the implosion may need to be delayed. The Lead PSO will keep the Environmental Compliance Manager informed about the disposition of the animal. If the animal remains in the exclusion zone, blasting will be delayed until it has left the exclusion zone. If the animal dives and is not seen again, blasting will be delayed at least 15 minutes. After the implosion has occurred, the PSOs will continue to monitor the area for at least 60 minutes.

(3) Data Collection

Each PSO will record the observation position, start and end times of observations, and weather conditions (*i.e.,* sunny/cloudy, wind speed, fog, visibility). For each marine mammal sighting, the following will be recorded, if possible:

- Species.
- Number of animals (with or without pup/calf).
- Age class (pup/calf, juvenile, adult).
- Identifying marks or color (*e.g.,* scars, red pelage, damaged dorsal fin).
- Position relative to Piers E4 or E5 (distance and direction).
- Movement (direction and relative speed).
- Behavior (*e.g.,* logging [resting at the surface], swimming, spy-hopping [raising above the water surface to view the area], foraging).

(4) Post-Implosion Survey

Although any injury or mortality from the implosions of Piers E4 and E5 is very unlikely, boat or shore surveys will be conducted for three days following the event, to determine whether any injured or stranded marine mammals are in the area. If an injured or dead animal is discovered during these surveys or by other means, the NMFS-designated stranding team will be contacted to pick up the animal. Veterinarians will treat the animal or will conduct a necropsy to attempt to determine whether it stranded because of the Piers E4 and E5 implosions.

Reporting Measures

CALTRANS would be required to submit a draft monitoring report within 90 days after completion of the construction work or the expiration of the IHA, whichever comes earlier. This draft report would detail the monitoring protocol, summarize the data recorded during monitoring, and estimate the number of marine mammals that may have been harassed. NMFS would have an opportunity to provide comments on the draft report within 30 days, and if NMFS has comments, CALTRANS would address the comments and submit a final report to NMFS within 30 days. If no comments are provided by NMFS after 30 days receiving the report, the draft report is considered to be final.

Marine Mammal Stranding Plan

A stranding plan for the Pier E3 implosion was prepared in cooperation with the local NMFS-designated marine mammal stranding, rescue, and rehabilitation center. An updated version of this plan will be implemented during implosions of Piers E4 and E5. Although avoidance and minimization measures likely will prevent any injuries, preparations will be made in the unlikely event that marine mammals are injured. Elements of the plan will include the following:

1. The stranding crew will prepare treatment areas at an NMFS-designated facility for cetaceans or pinnipeds that may be injured from the implosions. Preparation will include equipment to treat lung injuries, auditory testing equipment, dry and wet caged areas to hold animals, and operating rooms if surgical procedures are necessary.
2. A stranding crew and a veterinarian will be on call near the Piers E4 and E5 area at the time of the implosions, to quickly recover any injured marine mammals, provide emergency veterinary care, stabilize the animal's condition, and transport individuals to an NMFS-designated facility. If an injured or dead animal is found, NMFS (both the regional office and headquarters) will be notified immediately, even if the animal appears to be sick or injured from causes other than the implosions.
3. Post-implosion surveys will be conducted immediately after the event and over the following three days to determine whether any injured or dead marine mammals are in the area.
4. Any veterinarian procedures, euthanasia, rehabilitation decisions, and time of release or disposition of the animal will be at the discretion of the NMFS-designated facility staff and the veterinarians treating the animals. Any necropsies to determine whether the injuries or death of an animal was the result of an implosion or other anthropogenic or natural causes will be conducted at an NMFS-designated facility by the stranding crew and veterinarians. The results will be communicated to both the CALTRANS and to NMFS as soon as possible, followed by a written report within a month.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as: Any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment) or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

The distance to marine mammal threshold criteria for pile driving and blasting activities, and corresponding ZOI have been determined based on underwater sound and pressure measurements collected during pervious activities in the SFOBB Project area. The numbers of marine mammals by species that may be taken by each type of take were calculated based on distance to the specific marine mammal harassment thresholds, number of days of the activity, and the estimated density of each species in the ZOI.

Estimates of Species Densities of Marine Mammals

No systematic line transect surveys of marine mammals have been performed in the San Francisco Bay. Therefore, the in-water densities of harbor seals, California sea lions, and harbor porpoises were calculated based on 15 years of observations during monitoring for the SFOBB construction and demolition. The amount of monitoring performed per year varied depending on the frequency and duration of construction activities with the potential to affect marine mammals. During the 237 days of monitoring from 2000 through 2015 (including 15 days of baseline monitoring in 2003), 822 harbor seals, 77 California sea lions, and nine harbor porpoises were observed within the waters of the SFOBB east span. Density estimates for other species were made from stranding data, provided by the Marine Mammal Center (MMC).

1. Pacific Harbor Seal Density Estimates

Harbor seal density was calculated from all observations of animals in water during SFOBB Project monitoring from 2000 to 2015, divided by the size of the project area. These observations included data from baseline, pre-, during and post-pile driving, mechanical dismantling, onshore blasting, and offshore implosion activities. During this time, the population of harbor seals in the Bay remained stable (Manugian 2013). Therefore, substantial differences in numbers or behaviors of seals hauling out, foraging, or in their movements are not anticipated. All harbor seal observations within a 1 km² area were used in the estimate. Distances were recorded using a laser range finder (Bushnell Yardage Pro Elite 1500; ± 1.0 yard accuracy). Care was taken to eliminate multiple observations of the same animal, although this was difficult when more than three seals were foraging in the same area.

Density of harbor seals was highest near YBI and Treasure Island, probably because of the haul-out site and nearby foraging areas in Coast Guard and

Clipper coves. Therefore, density estimates were calculated for a higher density area within 4,921 ft (1,500 m) west of Piers E4 and E5, which included the two foraging coves. A lower density estimate was calculated from the areas east of Piers E4 and E5, and beyond 4,921 ft (1,500 m) north and south of the bridge. Harbor seal densities in these two areas in spring-summer and fall-winter seasons are provided in Table 5.

2. California Sea Lion Density Estimates

Within the SFOBB Project area, California sea lion density was calculated from all observations of animals in water during SFOBB Project monitoring from 2000 to 2015, divided by the size of the project area. These observations included data from baseline, pre, during, and post-pile driving, mechanical dismantling, onshore blasting, and offshore implosion activities. All sea lion observations within a 1 km² area were used in the estimate. Distances were recorded using a laser range finder (Bushnell Yardage Pro Elite 1500; ± 1.0 yard accuracy). Care was taken to eliminate multiple observations of the same animal, although most sea lion observations involve a single animal.

California sea lion densities in late spring-early summer and late summer-fall seasons are provided in Table 5.

3. Northern Elephant Seal Density Estimates

Northern elephant seal density in the project area was calculated from the stranding records of the MMC, from 2004 to 2014. These data included both injured or sick seals and healthy seals. Approximately 100 elephant seals were reported in the Bay during this time; most of these hauled out and likely were sick or starving. The actual number of individuals in the Bay may have been higher because not all individuals would necessarily have hauled out. Some individuals may have simply left the Bay soon after entering. Data from the MMC show several elephant seals stranding on Treasure Island, and one healthy elephant seal was observed resting on the beach in Clipper Cove in 2012. Elephant seal pups or juveniles also may have stranded after weaning in the spring and when they returned to California in the fall (September through November). Density of northern elephant seal is estimated as the number of stranded seals over the SFOBB project area, which is 0.03 animal/km² (Table 5).

4. Harbor Porpoise Density Estimates

Harbor porpoise density was calculated from all observations during SFOBB Project monitoring, from 2000 to 2015. These observations included data from baseline, pre, during and post-pile driving, and onshore implosion activities. Over this period, the number of harbor porpoises that were observed entering and using the Bay increased. During the 15 years of monitoring in the SFOBB Project area, only nine harbor porpoises were observed, and all occurred between 2006 and 2015 (including two in 2014 and five in 2015). Density of harbor porpoise is estimated to be 0.021 animal/km² (Table 5).

5. Gray Whale Density Estimate

Gray whale density was estimated for the entire Bay as no observations have occurred of gray whales in the SFOBB Project area. Each year, two to six gray whales enter the Bay, presumably to feed, in the late winter through spring (February through April), per the MMC. Gray whales rarely occur in the Bay from October through December. The gray whale density was estimated based on a maximum of 6 whales occurring within the main area of San Francisco Bay, which yielded a density of 0.00004/km² (Thorson, pers. comm., 2014).

TABLE 5—ESTIMATED IN-WATER DENSITY OF MARINE MAMMALS IN THE SFOBB PROJECT AREA

Species	Main season of occurrence	Density west of piers E4 and E5 within 1,500 m of SFOBB (animals/km²)	Density east of piers E4 and E5 and/or beyond 1,500 m of SFOBB (animals/km²)
Harbor Seal	Spring–Summer	0.32	0.17
Harbor Seal	Fall–Winter	0.83	0.17
California Sea Lion	Late Summer–Fall (post breeding season)	0.09	0.09
California Sea Lion	Late Spring–Early Summer (breeding season)	0.04	0.04
Northern Elephant Seal	Late Spring–Early Winter	0.03	0.03
Harbor Porpoise	All Year	0.021	0.021
Gray Whale	Late Winter and Spring	0.00004	0.00004

Note: Densities for Pacific harbor seals, California sea lions and harbor porpoises are based on monitoring for the east span of the SFOBB from 2000 to 2013. Gray whale and elephant seal densities are estimated from sighting and stranding data from the MMC.

Estimated Takes by Pile Driving and Pile Removal

The numbers of marine mammals by species that may be taken by pile driving were calculated by multiplying the ensonified area above a specific species exposure threshold by the days of the activity and by the estimated density of each species in the ensonified area. As discussed above, threshold distances were determined based on previously measured distances to thresholds during the driving of 42-inch-diameter (1.07 meters) pipe piles. The same threshold distances have been applied to all types and sizes of piles proposed for installation and removal (*i.e.,* H-piles, and pipe piles equal to or less than 36 inches (0.91 meter)). The take estimate is based on 132 days of pile driving to install 200 piles.

For rare species of which the density estimates are unknown, such as northern fur seal and bottlenose dolphin, NMFS worked with CALTRANS and allotted 20 northern fur seals and 10 bottlenose dolphin for incidental take by Level B behavioral harassment to cover the chance encounter in case these animals happen to occur in the project area.

A summary of estimated takes by in-water pile driving and pile removal is provided in Table 6.

TABLE 6—ESTIMATED TAKE OF MARINE MAMMALS FROM PILE DRIVING AND PILE REMOVAL ACTIVITIES

Species	Level B harassment (behavioral response)	Level A harassment
Pacific Harbor Seal	862	0
California Sea Lion	108	0
Northern Elephant Seal	13	0
Harbor Porpoise	13	0
Gray Whale	1	0
Northern fur seal	20	0
Bottlenose dolphin	10	0

The number of marine mammals by species that may be taken by implosion of Piers E4 and E5 were calculated based on distances to the marine mammal threshold for explosions (Table 4) and the estimated density of each species in the ensonified areas (Table 5). A summary of estimated and requested takes by controlled implosion is provided in Table 8.

TABLE 7—ESTIMATED EXPOSURES OF MARINE MAMMALS TO THE PIER E4 AND E5 IMPLOSIONS FOR LEVELS A AND B, AND MORTALITY

Species	Level B exposures		Level A exposures			Mortality
	Behavioral response	TTS	PTS	Gastro-intestinal track injury	Slight lung injury	
Pacific Harbor Seal	1	1	0	0	0	0
California Sea Lion	0	0	0	0	0	0
Northern Elephant Seal	0	0	0	0	0	0
Harbor Porpoise	0	0	0	0	0	0

However, the number of marine mammals in the area at any given time is highly variable. Animal movement depends on time of day, tide levels, weather, and availability and distribution of prey species. Therefore, to account for potential high animal density that could occur during the short window of controlled implosion, NMFS worked with CALTRANS and adjusted the estimated number upwards for the requested takes. These adjustments were based on likely group sizes of these animals.

A summary of estimated takes by implosion of Piers E4 and E5 is provided in Table 8.

TABLE 8—SUMMARY OF REQUESTED TAKES OF MARINE MAMMALS FOR THE PIER E4 AND E5 IMPLOSIONS

Species	Level B behavioral	Level B TTS
Pacific harbor seal	12	6
California sea lion	3	2
Northern elephant seal	2	1
Harbor porpoise	6	3
Northern fur seal	1	1
Bottlenose dolphin	2	2

A summary of the request incidental takes of marine mammals for CALTRANS SFOBB construction activity, including from in-water pile driving/pile removal and controlled implosion for Piers E4 and E5 is provided in Table 9. These take estimates represent "instances" of take and are likely overestimates of the number of individual animals taken, since some individuals are likely taken on multiple days. The more likely the individuals are to remain in the action area for multiple days, the greater the overestimate of individuals.

TABLE 9—SUMMARY OF AUTHORIZED TAKES OF MARINE MAMMALS FOR CALTRANS SFOBB PROJECT

Species	Level B behavioral	Level B TTS	Population	% take population
Pacific harbor seal	874	6	30,968	2.84
California sea lion	111	2	296,750	0.04
Northern elephant seal	15	1	179,000	0.01
Harbor porpoise	19	3	9,886	0.22
Northern fur seal	21	1	12,844	0.17

TABLE 9—SUMMARY OF AUTHORIZED TAKES OF MARINE MAMMALS FOR CALTRANS SFOBB PROJECT—Continued

Species	Level B behavioral	Level B TTS	Population	% take population
Gray whale	1	0	20,990	0.00
Bottlenose dolphin	12	2	323	4.33

Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing

On August 4, 2016, NMFS released its Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Guidance). This new guidance established new thresholds for predicting auditory injury, which equates to Level A harassment under the MMPA. In the **Federal Register** notice (81 FR 51694), NMFS explained the approach it would take during a transition period, wherein we balance the need to consider this new best available science with the fact that some applicants have already committed time and resources to the development of analyses based on our previous guidance and have constraints that preclude the recalculation of take estimates, as well as where the action is in the agency's decision-making pipeline. In that Notice, we included a non-exhaustive list of factors that would inform the most appropriate approach for considering the new Guidance, including: The scope of effects; how far in the process the applicant has progressed; when the authorization is needed; the cost and complexity of the analysis; and the degree to which the guidance is expected to affect our analysis. In this case, CALTRANS submitted an adequate and complete application in a timely manner and indicated that they would need to receive an IHA (if issued) by early September 2016. The CALTRANS analysis put forth in the proposed IHA contemplated the potential for small numbers of permanent or temporary threshold shift, but ultimately concluded that permanent threshold shift will not occur. Consideration of the new Guidance suggested that in the absence of mitigation a small number of Level A takes could potentially occur to one harbor seal. However, CALTRANS has a robust and practicable monitoring and mitigation program—and in addition they enlarged the exclusion zone for pile driving from 95 m to 156 m for 14″ H-pile and to 183 m for 36″ steel pipe when driven by an impact hammer, providing further protection. When this mitigation is considered in combination with the fact that a fair number of marine mammals are expected to intentionally avoid approaching within distances of this slow-moving source that would result in injury, we believe that injury is unlikely. In summary, we have considered the new Guidance and believe that the likelihood of injury is adequately addressed in the analysis and appropriate protective measures are in place in the IHA.

Analysis and Determinations

Negligible Impact

Negligible impact is "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival" (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of Level B harassment takes, alone, is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be "taken" through behavioral harassment, NMFS must consider other factors, such as the likely nature of any responses (their intensity, duration, *etc.*), the context of any responses (critical reproductive time or location, migration, *etc.*), as well as the number and nature of estimated Level A harassment takes, the number of estimated mortalities, and effects on habitat.

To avoid repetition, this introductory discussion of our analyses applies to all the species listed in Table 9, given that the anticipated effects of CALTRANS' SFOBB construction activities involving pile driving and pile removal and controlled implosions for Piers E4 and E5 on marine mammals are expected to be relatively similar in nature. There is no information about the nature or severity of the impacts, or the size, status, or structure of any species or stock that would lead to a different analysis for this activity, or else species-specific factors would be identified and analyzed.

No injuries or mortalities are anticipated to occur as a result of CALTRANS' SFOBB construction activity associated with pile driving and pile removal and controlled implosion to demolish Piers E4 and E5, and none are authorized. The relatively low marine mammal density, relatively small Level A harassment zones, and robust mitigation plan make injury takes of marine mammals unlikely, based on take calculation described above. In addition, the Level A exclusion zones would be thoroughly monitored before the implosion, and detonation activity would be postponed if an marine mammal is sighted within the exclusion zone.

The takes that are anticipated and authorized are expected to be limited to short-term Level B harassment (behavioral and TTS). Marine mammals (Pacific harbor seal, northern elephant seal, California sea lion, northern fur seal, gray whale, harbor porpoise, and bottlenose dolphin) present in the vicinity of the action area and taken by Level B harassment would most likely show overt brief disturbance (startle reaction) and avoidance of the area from elevated noise level during pile driving and pile removal and the implosion noise. A few marine mammals could experience TTS if they occur within the Level B TTS ZOI during the two implosion events. However, as discussed early in this document, TTS is a temporary loss of hearing sensitivity when exposed to loud sound, and the hearing threshold is expected to recover completely within minutes to hours. Therefore, it is not considered an injury. In addition, even if an animal receives a TTS, the TTS would be a one-time event from a brief impulse noise (about 5 seconds), making it unlikely that the TTS would involve into PTS. Finally, there is no critical habitat or other biologically important areas in the vicinity of CALTRANS' Pier E4 and E5 controlled implosion areas (Calambokidis *et al.,* 2015).

The project also is not expected to have significant adverse effects on affected marine mammals' habitat, as analyzed in detail in the "Anticipated Effects on Marine Mammal Habitat" section. There is no biologically important area in the vicinity of the SFOBB project area. The project activities would not permanently modify existing marine mammal habitat. The activities may kill some fish and cause other fish to leave the area temporarily, thus impacting marine mammals' foraging opportunities in a limited portion of the foraging range; but, because of the short duration of the activities and the relatively small area of the habitat that may be affected, the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the monitoring and mitigation measures, NMFS finds that the total marine mammal take from CALTRANS's SFOBB construction activity and the associated Piers E4 and E5 demolition via controlled implosion will have a negligible impact on the affected marine mammal species or stocks.

Small Numbers

The requested takes represent less than 4.33 percent of all populations or stocks potentially impacted (see Table 9 in this document). These take estimates represent the percentage of each species or stock that could be taken by Level B behavioral harassment and TTS (Level B harassment). The numbers of marine mammals estimated to be taken are small proportions of the total populations of the affected species or stocks. In addition, the mitigation and monitoring measures (described previously in this document) prescribed in the IHA are expected to reduce even further any potential disturbance to marine mammals.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS finds that small numbers of marine mammals will be taken relative to the populations of the affected species or stocks.

Impact on Availability of Affected Species for Taking for Subsistence Uses

There are no subsistence uses of marine mammals in the project area; and, thus, no subsistence uses impacted by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act

NMFS has determined that issuance of the IHA will have no effect on listed marine mammals, as none are known to occur in the action area.

National Environmental Policy Act

NMFS prepared an Environmental Assessment (EA) for the take of marine mammals incidental to construction of the East Span of the SFOBB and made a Finding of No Significant Impact (FONSI) on November 4, 2003. Due to the modification of part of the construction project and the mitigation measures, NMFS reviewed additional information from CALTRANS regarding empirical measurements of pile driving noises for the smaller temporary piles without an air bubble curtain system and the use of vibratory pile driving. NMFS prepared a Supplemental Environmental Assessment (SEA) and analyzed the potential impacts to marine mammals that would result from the modification of the action. A FONSI was signed on August 5, 2009. In addition, for CALTRANS' Piers E4 and E5 demolition using controlled implosion, NMFS prepared an SEA and analyzed the potential impacts to marine mammals that would result from the modification. A FONSI was signed on September 3, 2015. The activity and expected impacts remain within what was previously analyzed in the EA and SEAs. Therefore, no additional NEPA analysis is warranted. A copy of the SEA and FONSI is available upon request (see **ADDRESSES**).

Authorization

As a result of these determinations, NMFS has issued an IHA to CALTRANS for the take of marine mammals, by Level B harassment, incidental to conducting SFOBB project in the San Francisco Bay, which also includes the mitigation, monitoring, and reporting requirements described in this Notice.

Dated: September 26, 2016.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2016–23602 Filed 9–29–16; 8:45 am]

BILLING CODE 3510–22–P

COMMISSION OF FINE ARTS

Notice of Meeting

The next meeting of the U.S. Commission of Fine Arts is scheduled for 20 October 2016, at 9:00 a.m. in the Commission offices at the National Building Museum, Suite 312, Judiciary Square, 401 F Street NW., Washington, DC 20001–2728. Items of discussion may include buildings, parks and memorials.

Draft agendas and additional information regarding the Commission are available on our Web site: *www.cfa.gov.* Inquiries regarding the agenda and requests to submit written or oral statements should be addressed to Thomas Luebke, Secretary, U.S. Commission of Fine Arts, at the above address; by emailing *staff@cfa.gov;* or by calling 202–504–2200. Individuals requiring sign language interpretation for the hearing impaired should contact the Secretary at least 10 days before the meeting date.

Dated September 19, 2016 in Washington, DC.

Thomas Luebke,

Secretary.

[FR Doc. 2016–23120 Filed 9–29–16; 8:45 am]

BILLING CODE 6330–01–M

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Deletions from the Procurement List.

SUMMARY: This action deletes products from the Procurement List previously furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Effective Date:* 10/30/2016.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia, 22202–4149.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Deletions

On 7/22/2016 (81 FR 47777–47778), the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List.

After consideration of the relevant matter presented, the Committee has determined that the products listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities.

The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the products to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the products deleted from the Procurement List.

End of Certification

Accordingly, the following products are deleted from the Procurement List:

Products:

NSN(s)—Product Name(s):
8415–00–NIB–1053—Jacket, Tanker, USMC, Pewter Gray, Size 38R
8415–00–NIB–1054—Jacket, Tanker, USMC, Pewter Gray, Size 38L
8415–00–NIB–1055—Jacket, Tanker, USMC, Pewter Gray, Size 38XL
8415–00–NIB–1056—Jacket, Tanker, USMC, Pewter Gray, Size 40S
8415–00–NIB–1057—Jacket, Tanker, USMC, Pewter Gray, Size 40R
8415–00–NIB–1058—Jacket, Tanker, USMC, Pewter Gray, Size 40L
8415–00–NIB–1059—Jacket, Tanker, USMC, Pewter Gray, Size 40XL
8415–00–NIB–1092—Jacket, Tanker, USMC, Pewter Gray, Size 42S
8415–00–NIB–1093—Jacket, Tanker, USMC, Pewter Gray, Size 42R
8415–00–NIB–1094—Jacket, Tanker, USMC, Pewter Gray, Size 42L
8415–00–NIB–1095—Jacket, Tanker, USMC, Pewter Gray, Size 42XL
8415–00–NIB–1096—Jacket, Tanker, USMC, Pewter Gray, Size 44S
8415–00–NIB–1097—Jacket, Tanker, USMC, Pewter Gray, Size 44R
8415–00–NIB–1098—Jacket, Tanker, USMC, Pewter Gray, Size 44L
8415–00–NIB–1099—Jacket, Tanker, USMC, Pewter Gray, Size 44XL
8415–00–NIB–1100—Jacket, Tanker, USMC, Pewter Gray, Size 46S
8415–00–NIB–1101—Jacket, Tanker, USMC, Pewter Gray, Size 46R
8415–00–NIB–1102—Jacket, Tanker, USMC, Pewter Gray, Size 46L
8415–00–NIB–1103—Jacket, Tanker, USMC, Pewter Gray, Size 46XL
8415–00–NIB–1104—Jacket, Tanker, USMC, Pewter Gray, Size 48R
8415–00–NIB–1105—Jacket, Tanker, USMC, Pewter Gray, Size 48L
8415–00–NIB–1106—Jacket, Tanker, USMC, Pewter Gray, Size 48XL
8415–00–NIB–1107—Jacket, Tanker, USMC, Pewter Gray, Size 50R
8415–00–NIB–1108—Jacket, Tanker, USMC, Pewter Gray, Size 50L
8415–00–NIB–1109—Jacket, Tanker, USMC, Pewter Gray, Size 50XL
8415–00–NIB–1110—Jacket, Tanker, USMC, Pewter Gray, Size 52R
8415–00–NIB–1111—Jacket, Tanker, USMC, Pewter Gray, Size 52L
8415–00–NIB–1112—Jacket, Tanker, USMC, Pewter Gray, Size 54R
8415–00–NIB–1113—Jacket, Tanker, USMC, Pewter Gray, Size 54L
Mandatory Source(s) of Supply: Lions Services, Inc., Charlotte, NC
Contracting Activity: Marine Corps Systems Command, Quantico, VA

NSN(s)—Product Name(s): 1005–01–511–2152—Sling, M–249 Small Arms
Mandatory Source(s) of Supply: UNKNOWN
Contracting Activity: Defense Logistics Agency Land and Maritime

NSN(s)—Product Name(s): 1095–00–223–7164—Scabbard, Bayonet-Knife
Mandatory Source(s) of Supply: UNKNOWN
Contracting Activity: W40M NORTHEREGION CONTRACT OFC

NSN(s)—Product Name(s): 1005–01–478–0848—Sling, Combat, Close Quarters
Mandatory Source(s) of Supply: Best Industries for the Blind Inc., Runnemede, NJ
Contracting Activity: W40M NORTHEREGION CONTRACT OFC

Barry S. Lineback,
Director, Business Operations.

[FR Doc. 2016–23642 Filed 9–29–16; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Addition and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed addition to and deletions from the Procurement List.

SUMMARY: The Committee is proposing to add a service to the Procurement List that will be provided by a nonprofit agency employing persons who are blind or have other severe disabilities, and deletes products previously furnished by such agency.

Comments Must be Received on or Before: 10/30/2016.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia 22202–4149.

FOR FURTHER INFORMATION OR TO SUBMIT COMMENTS CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Addition

If the Committee approves the proposed addition, the entity of the Federal Government identified in this notice will be required to procure the service listed below from the nonprofit agency employing persons who are blind or have other severe disabilities.

The following service is proposed for addition to the Procurement List for production by the nonprofit agency listed:

Service

Service Type: Document Control and Conversion Support Service
Mandatory for: U.S. Geological Survey, 4611 Research Park Circle, Suites D and E, Las Cruces, NM
Mandatory Source(s) of Supply: Tresco, Inc., Las Cruces, NM
Contracting Activity: U.S. Federal Communications Commission, Office of Managing Director, Enterprise Acquisition Center, Washington, DC

Deletions

The following products are proposed for deletion from the Procurement List:

Products

NSN(s)—Product Name(s):
1670–01–468–9178—Line, Multi-Loop, low altitude parachute extraction system, 140′
1670–01–062–6310—Line, Multi-Loop, low altitude parachute extraction system, 11′
1670–01–062–6307—Line, Multi-Loop, low altitude parachute extraction system, 12′
1670–01–062–6311—Line, Multi-Loop, low altitude parachute extraction system, 120′
1670–01–063–7761—Line, Multi-Loop, low altitude parachute extraction system, 16′
Contracting Activity: Defense Logistics Agency Aviation

Barry S. Lineback,
Director, Business Operations.

[FR Doc. 2016–23637 Filed 9–29–16; 8:45 am]

BILLING CODE 6353–01–P

COMMODITY FUTURES TRADING COMMISSION

Privacy Act of 1974 System of Records Notice

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice; alterations of Privacy Act systems of records.

SUMMARY: The Commodity Futures Trading Commission (CFTC) is consolidating and revising several notices of systems of records under the Privacy Act of 1974. It is consolidating two system of records notices, CFTC–5, "Employee Personnel/Payroll Records," and CFTC–4, "Employee Leave, Time,

and Attendance," into one, CFTC–5, "Employee Personnel, Payroll, Time and Attendance," to reflect more integrated business processes and applications, and to be more descriptive of its contents and enhancements. The Commission also is consolidating three system of records notices, CFTC–34, "Telecommunications Services," CFTC–35, "Interoffice and Internet Email," and CFTC–36, "Internet Security Gateway Systems," into one system of records notice, CFTC–35, entitled "General Information Technology Records" to reflect more integrated business processes and applications, and to be more descriptive of its contents and enhancements. The revised CFTC–35, "General Information Technology Records," broadly covers the information in identifiable form needed for the CFTC information technology network to provide communications and operate effectively and securely.

DATES: Comments must be received on or before October 31, 2016. This action will be effective without further notice on November 9, 2016, unless revised pursuant to comments received.

ADDRESSES: You may submit comments identified by "Employee Personnel, Payroll, Time and Attendance Records" or "General Information Technology Records," as applicable, by any of the following methods:

- *Agency Web site, via its Comments Online process: http://comments.cftc.gov.* Follow the instructions for submitting comments through the Web site.
- *Federal eRulemaking Portal:* Comments may be submitted at *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.
- *Hand Delivery/Courier:* Same as Mail, above.

Please submit your comments using only one method.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations, 17 CFR 145.9.

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of a submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the notice will be retained in the public comment file and will be considered as required under all applicable laws and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Kathy Harman-Stokes, Chief Privacy Officer, *kharman-stokes@cftc.gov,* 202–418–6629, Office of the Executive Director, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. The Privacy Act

Under the Privacy Act of 1974, 5 U.S.C. 552a, a "system of records" is defined as any group of records under the control of a federal government agency from which information about individuals is retrieved by name or other personal identifier. The Privacy Act establishes the means by which government agencies must collect, maintain, and use personally identifiable information associated with an individual in a government system of records.

Each government agency is required to publish a notice in the **Federal Register** of a system of records in which the agency identifies and describes each system of records it maintains, the reasons why the agency uses the personally identifying information therein, the routine uses for which the agency will disclose such information outside the agency, and how individuals may exercise their rights under the Privacy Act to determine if the system contains information about them.

II. Routine Uses

Information in the systems of records covered by this **Federal Register** notice may be disclosed as specifically stated in the applicable notice and also in accordance with the blanket routine uses numbered 1 through 19 published at 76 FR 5974 (Feb. 2, 2011). These blanket routine uses apply to all CFTC systems of records, except as otherwise provided in a specific system of records notice.

III. Employee Personnel, Payroll, Time and Attendance

The Employee Personnel, Payroll, Time and Attendance System is a collection of information concerning CFTC employees, including interns and volunteers. This System contains certain personnel records not covered by government-wide system of records notices, including records related to telework, requests for reasonable accommodation, student loan repayment program documentation, employee counseling, and grievances and other employee matters not appealed to the Merit Systems Protection Board (MSPB). This System also contains records related to payroll, pay deductions for taxes, benefits, garnishments, and other matters, all forms of leave and absences, and time and attendance. The System includes, but is not limited to: Name; business and personal contact information; social security number; date of birth; medical and other information provided for leave requests and requests for reasonable accommodation; pay and benefit information; and direct deposit information.

IV. CFTC's General Information Technology Records

The General Information Technology Records system covers certain records that the CFTC computer systems routinely compile and maintain about users of those systems to enable the information technology ("IT") network and its hardware, software, applications, databases, communications, and Internet access to function effectively, reliably and securely, and for activities to be logged for auditing, system improvement, and security purposes. While the CFTC IT network contains a broad array of hardware, software, applications, databases, communications tools, and means to access the Internet, this General Information Technology Records system of records notice ("SORN") covers the personally identifiable information ("PII") processed or generated by the IT network that would be covered by the Privacy Act of 1974 and is not covered by another SORN, for individuals who currently or previously had access to the CFTC IT network, including current and former employees, volunteers, interns, contractors, and consultants. This system of records includes, but is not limited to: Network user information needed for the IT network and its components to function effectively and securely and for the CFTC to control access to software, applications, data and information; network activity information including activity logs, audit trails, identification of devices used to access CFTC systems, Internet sites visited, and information input into sites visited, logs of calls to and from a CFTC network user on desk or mobile phones, and similar communication data traffic logs, and, if needed to locate a misplaced CFTC mobile device or for related purposes, the location of that device; and logs of calls placed using CFTC calling cards. Many CFTC computer systems collect and maintain additional information, other than system use data, about individuals inside and outside the CFTC. For a complete list of CFTC Privacy Act systems, please see *http://www.cftc.gov/Transparency/PrivacyOffice/SORN/index.htm* to learn about other categories of information collected and maintained about individuals in the CFTC's computer system.

Issued in Washington, DC, on September 26, 2016, by the Commission.

Christopher J. Kirkpatrick,

Secretary of the Commission.

CFTC–5

SYSTEM NAME:

Employee Personnel, Payroll, Time and Attendance.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

This system is located in the Office of the Executive Director, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581 and on a computer system at the Commission's payroll processor, Department of Agriculture's National Finance Center, New Orleans, LA.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Former and current Commission employees, including volunteers and interns.

CATEGORIES OF RECORDS IN THE SYSTEM:

Categories of records include personnel records not covered by government-wide system of records notices, including records related to telework and requests for reasonable accommodation, which may include medical information; student loan repayment program application and information; and employee counseling, grievances and other employee matters not appealed to the MSPB. This System also contains records related to payroll, including salary information, awards and pay increases; benefits information needed for processing payment of benefits; direct deposit information; pay deductions, including tax and retirement deductions, life insurance, health and dental insurance deductions, flexible spending account deductions, savings allotments, transit and parking deductions, garnishments, debts owed to the Commission, and charity deductions; salary offset under part 141 of the Commission's rules; all forms of leave requests, balances and credits; all other absence types, including suspension; information necessary to administer the Commission's voluntary leave transfer program, including leave donated or used and any supporting documentation, which may include medical information; hours worked; and time and attendance records. The System includes identifying information, such as name; business and personal contact information; social security number; date of birth; citizenship; bank account information for direct deposit; and employee identification number.

Note: The CFTC is the custodian of many employment-related records that are described in the system notices published by the Office of Personnel Management, MSPB, Equal Employment Opportunity Commission and other Federal agencies. For a complete list of government-wide Privacy Act systems, please see OMB Memo 99–05, Attachment C, "Government-wide Systems of Records," at *https://www.whitehouse.gov/omb/memoranda_m99-05-c/.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 6101–6133; 5 U.S.C. 6301–6326; 44 U.S.C. 3101.

PURPOSE(S):

Information is collected to allow the Commission to handle personnel, payroll, time and attendance functions, including personnel functions involving records not covered by government-wide system of records notices, telework requests, requests for reasonable accommodation, student loan repayment program documentation, employee counseling, grievances and other employee matters not appealed to the Merit Systems Protection Board (MSPB), and payroll, pay deductions, leave requests, time and attendance.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

a. The information may be provided to the Department of Justice, the Office of Personnel Management or other Federal agencies, or used by the Commission in connection with any investigation or administrative or legal proceeding involving any violation of Federal law or regulation thereunder.

b. Certain information will be provided, as required by law, to the Office of Child Support Enforcement, Administration for Children and Families, Department of Health and Human Services Federal Parent Locator System (FPLS) and Federal Tax Offset System to enable state jurisdictions to locate individuals and identify their income sources to establish paternity, establish and modify orders of support, and for enforcement action.

c. Certain information will be provided, as required by law, to the Office of Child Support Enforcement for release to the Social Security Administration for verifying social security numbers in connection with the operation of the FPLS by the Office of Child Support Enforcement.

d. Certain information will be provided, as required by law, to the Office of Child Support Enforcement for release to the Department of Treasury for purposes of administering the Earned Income Tax Credit Program (Section 32, Internal Revenue Code of 1986) and verifying a claim with respect to employment in a tax return.

e. The information may be provided to insurance companies providing, or proposing to bid on a solicitation to provide, health benefits to Commission employees. This data may include, but is not limited to: Name, social security number, date of birth, age, gender, marital status, service computation date, date of initial appointment with the Commission, geographic location, standard metropolitan service area, home phone number, and home address of the Commission employee. For each enrolled dependent of the Commission employee, this information may include, but is not limited to: Dependent's name, relationship of the dependent to the Commission employee, date of birth, age, gender, social security number, home address, marital status, student status, and handicap status where applicable. This information may be used to verify eligibility, pay claims, or provide accurate bids.

f. For employees who request repayment of student loans through the CFTC Student Loan Repayment Program, certain information will be provided to the organizations that hold the requesting employees' loan notes for the purpose of verifying outstanding loan amounts and administering such program.

g. To provide information to officials of labor organizations recognized under 5 U.S.C. Chapter 71 when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting work conditions.

Information in this system also may be disclosed in accordance with the blanket routine uses that appear at the beginning of the Commission's compilation of its system of records notices, *see, e.g.*, 76 FR 5974 (Feb. 2, 2011), and the Commission's Web site, *www.cftc.gov*.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records are stored in file folders, and electronic records, including computer files, are stored on the Commission's network, the National Finance Center Personnel/Payroll System, and other electronic media as needed.

RETRIEVABILITY:

By the name, identification number, or other personally identifying information of the employee, volunteer or intern.

SAFEGUARDS:

Records are protected from unauthorized access and improper use through administrative, technical and physical security measures. Technical security measures within CFTC include restrictions on computer access to authorized individuals who have a legitimate need to know the information; required use of strong passwords that are frequently changed; multi-factor authentication for remote access and access to many CFTC network components; use of encryption for certain data types and transfers; firewalls and intrusion detection applications; and regular review of security procedures and best practices to enhance security. Only specifically authorized individuals may access the National Finance Center computer system. Physical measures include restrictions on building access to authorized individuals, 24-hour security guard service, and maintenance of records in lockable offices and filing cabinets.

RETENTION AND DISPOSAL:

These records are maintained according to retention schedules prescribed by the General Records Schedule for each type of workforce record.

SYSTEM MANAGER(S) AND ADDRESS:

Executive Director, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves, seeking access to records about themselves in this system of records, or contesting the content of records about themselves contained in this system of records should address written inquiries to the Office of General Counsel, Paralegal Specialist, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581. Telephone (202) 418–5011.

RECORDS SOURCE CATEGORIES:

Individual about whom the record is maintained; CFTC human resources office records; records from the National Finance Center; and information from third parties providing benefits or other services to covered individuals.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

CFTC–35

SYSTEM NAME:

General Information Technology Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

This system is located in the Commission's Office of Data and Technology at its principal office at Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals covered by the system include current and former CFTC network users, including current or former employees, interns, volunteers, contractors and consultants.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system of records covers certain records that the CFTC computer systems routinely compile and maintain about users of its systems to enable the information technology ("IT") network and its hardware, software, applications, databases, communications and Internet access to function effectively, reliably and securely, and for activities to be logged for auditing, system improvement, and security purposes, to the extent such records are covered by the Privacy Act of 1974 and not included in another system of records. This system includes but is not limited to: Network user information needed for the IT network and its components to function effectively and securely and for the CFTC to control access to software, applications, data and information; network activity information including, for example, activity logs, audit trails, identification of devices used to access CFTC systems, Internet sites visited, and information input into sites visited, logs of calls to and from a CFTC network user on desk or mobile phones, and similar communication data traffic logs, and, if needed to locate a misplaced CFTC mobile device or for related purposes, the location of that device; and logs of calls placed using CFTC calling cards. Many CFTC computer systems collect and maintain additional information, other than system use data, about individuals inside and outside the CFTC. For a complete list of CFTC Privacy Act systems, please see *http://www.cftc.gov/Transparency/PrivacyOffice/SORN/index.htm* to learn about other categories of information collected and maintained about individuals in the CFTC's computer system.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; Commodity Exchange Act, 7 U.S.C. 1 *et seq.* including Section 12 of the Commodity Exchange Act, at 7 U.S.C. 16, and the rules and regulations promulgated thereunder.

PURPOSE(S):

The purpose of the system of records is to enable effective, reliable and secure operation of the information technology network and its hardware, software, applications, databases, communications and Internet access that CFTC staff members rely upon to perform their job duties and carry out the agency's mission. This includes: To monitor usage of computer systems; to ensure the availability and reliability of the agency computer facilities; to document and/or control access to various computer systems; to audit, log, and alert responsible CFTC personnel when certain personally identifying information is accessed in specified systems; to identify the need for and to conduct training programs, which can include the topics of information security, acceptable computer practices, and CFTC information security policies and procedures; to monitor security on computer systems; to add and delete users; to investigate and make referrals for disciplinary or other action if improper or unauthorized use is suspected or detected.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The information in this system will be routinely used by CFTC staff members in the Office of Data and Technology to: Facilitate authorized access to and use of CFTC email accounts and internal individual and shared electronic storage and collaboration platforms; enable appropriate access and controls over access to other CFTC systems, applications and information; implement privacy and security controls over CFTC resources and information; generate audit trails for review by staff to understand vulnerabilities and issues to improve system effectiveness and security; and support the communications, telecommunications and audiovisual services CFTC staff members need to fulfill their job duties. Information in this system also may be disclosed in accordance with the blanket routine uses that appear at the beginning of the Commission's compilation of its system of records notices, *see, e.g.,* 76 FR 5974 (Feb. 2, 2011), and the Commission's Web site, *http://www.cftc.gov.*

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESS CONTROLS, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records are stored in file folders and electronic records are stored on the Commission's network and other electronic media as needed, such as encrypted hard drives and back-up media.

RETRIEVABILITY:

Certain information covered by this SORN may be retrieved by name, CFTC username, identification number, title, device identifier, Internet Protocol address assigned to CFTC IT network components, email address, and calling card or phone number of the CFTC network user.

SAFEGUARDS:

Records are protected from unauthorized access and improper use through administrative, technical and physical security measures. Technical security measures within CFTC include restrictions on computer access to authorized individuals who have a legitimate need to know the information; required use of strong passwords that are frequently changed; multi-factor authentication for remote access and access to many CFTC network components; use of encryption for certain data types and transfers; firewalls and intrusion detection applications; and regular review of security procedures and best practices to enhance security. Physical measures include restrictions on building access to authorized individuals, 24-hour security guard service, and maintenance of records in lockable offices and filing cabinets.

RETENTION AND DISPOSAL:

The records will be maintained in accordance with records disposition schedules approved by the National Archives and Records Administration. The schedules are available at *www.cftc.gov.*

SYSTEM MANAGER(S) AND ADDRESS:

The Chief Information Officer, Office of Data and Technology, located at the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves, seeking access to records about themselves in this system of records, or contesting the content of records about themselves contained in this system of records should address written inquiries to the Office of General Counsel, Paralegal Specialist, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581. Telephone (202) 418–5011.

RECORD SOURCE CATEGORIES:

Current and former CFTC IT network users, including current and former employees, interns, volunteers, contractors and consultants; individuals communicating with CFTC network users through CFTC communications platforms; and CFTC hardware, software and system components that generate information reflecting activity on the CFTC IT network.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2016–23616 Filed 9–29–16; 8:45 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Privacy Act of 1974 System of Records Notice

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice; withdrawal of a Privacy Act system of records notice.

SUMMARY: In accordance with the Privacy Act of 1974, the Commodity Futures Trading Commission (CFTC) is providing notice that it is withdrawing one system of records notice, CFTC–8, "Employment Applications," from its inventory of record systems because the relevant records are covered by an existing government-wide system notice.

DATES: Effective upon publication.

FOR FURTHER INFORMATION CONTACT: Kathy Harman-Stokes, Chief Privacy Officer, *kharman-stokes@cftc.gov,* 202–418–6629, Office of the Executive Director, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION: Pursuant to the Privacy Act of 1974, 5 U.S.C. 552a, and as part of the Commodity Futures Trading Commission's effort to review and update system of records notices, the Commission is withdrawing one system of records notice, CFTC–8, "Employment Applications." The Commission is withdrawing the system notice because the records are covered by an existing government-wide notice, OPM/GOVT–5, "Recruiting, Examining, and Placement Records."

The Commission will continue to collect and maintain records regarding recruiting, examining and placement as a custodian for such records for the Office of Personnel Management and will rely upon and follow the existing Federal government-wide system of records notice, OPM/GOVT–5 (71 FR 35351, June 19, 2006). Eliminating CFTC–8 will not have an adverse impact on individuals and will promote the overall streamlining and management of CFTC Privacy Act record systems.

Accordingly, this notice formally terminates system of records notice CFTC–8 and removes it from the inventory of the Commodity Futures Trading Commission.

Issued in Washington, DC, on September 26, 2016, by the Commission.

Christopher J. Kirkpatrick,

Secretary of the Commission.

[FR Doc. 2016–23621 Filed 9–29–16; 8:45 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 10:00 a.m., Friday, October 7, 2016.

PLACE: Three Lafayette Centre, 1155 21st Street NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance, enforcement, and examinations matters. In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's Web site at *http://www.cftc.gov.*

CONTACT PERSON FOR MORE INFORMATION: Christopher Kirkpatrick, 202–418–5964.

Christopher J. Kirkpatrick,

Secretary of the Commission.

[FR Doc. 2016–23886 Filed 9–28–16; 4:15 pm]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Air University Board of Visitors' Air Force Institute of Technology Subcommittee Notice of Meeting

AGENCY: Department of the Air Force, Air University, Air Force Institue of Technology.

ACTION: Meeting notice.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces that the Air University Board of Visitors' Air Force Institute of Technology (AFIT) Subcommittee meeting will take place on 16 and 17 October, 2016 at the Air Force Institute of Technology, located at 2950 Hobson Way, Wright-Patterson AFB, Dayton, Ohio. The meeting will occur from approximately 8:00 a.m.–4:30 p.m. on Monday, 17 October, 2016 and from approximately 8:00 a.m.–3:00 p.m. on Tuesday, 18 October, 2016. The session that will be closed to the *general public* will be held from 1:25 p.m. to 5:00 p.m. on 17 October, 2016. The purpose of this Air Force Institue of Technology Subcommittee meeting is to provide independent advice and recommendations on matters pertaining to the educational policies, programs, and strategic direction of the Air Force Institute of Technology and to apportion time for Air Force senior leaders to brief the Air Force Institute of Technology Subcommittee on their most vital STEM updates and concerns. In accordance with 5 U.S.C. 552b, as amended, and 41 CFR 102–3.155, a portion of the AFIT Subcommittee meeting will be closed to the general public because they will discuss For Official Use Only (FOUO) information and matters covered by Section 552b of Title 5, United States Code, subsection (c), subparagraph (1).

Any member of the public that wishes to attend this meeting or provide input to the AFIT Subcommittee must contact the BOV meeting organizer at the phone number or email address listed in this announcement at least ten working days prior to the meeting date. Please ensure that you submit your written statement in accordance with 41 CFR 102–3.140(c) and section 10(a)(3) of the Federal Advisory Committee Act. Statements being submitted in response to the agenda mentioned in this notice must be received by the BOV meeting organizer at least ten calendar days prior to the meeting commencement date. The BOV meeting organizer will review all timely submissions and respond to them prior to the start of the meeting identified in this notice. Written statements received after this date may not be considered by the AFIT Subcommittee until their next scheduled meeting.

FOR FURTHER INFORMATION CONTACT: The BOV meeting organizer, Ms. Lisa Arnold at *lisa.arnold.2@us.af.mil or* 334–953–2989; Headquarters Air University, Chief, Advisory Boards, 55 LeMay Plaza South, Maxwell AFB, AL 36112.

Henry Williams,

Acting Air Force Federal Register Officer.

[FR Doc. 2016–23778 Filed 9–28–16; 11:15 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2009–0021]

Submission for OMB Review; Comment Request

ACTION: Notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by October 31, 2016.

FOR FURTHER INFORMATION CONTACT: Fred Licari, 571–372–0493.

SUPPLEMENTARY INFORMATION:

Title, Associated Form and OMB Number: USMA Pre-Candidate Procedures, 0702–0060.

Type of Request: Reinstatement, with change, of a previously approved collection for which approval has expired.

Number of Respondents: 75,000.

Responses per Respondent: 1.

Annual Responses: 75,000.

Average Burden per Response: 25 minutes.

Annual Burden Hours: 10,000.

Needs and Uses: West Point candidates provide personal background information which allows the West Point Admissions Committee to make subjective judgements on non-academic experiences. Data are also used by West Point's Office of Institutional Research for correlation with success in graduation and military careers.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Comments and recommendations on the proposed information collection should be emailed to Ms. Jasmeet Seehra, DoD Desk Officer, at *Oira_submission@omb.eop.gov.* Please identify the proposed information collection by DoD Desk Officer and the Docket ID number and title of the information collection.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Mr. Frederick Licari.

Written requests for copies of the information collection proposal should be sent to Mr. Licari at WHS/ESD Directives Division, 4800 Mark Center Drive, East Tower, Suite 03F09, Alexandria, VA 22350–3100.

Dated: September 27, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–23714 Filed 9–29–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Board of Regents, Uniformed Services University of the Health Sciences; Notice of Federal Advisory Committee Meeting

AGENCY: Uniformed Services University of the Health Sciences ("the University"), Department of Defense.

ACTION: Quarterly meeting notice.

SUMMARY: The Department of Defense is publishing this notice to announce the following meeting of the Board of Regents, Uniformed Services University of the Health Sciences ("the Board").

DATES: Tuesday, November 1, 2016, from 8:00 a.m. to 10:40 a.m. (Open Session) and 10:45 a.m. to 11:30 a.m. (Closed Session).

ADDRESSES: Uniformed Services University of the Health Sciences, 4301 Jones Bridge Road, Everett Alvarez Jr. Board of Regents, Room (D3001), Bethesda, Maryland 20814.

FOR FURTHER INFORMATION CONTACT: Jennifer Nuetzi James, Designated Federal Officer, 4301 Jones Bridge Road, D3002, Bethesda, Maryland 20814; telephone 301–295–3066; email *jennifer.nuetzi-james@usuhs.edu.*

SUPPLEMENTARY INFORMATION: This meeting notice is being published under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150.

Purpose of the Meeting: The purpose of the meeting is to provide advice and recommendations to the Secretary of Defense, through the Under Secretary of Defense for Personnel and Readiness, on academic and administrative matters critical to the full accreditation and successful operation of the University. These actions are necessary for the University to pursue its mission, which is to educate, train and comprehensively prepare uniformed services health professionals, officers, scientists and leaders to support the Military and Public Health Systems, the National Security and National Defense Strategies of the United States, and the readiness of our Uniformed Services.

Agenda: The actions scheduled to occur include the review of the minutes from the Board meeting held on August 2, 2016; recommendations regarding the awarding of post-baccalaureate degrees; recommendations regarding the approval of faculty appointments and promotions; and recommendations regarding award nominations. The University President will provide a report on recent actions affecting academic and operational aspects of the University. Member Reports will include an Academics Summary consisting of reports from the Armed Forces Radiobiology Research Institute, University Faculty Senate, and the Henry M. Jackson Foundation for the Advancement of Military Medicine. Member Reports will also include a Finance and Administration Summary consisting of reports from the Senior Vice President, Southern Region; Vice President for Finance and Administration; Vice President for External Affairs; and the Office of Accreditation and Organizational Assessment. The Dean of the F. Edward Hébert School of Medicine, Dean of the Daniel K. Inouye Graduate School of Nursing, and Executive Dean of the Postgraduate Dental College will provide quarterly updates; a report will be provided on the College of Allied Health Sciences, and the meeting will conclude with an update on the USU School of Medicine Honor Code. A closed session will be held, after the open session, to discuss active investigations and personnel actions.

Meeting Accessibility: Pursuant to Federal statutes and regulations (5 U.S.C., Appendix, 5 U.S.C. 552b, and 41 CFR 102–3.140 through 102–3.165) and the availability of space, the meeting is open to the public from 8:00 a.m. to 10:40 a.m. Seating is on a first-come basis. Members of the public wishing to attend the meeting should contact Jennifer Nuetzi James no later than five business days prior to the meeting, at the address and phone number noted in the **FOR FURTHER INFORMATION CONTACT** section.

Pursuant to 5 U.S.C. 552b(c)(2, 5–7), the Department of Defense has determined that the portion of the meeting from 10:45 a.m. to 11:30 a.m. shall be closed to the public. The Under Secretary of Defense (Personnel and Readiness), in consultation with the Office of the Department of Defense General Counsel, has determined in writing that this portion of the committee's meeting will be closed as the discussion will disclose sensitive personnel information, will include matters that relate solely to the internal personnel rules and practices of the agency, will involve allegations of a person having committed a crime or censuring an individual, and may disclose investigatory records compiled for law enforcement purposes.

Written Statements: Pursuant to section 10(a)(3) of the Federal Advisory Committee Act of 1972 and 41 CFR 102–3.140, the public or interested organizations may submit written comments to the Board about its approved agenda pertaining to this meeting or at any time regarding the Board's mission. Individuals submitting a written statement must submit their statement to the Designated Federal Officer at the address listed in **FOR FURTHER INFORMATION CONTACT**. Written statements that do not pertain to a scheduled meeting of the Board may be submitted at any time. However, if individual comments pertain to a specific topic being discussed at the planned meeting, then these statements must be received at least 5 calendar days prior to the meeting, otherwise, the comments may not be provided to or considered by the Board until a later date. The Designated Federal Officer will compile all timely submissions with the Board's Chair and ensure such submissions are provided to Board Members before the meeting.

Dated: September 27, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–23674 Filed 9–29–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2016–OS–0047]

Submission for OMB Review; Comment Request

ACTION: Notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by October 31, 2016.

FOR FURTHER INFORMATION CONTACT: Fred Licari, 571–372–0493.

SUPPLEMENTARY INFORMATION:

Title, Associated Form and OMB Number: Representations to Implement Appropriation Act Provisions on Felony Convictions and Unpaid Federal Tax Liabilities; OMB Control Number 0704–0494.

Type of Request: Extension.

Number of Respondents: 2,500.

Responses per Respondent: 6.

Annual Responses: 15,000.

Average Burden per Response: 5 minutes.

Annual Burden Hours: 1,250 hours.

Needs and Uses: The information collection requirement is necessary to enable DoD awarding officials to exercise due diligence and continue to comply with provisions found in Sections 745 and 746 of the Financial Services and General Government Appropriations Act, 2016 (Division E of Pub. L. 114–113, the Consolidated Appropriations Act, 2016), as well as similar provisions that future years' appropriations acts may include. The requirements of these provisions were originally enacted in three Fiscal Year (FY) 2012 appropriations acts that made funds available to DoD Components for obligation. The details of the provisions in the three FY 2012 acts varied somewhat but they generally required DoD to consider suspension or debarment before using appropriated funding to enter into a grant or cooperative agreement with a corporation if the awarding official was aware that the corporation had an unpaid federal tax liability or was convicted of a felony criminal violation within the preceding 24 months. The FY 2012 provisions were in:

- Sections 8124 and 8125 of the Department of Defense Appropriations Act, 2012 (Division A of Pub. L. 112–74, the Consolidated Appropriations Act, 2012);
- Section 514 of the Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2012 (Division H of Pub. L. 112–74); and
- Sections 504 and 505 of the Energy and Water Development Appropriations Act, 2012 (Division B of Pub. L. 112–74).

Generally, the requirements related to these provisions of the FY 2012 appropriations acts have been included in each subsequent fiscal year's appropriations acts. Since FY 2015, the provisions related to felony convictions and unpaid federal tax liabilities have been enacted in the government-wide general provisions portion of the Financial Services and General Government Appropriations Act.

Affected Public: Not-For-Profit Institutions; Business or other for-profit.

Frequency: On occasion.

Respondent's Obligation: Required to Obtain or Retain Benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Comments and recommendations on the proposed information collection should be emailed to Ms. Jasmeet Seehra, DoD Desk Officer, at *Oira_submission@omb.eop.gov.* Please identify the proposed information collection by DoD Desk Officer and the Docket ID number and title of the information collection.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Mr. Frederick Licari.

Written requests for copies of the information collection proposal should be sent to Mr. Licari at WHS/ESD Directives Division, 4800 Mark Center Drive, East Tower, Suite 03F09, Alexandria, VA 22350–3100.

Dated: September 27, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–23636 Filed 9–29–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Availability and Notice of Public Meetings for the Draft Supplemental Environmental Impact Statement for Land Acquisition and Airspace Establishment To Support Large-Scale Marine Air Ground Task Force Live-Fire and Maneuver Training at the Marine Corps Air Ground Combat Center, Twentynine Palms, California

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: Pursuant to section (102)(2)(c) of the National Environmental Policy Act (NEPA) of 1969, and regulations implemented by the Council on Environmental Quality (40 Code of Federal Regulations [CFR] Parts 1500–1508), Department of Navy (DoN) NEPA regulations (32 CFR part 775) and U.S. Marine Corps (USMC) NEPA directives (Marine Corps Order P5090.2A, changes 1–3), the DoN has prepared and filed with the U.S. Environmental Protection Agency (EPA) a Draft Supplemental Environmental Impact Statement (EIS) evaluating the potential environmental impacts that may result from implementing alternative desert tortoise translocation plans at the Marine Corps Air Ground Combat Center, Twentynine Palms (hereinafter "the Combat Center"). The Supplemental EIS is a supplement to the Final EIS for "Land Acquisition and Airspace Establishment to Support Large-Scale Marine Air Ground Task Force Live Fire and Maneuver Training" dated July 2012 (hereinafter "2012 Final EIS") (77 FR 44234).

With the filing of the Draft Supplemental EIS, the DoN is initiating a 45-day public comment period and has scheduled three public open house meetings to receive oral and written comments on the Draft Supplemental EIS. Federal, state and local agencies and interested parties are encouraged to provide comments in person at any of the public open house meetings, or in writing anytime during the public comment period. This notice announces the dates and locations of the public meetings and provides supplementary information about the environmental planning effort.

DATES: The Draft Supplemental EIS public review period will begin September 30, 2016, and end on November 14, 2016. The USMC is holding three informational open house style public meetings to inform the public about the proposed action and the alternatives under consideration, and to provide an opportunity for the public to comment on the proposed action, alternatives, and the adequacy and accuracy of the Draft Supplemental EIS. USMC representatives will be on hand to discuss and answer questions on the proposed action, the NEPA process and the findings presented in the Draft Supplemental EIS. Public open house meetings will be held:

(1) Tuesday, October 25, 2016, 5:00 p.m. to 8:00 p.m., at the Joshua Tree Community Center, 6171 Sunburst Avenue, Joshua Tree, CA 92252.

(2) Wednesday, October 26, 2016, 5:00 p.m. to 8:00 p.m., at the Palm Springs Convention Center, 277 N. Avenida Caballeros, Palm Springs, CA 92262.

(3) Thursday, October 27, 2016, 5:00 p.m. to 8:00 p.m., at the Barstow Harvey House, 681 N. 1st Avenue, Barstow, CA 92311.

Attendees will be able to submit written comments at the public meetings. A stenographer will be present to transcribe oral comments. Equal weight will be given to oral and written statements. All statements, oral transcription and written, submitted during the public review period will become part of the public record on the Draft Supplemental EIS and will be responded to in the Final Supplemental EIS. Comments may also be submitted by U.S. mail or electronically via the project Web site provided below.

ADDRESSES: A copy of the Draft Supplemental EIS is available at the project Web site, *http://www.SEISforLAA.com,* and at the local libraries identified at the end of this notice. Comments on the Draft Supplemental EIS can be submitted via the project Web site or submitted in writing to: 29Palms SEIS Project Team, c/o Cardno Government Services, 3888 State Street, Ste. 201, Santa Barbara, CA 93105. All comments must be postmarked or received by November 14, 2016, to ensure they become part of the official record. All timely comments will be responded to in the Final Supplemental EIS.

FOR FURTHER INFORMATION CONTACT: The Resource Management Group at the Combat Center 760–830–3737.

SUPPLEMENTARY INFORMATION: A Notice of Intent to prepare the Supplemental EIS was published in the **Federal Register** on August 24, 2016 (Vol. 81, No. 164, p. 57891–57893).

Proposed Action

Pursuant to 40 CFR 1502.9(c), the Draft Supplemental EIS evaluates new information relevant to environmental concerns associated with translocation of tortoises from specific training areas on newly acquired lands. Translocation was deemed necessary to mitigate the moderate to high levels of impact on the tortoise population from the Marine Expeditionary Brigade (MEB) training activities assessed in the 2012 Final EIS. A 2012 Biological Opinion (hereinafter “the 2012 BO”) issued by the United States Fish and Wildlife Service (USFWS) approved several conservation measures pertaining to the desert tortoise, including a 2011 General Translocation Plan (GTP). Since the 2012 Final EIS, and the subsequent Record of Decision (ROD) signed by the DON in February 2013 (hereinafter “the 2013 ROD”), the Marine Corps has conducted additional detailed studies and worked cooperatively with the USFWS, the California Department of Fish and Wildlife (CDFW), and the Bureau of Land Management (BLM) on alternative translocation plans for the desert tortoise, as required in the 2012 BO.

The proposed action for this Supplemental EIS includes four fundamental and interrelated components that are reflected in all alternatives:

(1) *Recipient and Control Areas.* The 2011 GTP identified criteria for selection of recipient areas that should be met for successful translocation to occur. These criteria are consistent with the goals, objectives, and recovery strategies of the 2011 USFWS revised recovery plan for the Mojave population of the desert tortoise and the 2010 USFWS plan development guidance for translocation of desert tortoises.

(2) *Translocation Methods.* Translocation methods would include handling procedures, fencing, translocation, and clearance surveys. All tortoise handling would be accomplished by the techniques outlined in the Desert Tortoise Field Manual, including the most recent disease prevention techniques. Juvenile tortoises that are too small to wear transmitters would be moved to established juvenile pens at Tortoise Research and Captive Rearing Sites (TRACRS) or Special Use Areas where they may become part of the head start program (the Combat Center’s tortoise rearing program). Tortoise exclusion fencing would be installed along certain borders of newly designated Special Use Areas (areas that have not been identified as part of the large-scale training scenarios and that contain habitat supporting desert tortoises) on Combat Center land near maneuver or high use areas.

Desert tortoises that exhibit moderate to severe nasal discharge would not be translocated, and may be sent to a USFWS-approved facility where they would undergo further assessment, treatment, and/or study. For up to the first 5 years following initial translocation, clearance surveys would be conducted in the high- and moderate-impact areas to locate and remove any remaining desert tortoises.

(3) *Post-Translocation Monitoring.* Radio-telemetry tracking of all translocated tortoises is impractical; however, 20 percent of translocated tortoises, and a similar number of resident and control tortoises, would be tracked using radio-telemetry. Repeated readings of mark-recapture plots where tortoises have been translocated would be conducted to yield information on survival of translocated tortoises, population demography, repatriation, and health. Mark-recapture plots would be used to estimate the tortoise population size by capturing, marking, and releasing a portion of the population, then later capturing another portion and counting the number of marked individuals. Capture, marking, and releasing activities would not involve any ground disturbance. Four subject areas would be investigated by monitoring, each of which is described below:

(a) *Survival:* Survival of translocated is the main metric for evaluating translocation as a take minimization measure. Survival of translocated tortoises would be measured using two methods: Mark-recapture plots and tracking.

(b) *Threats to survival:* Anthropogenic disturbances and predator populations that cause potential risks to recovery and translocation success threats would be assessed both qualitatively and quantitatively and compared to current levels.

(c) *Habitat stability/changes:* Habitat would be assessed to monitor changes or stability during each reading of the mark-recapture plots.

(d) *Health and disease:* The incidence of disease and other health issues would be monitored using body condition indices, clinical signs of disease, serology, and visual inspection for injuries. This would be accomplished using both telemetered tortoises and all tortoises captured on mark-recapture plots. Any health problems observed (*e.g.,* rapid declines in body condition, perceived outbreaks of disease, mortality events) would be reported to the USFWS, CDFW, and BLM such that appropriate actions could be taken in a timely manner.

(4) *Other Research.* The Marine Corps, in consultation with USFWS, identified a research program to benefit recovery of the species. Research topics include translocation effectiveness, constrained dispersal (“repatriation” in the 2011 GTP), stocking densities, habitat, and disease.

Two main research topics that would be implemented are summarized below, both of which are anticipated to provide results that are topical and important for recovery.

(a) *Experimental Translocation Densities:* The intent behind this research is to evaluate the capability of the habitat to sustain a certain density of tortoises.

(b) *Constrained Dispersal:* Constrained dispersal (called “repatriation” in the 2011 GTP) is a technique wherein tortoises are translocated to a fenced site to encourage settling before the fence is removed.

Purpose and Need

The purpose of the proposed action evaluated in the Supplemental EIS is to study alternative translocation plans in support of the project that was described in the 2012 Final EIS, selected in the 2013 Record of Decision (ROD)(78 FR 11632), and authorized by the National Defense Authorization Act for Fiscal Year 2014. The 2011 GTP, developed during the section 7 Endangered Species Act (ESA) consultation on the 2012 Final EIS proposed action, identified proposed recipient areas, translocation methods, and research treatments based on information available at the time of publication. Studies were planned over the following 3 years to provide information necessary to refine these areas, methods, and treatments. The 2011 GTP explicitly recognized that as a result of these studies, the Combat Center could refine these areas to specific sites and determine better recipient sites not considered in the 2011 GTP. The results of these efforts and further consultation with USFWS and CDFW, identified refinements to translocation methods, recipient sites, and research treatments that could better support the goals of the translocation effort (and became the basis for the action alternatives considered in this Supplemental EIS). The alternative selected in the ROD for the Supplemental EIS will be implemented prior to conducting sustained, combined-arms, live-fire, and maneuver field training for MEB-sized Marine Air Ground Task Forces (MAGTFs) contemplated in the 2012 Final EIS.

The Marine Corps needs to implement the proposed action to satisfy requirements identified in the 2012 Final EIS and associated 2012 BO. The 2012 BO concluded that the implementation of the Preferred Alternative from the 2012 Final EIS would likely result in the "take" of desert tortoises associated with military training, tortoise translocation efforts, and authorized and unauthorized Off-Highway Vehicle (OHV) use by recreationists displaced from former areas of the Johnson Valley OHV Area.

Alternatives Considered in the Draft Supplemental EIS

In light of the purpose and need for the proposed action, the DON has identified two potential action alternatives and a No-Action Alternative for the translocation of desert tortoise from training impact areas.

Each alternative includes recipient areas/sites (to which tortoises would be translocated) and control areas/sites (where the resident tortoise populations will be studied to provide comparative data on survival, threats to survival, habitat stability and changes, and health and disease relative to the translocated tortoise populations at the recipient sites). Each alternative also specifies the details of the proposed tortoise translocation, including specific handling procedures, fencing, clearance surveys, 30 years of post-translocation monitoring, and other research activities.

The Combat Center identified and applied screening criteria from the 2011 USFWS revised recovery plan for the Mojave population of the desert tortoise and the 2011 USFWS revised recovery plan development guidance for translocation of desert tortoises to evaluate and select the proposed recipient areas/sites under each alternative. These criteria relate to land use, habitat quality, population levels, disease prevalence, and distance from collection. The Combat Center also screened for research and monitoring feasibility.

Under the No-Action Alternative, the Marine Corps would conduct translocation of desert tortoises in accordance with the 2011 GTP described in the 2012 BO. Alternatives 1 and 2 primarily differ from the No-Action Alternative in the selection of proposed recipient and control areas and in the distribution of desert tortoises at each release site. Compared to the No-Action Alternative, Alternatives 1 and 2 would also include additional research studies and reflect updated information obtained from the 3-year program of surveys conducted since the 2012 Final EIS. Alternative 2 differs from Alternative 1 in that: (1) One less recipient site would be used; (2) the pairing of control sites to recipient sites would be different; (3) the Bullion control site would be located on the Combat Center instead of within the Cleghorn Lakes Wilderness Area; and (4) translocation densities would be different.

Environmental Effects Identified in the Draft Supplemental EIS

Potential impacts were evaluated in the Draft Supplemental EIS under all alternatives for the following resources: Biological resources, land use, air quality, and cultural resources. The Draft Supplemental EIS analysis evaluates direct, indirect, short-term and long-term impacts, as well as cumulative impacts from other relevant activities.

The Draft Supplemental EIS includes mitigation measures, special conservation measures, and features of project design to avoid or minimize potential impacts. The proposed action would fully comply with regulatory requirements for the protection of environmental resources. A desert tortoise translocation plan has been submitted to the USFWS in compliance with Section 7 of the ESA. The USFWS will issue a revised BO that will be included with the Final Supplemental EIS. In addition, the USMC is coordinating with the California State Historic Preservation Office and affected Native American tribes under Section 106 of the National Historic Preservation Act, and with the Mojave Desert Air Quality Management District under the Clean Air Act.

The proposed action would result in unavoidable impacts related to biological resources (due to desert tortoise translocation as well as impacts to vegetation and desert tortoise habitat resulting from construction of fences and associated maintenance roads); land use (due to desert tortoise translocation); air quality (due to air emissions from construction activities); and potentially cultural resources (due to the fence and road construction; although the fences/roads would be routed to avoid cultural resource sites).

Schedule: The Notice of Availability (NOA) and Notice of Public Meetings (NOPM) publication in the **Federal Register** and local print media starts the 45-day public comment period for the Draft Supplemental EIS. The DoN will consider and respond to all written, oral and electronic comments, submitted as described above, in the Final Supplemental EIS. The DoN intends to issue the Final Supplemental EIS in January 2017, at which time an NOA will be published in the **Federal Register** and local print media. A Record of Decision is expected to be published in February 2017.

Copies of the Draft Supplemental EIS can be found on the project Web site, *http://www.SEISforLAA.com* or at the following locations:

(1) Newton T. Bass Apple Valley Branch Library, 14901 Dale Evans Parkway, Apple Valley, CA 92307
(2) Barstow Branch Library, 304 E. Buena Vista St., Barstow, CA 92311
(3) Joshua Tree Library, 6465 Park Blvd., Joshua Tree, CA 92252
(4) Lucerne Valley Janice Horst Branch Library, 33103 Old Woman Springs Road, Lucerne Valley, CA 92356
(5) Needles Branch Library, 1111 Bailey Ave., Needles, CA 92363
(6) Ovitt Family Community Library, 215 E. C St., Ontario, CA 91764
(7) Stanley Mosk Library and Courts Building, 914 Capitol Mall, Sacramento, CA 95814
(8) San Bernardino County Library Administrative Offices, 777 E. Rialto Avenue, San Bernardino, CA 92415
(9) Twentynine Palms Library, 6078 Adobe Road, Twentynine Palms, CA 92277
(10) Victorville City Library, 15011 Circle Drive, Victorville, CA 92395
(11) Yucca Valley Branch Library, 57098 29 Palms Highway, Yucca Valley, CA 92284
(12) Palm Springs Public Library, 300 S. Sunrise Way, Palm Springs, CA 92262

Dated: September 26, 2016.

C. Mora,

Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2016–23649 Filed 9–29–16; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2016–ICCD–0106]

Agency Information Collection Activities; Comment Request; Targeted Teacher Shortage Areas

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing a revision of an existing information collection.

DATES: Interested persons are invited to submit comments on or before November 29, 2016.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2016–ICCD–0106. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E–347, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Freddie Cross, 202–453–7224.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Targeted Teacher Shortage Areas.

OMB Control Number: 1840–0595.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 57.

Total Estimated Number of Annual Burden Hours: 4,275.

Abstract: This request is for approval of reporting requirements that are contained in the Federal Family Education Loan Program regulations which address the targeted teacher deferment provision of the Higher Education Act of 1965, as amended. The information collected is necessary for a state to support it's annual request for designation of teacher shortage areas within the state. In previous years, the data collection was conducted by paper and pencil, mail-in method. Beginning with the 2017 collection, data collection will be conducted completely online thus reducing burden to the respondents.

Dated: September 27, 2016.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2016–23658 Filed 9–29–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[OE Docket No. EA–429]

Application To Export Electric Energy; CWP Energy

AGENCY: Office of Electricity Delivery and Energy Reliability, DOE.

ACTION: Notice of application.

SUMMARY: CWP Energy (Applicant or CWP Energy) has applied for authority to transmit electric energy from the United States to Mexico pursuant to section 202(e) of the Federal Power Act.

DATES: Comments, protests, or motions to intervene must be submitted on or before October 31, 2016.

ADDRESSES: Comments, protests, motions to intervene, or requests for more information should be addressed to: Office of Electricity Delivery and Energy Reliability, Mail Code: OE–20, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585–0350. Because of delays in handling conventional mail, it is recommended that documents be transmitted by overnight mail, by electronic mail to *Electricity.Exports@hq.doe.gov,* or by facsimile to 202–586–8008.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated by the Department of Energy (DOE) pursuant to sections 301(b) and 402(f) of the Department of Energy Organization Act (42 U.S.C. 7151(b), 7172(f)) and require authorization under section 202(e) of the Federal Power Act (16 U.S.C. 824a(e)).

On September 14, 2016, DOE received an application from CWP Energy for authority to transmit electric energy from the United States to Mexico as a power marketer for a five-year term using existing international transmission facilities.

In its application, CWP Energy states that it does not own or control any electric generation or transmission facilities, and it does not have a franchised service area. The electric energy that CWP Energy proposes to export to Mexico would be surplus energy purchased from third parties such as electric utilities and Federal power marketing agencies pursuant to voluntary agreements. The existing international transmission facilities to be utilized by the Applicant have previously been authorized by Presidential Permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties.

Procedural Matters: Any person desiring to be heard in this proceeding should file a comment or protest to the application at the address provided above. Protests should be filed in accordance with Rule 211 of the Federal Energy Regulatory Commission's (FERC) Rules of Practice and Procedures (18 CFR 385.211). Any person desiring to become a party to these proceedings should file a motion to intervene at the above address in accordance with FERC Rule 214 (18 CFR 385.214). Five copies of such comments, protests, or motions to intervene should be sent to the address provided above on or before the date listed above.

Comments and other filings concerning CWP Energy's application to export electric energy to Mexico should be clearly marked with OE Docket No. EA–429. An additional copy is to be provided to both Ruta Kalvaitis Skučas, Pierce Atwood LLC, 1875 K St. NW., Suite 700, Washington, DC 20006 and Pascal Massey, CWP Energy, 407 McGill Street, Suite 315, Montreal, PQ, H2Y 2G3.

A final decision will be made on this application after the environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR part 1021) and after a determination is made by DOE that the proposed action will not have an adverse impact on the sufficiency of supply or reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above, by accessing the program Web site at *http://energy.gov/node/11845,* or by emailing Angela Troy at *Angela.Troy@hq.doe.gov.*

Issued in Washington, DC, on September 27, 2016.

Christopher Lawrence,

Electricity Policy Analyst, Office of Electricity Delivery and Energy Reliability.

[FR Doc. 2016–23662 Filed 9–29–16; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Impact Statement for the Recapitalization of Infrastructure Supporting Naval Spent Nuclear Fuel Handling at the Idaho National Laboratory

AGENCY: Department of Energy.

ACTION: Notice of availability.

SUMMARY: The U.S. Department of Energy (DOE) Naval Nuclear Propulsion Program (NNPP) announces the availability of the *Final Environmental Impact Statement for the Recapitalization of Infrastructure Supporting Naval Spent Nuclear Fuel Handling at the Idaho National Laboratory* (DOE/EIS–0453–F). The Final EIS evaluates the potential environmental impacts associated with recapitalizing the infrastructure needed to ensure the long-term capability of the NNPP to support naval spent nuclear fuel handling until at least 2060.

DATES: The NNPP will publish a Record of Decision no sooner than 30 days after publication of the U.S. Environmental Protection Agency's (EPA) Notice of availability in the **Federal Register**.

ADDRESSES: Copies of the Final EIS are available in public reading rooms and libraries as indicated in the **SUPPLEMENTARY INFORMATION** portion of this notice. The Final EIS is also available for review at *www.ecfrecapitalization.us* and on the DOE's NEPA Web site at *http://energy.gov/nepa.*

FOR FURTHER INFORMATION CONTACT: For further information about this Final EIS, contact: Erik Anderson, Naval Sea Systems Command, 1240 Isaac Hull Avenue SE., Stop 8036, Washington Navy Yard, DC 20376–8036.

For information regarding the DOE NEPA process, please contact: Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance (GC–54), U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, Telephone (202) 586–4600, or leave a message at (800) 472–2756.

SUPPLEMENTARY INFORMATION: The NNPP prepared this Final EIS in accordance with the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality (CEQ) regulations for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), and the DOE NEPA implementing procedures (10 CFR 1021). This Final EIS addresses all public comments on the Draft EIS which was issued on June 19, 2015 (80 FR 35331). The NNPP is committed to managing naval spent nuclear fuel in a manner that is consistent with the *Department of Energy (DOE) Programmatic Spent Nuclear Fuel Management and Idaho National Engineering Laboratory Environmental Restoration and Waste Management Programs Final Environmental Impact Statement* (DOE/EIS–0203–F), and to complying with the Settlement Agreement, as amended in 2008, among the State of Idaho, the DOE, and the Navy concerning the management of naval spent nuclear fuel. Consistent with the Record of Decision for DOE/EIS–0203–F, naval spent nuclear fuel is shipped by rail from shipyards and prototype facilities to the Idaho National Laboratory (INL) for processing. To allow the NNPP to continue to unload, transfer, prepare, and package naval spent nuclear fuel for disposal, three alternatives are evaluated in the Final EIS: No Action Alternative, Overhaul Alternative, and New Facility Alternative. The preferred alternative to recapitalize the infrastructure supporting naval spent nuclear fuel handling is to build a new facility (New Facility Alternative).

Background

The mission of the NNPP, also known as the Naval Reactors Program, is to provide the U.S. with safe, effective, and affordable naval nuclear propulsion plants and to ensure their continued safe and reliable operation through lifetime support, research and development, design, construction, specification, certification, testing, maintenance, and disposal. A crucial component of this mission, naval spent nuclear fuel handling, occurs at the end of a nuclear propulsion system's useful life or when naval nuclear fuel has been depleted. The NNPP is responsible for removal of the naval spent nuclear fuel through a defueling or refueling operation. Both operations remove the naval spent nuclear fuel from the reactor, but a refueling operation also involves installing new fuel, allowing the nuclear-powered ship to be redeployed into the U.S. Navy fleet. Once the naval spent nuclear fuel has been removed from an aircraft carrier, submarine, or prototype, it is sent to the Naval Reactors Facility (NRF) for examination and further naval spent nuclear fuel handling including transferring, preparing, and packaging for transfer to an interim storage facility or geologic repository.

The NNPP ensures that naval spent nuclear fuel handling is performed in a safe and environmentally responsible manner in accordance with 50 U.S.C. 2406 and 2511 (codifying Executive Order 12344). Nuclear fuel handling is an intricate and intensive process requiring a complex infrastructure.

Proposed Action

NNPP is proposing to recapitalize the current naval spent nuclear fuel handling capabilities provided by the Expended Core Facility (ECF) located at the NRF on the INL. The purpose of the proposed action is to provide the infrastructure necessary to support the naval nuclear reactor defueling and refueling schedules required to meet the operational needs of the U.S. Navy. The proposed action is needed because significant upgrades are necessary to ECF infrastructure and water pools to continue safe and environmentally responsible naval spent nuclear fuel handling until at least 2060.

The transfer, preparation, and packaging of naval spent nuclear fuel are vital to the NNPP's mission of maintaining the reliable operation of the naval nuclear fleet and developing effective nuclear propulsion plants. Although ECF continues to be operated in a safe and environmentally responsible manner, the ECF infrastructure and equipment necessary to accomplish the work of naval spent nuclear fuel handling need significant upgrades to continue safe and environmentally responsible naval spent nuclear fuel handling until at least 2060. Efforts are ongoing to sustain this infrastructure, preserve these essential capabilities, and ensure that the high NNPP standards for protecting the environment continue to be met. However, major portions of this infrastructure have been in service for over 50 years.

Alternatives

Consistent with the Record of Decision for DOE/EIS–0203–F, naval spent nuclear fuel would continue to be shipped by rail from shipyards and prototypes to NRF for processing. To allow the NNPP to continue to unload, transfer, prepare, and package naval spent nuclear fuel for disposal, three alternatives were identified and analyzed in this Final EIS.

1. No Action Alternative

The No Action Alternative involves maintaining ECF without a change to the present course of action or management of the facility. The current naval spent nuclear fuel handling infrastructure would continue to be used while the NNPP performs only preventative and corrective maintenance. The No Action Alternative does not meet the purpose for the proposed action because it would not provide the infrastructure necessary to support the naval nuclear reactor defueling and refueling schedules required to meet the operational needs of the U.S. Navy. The No Action Alternative does not meet the NNPP's need because significant upgrades are necessary to the ECF infrastructure to continue safe and environmentally responsible naval spent nuclear fuel handling until at least 2060. As currently configured, the ECF infrastructure cannot support use of the new M–290 shipping containers. Significant changes in configuration of the facility and spent fuel handling processing locations in the water pool would be required to support unloading fuel from the new M–290 shipping containers. In addition, over the next 45 years, preventative and corrective maintenance without significant upgrades and refurbishments may not be sufficient to sustain the proper functioning of ECF infrastructure and equipment. Upgrades and refurbishments needed to support use of the new M–290 shipping containers and continue safe and environmentally responsible operations would not meet the definition of the No Action Alternative; therefore, these actions are represented by the Overhaul Alternative.

The implementation of the No Action Alternative (*i.e.,* failure to perform upgrades and refurbishments), in combination with the NNPP commitment to only operate in a safe and environmentally responsible manner, may result in ECF eventually being unavailable for handling naval spent nuclear fuel. If the NNPP naval spent nuclear fuel handling infrastructure were to become unavailable, the inability to transfer, prepare, and package naval spent nuclear fuel could immediately and profoundly impact the NNPP's mission and national security needs to refuel and defuel nuclear-powered submarines and aircraft carriers. In addition, the U.S. Navy could not ensure its ability to meet the requirements of the Settlement Agreement and its 2008 Addendum.

Since the No Action Alternative does not meet the purpose and need for the proposed action, it is considered to be an unreasonable alternative; however, the No Action Alternative is included in the Final EIS as required by CEQ regulations.

2. Overhaul Alternative

The Overhaul Alternative involves continuing to use the aging infrastructure at ECF, while incurring increasing costs to provide the required refurbishments and work-around actions necessary to ensure uninterrupted aircraft carrier and submarine refuelings and defuelings. Under the Overhaul Alternative, the NNPP would operate ECF in a safe and environmentally responsible manner by continuing to maintain ECF while implementing major refurbishment projects for the ECF infrastructure and water pools. This would entail:

- Short-term actions necessary to keep the infrastructure and equipment in safe working order, including regular upkeep sufficient to sustain their proper functioning (*e.g.,* the ongoing work currently performed in ECF to inspect and repair deteriorating water pool concrete coatings).
- Facility, process, and equipment reconfigurations needed for specific capabilities required in the future. These actions involve installation of new equipment and processes, and relocation of existing equipment and processes, within the current facility to provide a new capability (*e.g.,* modification of ECF and reconfiguration of the water pool as necessary to handle M–290 shipping containers).
- Major refurbishment actions necessary to sustain the life of the infrastructure (*e.g.,* to the extent practicable, overhaul the water pools to bring them up to current design and construction standards).

Refurbishment activities would take place in parallel with ECF operations for the majority of the Overhaul Alternative time period. The first 33 years of the 45 years (*i.e.,* the refurbishment period) would include refurbishment and operations activities being conducted in parallel. During certain refurbishment phases, operations could be limited due to the nature of the refurbishment activities (*e.g.,* operations would not continue in water pools that are under repair). There would then be a 12-year period where only operational activities would take place in ECF (*i.e.,* the post-refurbishment operational period).

Failure to implement this overhaul in advance of infrastructure deterioration would impact the ability of ECF to operate for several years. Further, overhaul actions would necessitate operational interruptions for extended periods of time.

3. New Facility Alternative

A New Facility Alternative would acquire capital assets to recapitalize naval spent nuclear fuel handling capabilities. While a new facility requires new process and infrastructure assets, the design could leverage use of the newer, existing ECF support facilities and would leverage use of newer equipment designs. The facility would be designed with the flexibility to integrate future identified mission needs.

Under the current budget and funding levels for the New Facility Alternative, it is anticipated that construction activities would occur over approximately a 5-year period.

Construction of the New Facility Alternative would occur in parallel with ECF operations. An approximately 2-year period would follow the construction of the New Facility Alternative when new equipment would be installed and tested, and training would be provided to qualify the operations workforce.

A new facility would include all current naval spent nuclear fuel handling operations conducted at ECF. In addition, it would include the capability to unload naval spent nuclear fuel from M–290 shipping containers in the water pool and handle aircraft carrier naval spent nuclear fuel assemblies without prior disassembly for preparation and packaging for disposal. Such capability does not currently exist within the ECF water pools, mainly due to insufficient available footprint in areas of the water pool with the required depth of water.

The NNPP will continue to operate ECF during new facility construction, during a transition period, and after the new facility is operational for examination work. To keep the ECF infrastructure in a safe working order during these time periods, some limited upgrades and refurbishments may be necessary. Details are not currently available regarding which specific actions will be taken; therefore, they are not explicitly analyzed as part of the New Facility Alternative. The environmental impacts from these upgrades and refurbishments are considered to be bounded by the environmental impacts described in the Refurbishment Period of the Overhaul Alternative.

Changes From Draft EIS

The Draft EIS was published by the NNPP in June 2015. The NNPP has considered all public comments received in preparing this Final EIS, which includes the NNPP's responses to those comments. The Final EIS highlights changes that were made to address these comments as well as changes that have resulted from additional design and planning for the New Facility Alternative. Changes to the design and planning for the New Facility Alternative include changes to the seismic design strategy, water management strategy, and analysis of potential air emissions related to operation of concrete batch plants.

Public Reading Rooms and Libraries

The Final EIS is available for review at the following reading rooms:

Idaho Operations Office, Department of Energy, Public Reading Room, 2251 N. Boulevard, Idaho Falls, ID 83402, Telephone: (208) 526–1185
Idaho Falls Public Library, 457 W. Broadway, Idaho Falls, ID 83402, Telephone: (208) 612–8460
Shoshone-Bannock Library, Bannock and Pima Streets, P.O. Box 306, Fort Hall, ID 83203, Telephone: (208) 238–3882
Eli M. Oboler Library, Idaho State University, 850 South 9th Avenue, Pocatello, ID 83209, Telephone: (208) 282–2958
Twin Falls Public Library, 201 Fourth Avenue East, Twin Falls, ID 83301, Telephone: (208) 733–2964
Marshall Public Library, 113 South Garfield, Pocatello, ID 83204, Telephone: (208) 232–1263
Boise Public Library, 715 S. Capitol, Boise, ID 83702, Telephone: (208) 972–8200
Idaho Commission for Libraries, 325 W. State Street, Boise, ID 83702, Telephone: (208) 334–2150
Latah County, Free Library District, 110 S. Jefferson, Moscow, ID 83843, Telephone: (208) 882–3925

Issued in Washington, DC, on September 23, 2016.

Jeffrey M. Avery,

Director, Regulatory Affairs, Naval Nuclear Propulsion Program.

[FR Doc. 2016–23663 Filed 9–29–16; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 4093–035]

McMahan Hydroelectric, L.L.C.; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Original license.

b. *Project No.:* P–4093–035.

c. *Date filed:* March 30, 2015.

d. *Applicant:* McMahan Hydroelectric, L.L.C.

e. *Name of Project:* Bynum Hydroelectric Project.

f. *Location:* On the Haw River, near the Town of Pittsboro and the Town of Chapel Hill, North Carolina, in Chatham County, North Carolina. The project does not occupy federal lands.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contact:* Mr. Andrew J. McMahan, President, McMahan Hydroelectric, L.L.C., 105 Durham Eubanks Road, Pittsboro, NC 273121; (336) 509–2148; email—*mcmahanhydro@gmail.com.*

i. *FERC Contact:* Sean Murphy at (202) 502–6145; or email at *sean.murphy@ferc.gov,* or Dustin Wilson at (202) 502–6528; or email at *dustin.wilson@ferc.gov.*

j. *Deadline for filing comments, motions to intervene and protests:* 60 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file motions to intervene and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include docket number P–4093–035.

The Commission's Rules of Practice and Procedures require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted for filing, but is not ready for environmental analysis at this time. When the application is ready for environmental analysis, the Commission will issue a public notice requesting comments, recommendations, terms and conditions, or prescriptions.

l. *The existing Bynum Project includes:* (1) A 20-acre reservoir (referred to as Odell Lake) at elevation 315.0 feet mean sea level, with 100 acre-feet of gross storage and no net storage; (2) a 900-foot-long, 10-foot-high stone masonry dam (Bynum Dam, or Odell Lake Dam), consisting of a 750-foot-long uncontrolled spillway section and a 150-foot-long non-overflow section that contains canal intake facilities; (3) two hydraulically controlled 6-foot-wide Tainter gates that allow water to flow into an intake canal; (4) a 2,000-foot-long power canal varying in width from 25 to 40 feet that (a) extends from Bynum Dam to the powerhouse, and (b) includes a drainage gate located immediately upstream of the powerhouse; (5) a powerhouse with (a) an intake protected by a trashrack having a bar spacing of 2.75 inches, and (b) a single turbine/generator unit; (6) a 500-foot-long tailrace varying in width from 40 to 50 feet; (7) a 2,500-foot-long bypassed reach; (8) an interconnection with the transmission system at a nearby substation; and (9) appurtenant facilities.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Public notice of the filing of the initial development application was issued for competing applications or notices of intent. Under the Commission's regulations, any competing development application must be filed in response to and in compliance with public notice of the initial development application. No competing applications or notices of intent may be filed in response to this notice.

o. *Comments, Motions to Intervene, or Protests:* Anyone may submit comments, a motion to intervene, or a protest in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified deadline date for the particular application.

All filings must (1) bear in all capital letters the title "COMMENTS," "MOTION TO INTERVENE," or "PROTEST," as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, and protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: September 23, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–23677 Filed 9–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP16–500–000]

WBI Energy Transmission, Inc.; Notice of Request Under Blanket Authorization

Take notice that on September 15, 2016, WBI Energy Transmission, Inc. (WBI Energy), 1250 West Century Avenue, Bismarck, North Dakota 58503, filed in Docket No. CP16–500–000 a prior notice request pursuant to sections 157.205 and 157.216(b) of the Commission's regulations under the Natural Gas Act (NGA), requesting authorization to abandon by sale approximately 2,370 feet of the Walhalla 3-inch mainline and the Walhalla Town Border Station in Pembina County, North Dakota, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or TTY, contact (202) 502–8659.

Any questions concerning this application may be directed to Lori Myerchin, Manager, Regulatory Affairs, WBI Energy Transmission, Inc., 1250 West Century Avenue, Bismarck, North Dakota 58503, by telephone at (701) 530–1563 or by email at *lori.myerchin@wbienergy.com.*

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenter's will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenter's will not be required to serve copies of filed documents on all other parties. However, the non-party commentary, will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*www.ferc.gov*) under the "e-Filing" link. Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Dated: September 23, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–23680 Filed 9–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ID–8011–000]

Wheeler, Brent E.; Notice of Filing

Take notice that on September 22, 2016, Brent E. Wheeler filed an application for authorization to hold interlocking positions, pursuant to section 305(b) of the Federal Power Act, 16 U.S.C. 825d(b), Part 45 of the Regulations of the Federal Energy Regulatory Commission (Commission), 18 CFR part 45, and Order 664.[1]

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on October 13, 2016.

Dated: September 23, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–23676 Filed 9–29–16; 8:45 am]

BILLING CODE 6717–01–P

---

[1] *Comm'n Authorization to Hold Interlocking Positions,* 112 FERC ¶61,298 (2005) ("Order No. 664"); *order on reh'g,* 114 FERC ¶ 61,142 (2006) ("Order No. 664–A").

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP16–472–000; PF15–33–000]

Northern Natural Gas Company; Notice of Schedule for Environmental Review of the Northern Lights 2017 Expansion Project

On June 25, 2016, Northern Natural Gas Company (Northern) filed an application in Docket No. CP16–472–000 requesting a Certificate of Public Convenience and Necessity pursuant to Section 7(c) of the Natural Gas Act to construct and operate certain natural gas pipeline facilities. The proposed project is known as the Northern Lights 2017 Expansion Project (Project), and would expand the capacity of Northern's market area facilities in Minnesota.

On July 8, 2016, the Federal Energy Regulatory Commission (Commission or FERC) issued its Notice of Application for the Project. Among other things, that notice alerted agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission staff's Environmental Assessment (EA) for the Project. This instant notice identifies the FERC staff's planned schedule for the completion of the EA for the Project.

Schedule for Environmental Review

Issuance of EA—November 9, 2016

90-day Federal Authorization Decision Deadline—February 7, 2017

If a schedule change becomes necessary, additional notice will be provided so that the relevant agencies are kept informed of the Project's progress.

Project Description

The proposed Project includes 2 miles of 8-inch-diameter pipeline loop in Sherburne County, Minnesota; 2.8 miles of 12-inch-diameter pipeline loop in Isanti County, Minnesota; as well as an additional 15,900-horsepower compression unit at Northern's existing Faribault Compressor Station in Rice County, Minnesota. The Project would allow Northern to transport an incremental load of approximately 76,000 dekatherms per day.

Background

On April 11, 2016, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Planned Northern Lights 2017 Expansion Project and Request for Comments on Environmental Issues* (NOI). The NOI was issued during the pre-filing review of the Project in Docket No. PF15–33–000 and was sent to affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers. In response to the NOI, the Commission received comments from the Minnesota Department of Natural Resources (MN DNR) and the U.S. Environmental Protection Agency (EPA). The primary issue raised by the MN DNR was a request to describe potential impacts to the Rum River and any associated mitigation measures. The primary issues raised by the EPA were requests to address a range of specific environmental issues of concern in pipeline construction.

Additional Information

In order to receive notification of the issuance of the EA and to keep track of all formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/docs-filing/esubscription.asp.*

Additional information about the Project is available from the Commission's Office of External Affairs at (866) 208–FERC or on the FERC Web site (*www.ferc.gov*). Using the "eLibrary" link, select "General Search" from the eLibrary menu, enter the selected date range and "Docket Number" excluding the last three digits (*i.e.,* CP16–472), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866) 208–3676, TTY (202) 502–8659, or at *FERCOnlineSupport@ferc.gov.* The eLibrary link on the FERC Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Dated: September 26, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–23679 Filed 9–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC16–11–000]

Commission Information Collection Activities (FERC Form Nos. 1, 1–F, and 3–Q); Comment Request

AGENCY: Federal Energy Regulatory Commission.

ACTION: Comment request.

SUMMARY: The Commission previously issued a 60-day Notice in the **Federal Register** (81 FR 38169, 6/13/2016) requesting public comments on FERC Form Nos. 6, 580, 1, 1–F, and 3–Q. The Commission received no comments regarding FERC Form Nos. 6 and 580 and issued a separate 30-day Notice on those collections (81 FR 62112, 9/8/2016).

The Commission did receive comments (responding to the 60-day Notice) regarding FERC Form Nos. 1, 1–F, and 3–Q. This Notice addresses those comments and solicits additional comments on FERC Form Nos. 1, 1–F, and 3–Q.

In compliance with the requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(a)(1)(D), the Federal Energy Regulatory Commission (Commission or FERC) is submitting the FERC Form No. 1 (Annual Report of Major Electric Utilities, Licensees, and Others), FERC Form No. 1–F (Annual Report for Nonmajor Public Utilities and Licensees), and FERC Form No. 3–Q (Quarterly Financial Report of Electric Utilities, Licensees, and Natural Gas Companies) to the Office of Management and Budget (OMB) for review of the information collection requirements. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below.

DATES: Comments on the FERC Form Nos. 1, 1–F, and 3–Q are due by October 31, 2016.

ADDRESSES: Comments filed with OMB, identified by the OMB Control Nos. 1902–0021 (FERC Form No. 1), 1902–0029 (FERC Form No. 1–F), and 1902–0205 (FERC Form No. 3–Q) should be sent via email to the Office of Information and Regulatory Affairs: *oira_submission@omb.gov*, Attention: Federal Energy Regulatory Commission Desk Officer.

A copy of the comments should also be sent to the Commission, in Docket No. IC16–11–000, by either of the following methods:

- *eFiling at Commission's Web site: http://www.ferc.gov/docs-filing/efiling.asp*
- *Mail/Hand Delivery/Courier:* Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at: *http://www.ferc.gov/help/submission-guide.asp.* For user assistance, contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at: (866) 208–3676 (toll-free), or (202) 502–8659 for TTY.

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *http://www.ferc.gov/docs-filing/docs-filing.asp.*

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by email at *DataClearance@FERC.gov,* by telephone at (202) 502–8663, and by fax at (202) 273–0873.

SUPPLEMENTARY INFORMATION:

Type of Request: Three-year extension of the information collection requirements for FERC Form Nos. 1, 1–F, and 3–Q, with no changes to the current reporting requirements. Please note that each collection is distinct from the next.

Comments: Comments are invited on: (1) Whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collections of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collections; and (4) ways to minimize the burden of the collections of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FERC Form No. 1, Annual Report of Major Electric Utilities, Licensees, and Others

OMB Control No.: 1902–0021.

Abstract: The FERC Form No. 1 (Form No. 1) is a comprehensive financial and operating report submitted annually for electric rate regulation, market oversight analysis, and financial audits by Major electric utilities, licensees and others. Major pertains to utilities and licensees having in each of the three previous calendar years, sales or transmission services that exceed one of the following: (1) One million megawatt hours of total annual sales; (2) 100 megawatt hours of annual sales for resale; (3) 500 megawatt hours of annual power exchanges delivered; or (4) 500 megawatt hours of annual wheeling for others (deliveries plus losses).[1]

The Form No. 1 is designed to collect financial and operational information and is considered to be a non-confidential public use form. The Form No. 1 includes a basic set of financial statements: Comparative Balance Sheet, Statement of Income, Statement of Retained Earnings, Statement of Cash Flows, Statements of Accumulated Comprehensive Income, Comprehensive Income, and Hedging Activities; and Notes to Financial Statements. Supporting schedules contain supplementary information and outlines of corporate structure and governance; information on formula rates; and description of important changes during the year. Other schedules provide information on revenues and the related quantities of electric sales and electricity transmitted; account balances for all electric operation and maintenance expenses; selected plant cost data; and other statistical information.

Type of Respondent: Major electric utilities.

Comments: In response to the 60-day Notice, the Commission received comments from The Bureau of Economic Analysis (BEA) collectively on Forms 1 and 1–F.[2] A summary of the comments and the Commission's responses follow.

- The Bureau of Economic Analysis (BEA) submitted comments on 7/28/2016 on Forms 1 and 1–F.[3]

BEA Comments: BEA uses data from Forms 1 and 1–F in estimating the national income and product account (NIPA) structures investment estimate. BEA states: "While BEA uses this information indirectly through the [U.S. Census Bureau's Construction Value Put-In Place] program, it is considered an indispensable data source to the NIPA estimates."[4] BEA would like to explore receiving data directly from the Commission with aggregated industry totals of particular line items from Forms 1 and 1–F. BEA also suggests that the Commission expand the Form 1 and 1–F collection to include additional information regarding details on capital expenditures.

---

[1] As detailed in 18 CFR 101 (Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provision of the Federal Power Act, General Instructions) and 18 CFR 141.1. Nonoperating entities formerly designated as Major and new entities that expect to be in the Major category should file as detailed in 18 CFR 101.

[2] The submittals are posted at *http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14318233* and *http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14318200.*

[3] Id.

[4] Id.

FERC Response: BEA may access Form 1 and 1–F data directly: (1) Using the Form 1 viewer and historical data that is accessible via the Commission's Web site at *www.ferc.gov/docs-filing/forms.asp;* or (2) by searching for individual filings in eLibrary at *http://www.ferc.gov/docs-filing/elibrary.asp.*

The Commission is not presently considering modifications to collect additional information on the Forms 1 and 1–F. Separately, the Commission is looking at modernizing data collection in Docket No. AD15–11, but that is an activity not addressed here.[5]

Estimate of Annual Burden: The estimated annual burden[6] and cost[7] follow:

FORM NO. 1

Number of respondents (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden hours & cost per response (4)	Total annual burden hours & total annual cost (3) * (4) = (5)	Cost per respondent ($) (5) ÷ (1)
210	1	210	1,168 hrs.; $91,874.88	245,280 hrs.; $19,293,724.80	$91,874.88

The instructions to the Form 1 will be updated to reflect the current burden estimate and email addresses for FERC and OMB.

FERC Form No. 1–F, Annual Report for Nonmajor Public Utilities and Licensees

OMB Control No.: 1902–0029.

Abstract: The FERC Form No. 1–F (Form No. 1–F) is a financial and operating report submitted annually for electric rate regulation, market oversight analysis, and financial audits by Nonmajor electric utilities and licensees. Nonmajor pertains to utilities and licensees having total annual sales of 10,000 megawatt-hours or more in the previous calendar year and not classified as Major.[8]

The Form No. 1–F is designed to collect financial and operational information and is considered to be a non-confidential public use form. The Form No. 1–F includes a basic set of financial statements: Comparative Balance Sheet, Statement of Retained Earnings, Statement of Cash Flows, Statement of Comprehensive Income and Hedging Activities, and Notes to Financial Statements. Supporting schedules contain supplementary information and include revenues and the related quantities of electric sales and electricity transmitted; account balances for all electric operation and maintenance expenses; selected plant cost data; and other statistical information.

Type of Respondent: Nonmajor electric utilities.

Comments: In response to the 60-day Notice, the Commission received comments from the BEA on 7/28/2016. As indicated above, these comments were submitted collectively for both Forms 1 and 1–F; a summary of the comments and the Commission's responses are provided above under Form 1.

Estimate of Annual Burden: The estimated annual burden and cost follow. (The estimated hourly cost used for the Form No. 1–F is $78.66 (wages plus benefits) and is described above, under the Form No. 1.):

FORM NO. 1–F

Number of respondents (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden hours & cost per response (4)	Total annual burden hours & total annual cost (3) * (4) = (5)	Cost per respondent ($) (5) ÷ (1)
5	1	5	122 hrs.; $9,596.52	610 hrs.; $47,982.60	$9,596.52

The instructions to the Form 1–F will be updated to reflect the current burden estimate and email addresses for FERC and OMB.

FERC Form No. 3–Q, Quarterly Financial Report of Electric Utilities, Licensees, and Natural Gas Companies

OMB Control No.: 1902–0205.

Abstract: The FERC Form No. 3–Q (Form No. 3–Q) is a quarterly financial and operating report for rate regulation, market oversight analysis, and financial audits which supplements the (a) Form

---

[5] When FERC makes changes to the forms, instructions, and/or reporting platform system, that information will be submitted to OMB, as appropriate, for review under the Paperwork Reduction Act (PRA). More information on the Forms Refresh project is posted at *http://www.ferc.gov/docs-filing/forms/eforms-refresh.asp.*

[6] The one-time implementation burden (of 3 hours per respondent for the Forms 1 and 1–F) for the Final Rule in Docket No. RM11–24 (issued 7/18/2013) was administratively averaged over Years 1–3 giving an additional 1 hour annually for Years 1–3. Because the implementation period and that 3-year period (of averaging the implementation burden) have been completed, the additional 1 hour of burden is removed here and for the FERC Form 1–F, below. These changes were inadvertently omitted from the 60-day Notice in Docket No. IC16–11.

[7] The cost estimate (wages plus benefits) is $78.66/hour and is used for the Form Nos. 1, 1–F, and 3–Q. The $78.66/hour (wages plus benefits) is based on figures from the Bureau of Labor Statistics National Industry—Specific Occupational and Employment Wage Estimates (May 2015 estimates at *http://www.bls.gov/oes/current/naics2_22.htm,* and benefits information for December 2015 at *http://www.bls.gov/news.release/ecec.nr0.htm*) and is an average of the following: (a) Management (code 11–0000) of $88.94/hour; (b) business and financial operations occupations (code 13–0000) of $56.86/hour; (c) legal (code 23–0000) of $128.94/hour; and (d) office and administrative support (code 43–0000) of $39.91/hour.

[8] As detailed in 18 CFR 101 (Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provision of the Federal Power Act, General Instructions) and 18 CFR 141.2. Nonoperating entities formerly designated as Nonmajor and new entities that expect to be in the Nonmajor category should file as detailed in 18 CFR 101.

Nos. 1 and 1–F for the electric industry, or the (b) Form No. 2 (Major Natural Gas Pipeline Annual Report; OMB Control No. 1902–0028) and Form No. 2–A (Nonmajor Natural Gas Pipeline Annual Report; OMB Control No. 1902–0030) (for the natural gas industry). The Form No. 3–Q is submitted for all Major and Nonmajor electric utilities and licensees; and natural gas companies.[9]

Form No. 3–Q includes a basic set of financial statements: Comparative Balance Sheet, Statement of Income and Statement of Retained Earnings, Statement of Cash Flows, Statement of Comprehensive Income and Hedging Activities and supporting schedules containing supplementary information. Electric respondents report revenues and the related quantities of electric sales and electricity transmitted; account balances for all electric operation and maintenance expenses; selected plant cost data; and other statistical information. Natural gas respondents include monthly and quarterly quantities of gas transported and associated revenues; storage, terminaling and processing services; natural gas customer accounts and details of service; and operational expenses, depreciation, depletion and amortization of gas plant.

Type of Respondent: Major and nonmajor electric utilities and natural gas pipelines.

Comments: In response to the 60-day Notice, the Commission received comments from two parties on Form 3–Q. A summary of the comments and the Commission's responses follow.

- BEA submitted comments on 7/28/2016 on Form 3–Q.[10]

BEA Comments: BEA relies heavily on data from Forms 3–Q to calculate components of both the industry and national economic accounts to estimate gross output, intermediate input, and value added to the U.S. economy from the utilities industry. Similar to BEA's comments on Forms 1 and 1–F, BEA is interested in the inclusion of additional information in Form 3–Q regarding details related to capital expenditures. BEA suggests expansions to the Form 3–Q such as adding "new versus replacement capital expenditures for certain line items"; including "annual payments for equipment, software, and structures leased under operating leases from others"; and improving "questions to help identify plants producing services in the current period (in service) versus plant not in service or off-line".

FERC Response: The Commission is not presently considering modifications to collect additional information on the Form 3–Q but as noted above is looking at modernizing data collection, which is a separate activity not addressed here.

- EEI submitted comments on 8/12/2016 on the Form 3–Q.[11]

EEI Comments: In its comments, EEI proposes eliminating the Form 3–Q or reducing its frequency. EEI claims that the Form 3–Q has little to no value to the Commission's objective to achieve vigilant oversight of reporting entities. EEI states that it is unclear exactly how and to what extent the Commission uses the quarterly data and that no EEI member has ever been contacted about a Form 3–Q filing. EEI poses that Form 3–Q does not lend itself to identification of emerging trends or the economic effects of significant transactions and events and that Form 3–Q has no bearing on formula rate determination. As such EEI recommends that the Commission eliminate Form 3–Q or alternately adopt a mid-year frequency.

Regarding the accuracy of the Commission's burden and cost estimates, EEI comments that the Commission's estimates are reasonable, but that EEI does not believe the burden and costs are warranted.

FERC Response: The Commission currently uses the Form 3–Q report to perform oversight analysis and make timely evaluations of current financial information submitted to the Commission. Additionally, Form 3–Q is used to validate the debt and equity information of filings under Part 34 of the Commission's regulations when the most recent 12-month filing occurred more than 4 months prior to the application under Part 34. The Commission is not presently considering modifications to the collection or frequency of collection of the Form 3–Q, but may consider doing so in the future, at which time EEI will be able to submit comments on this issue.

Estimate of Annual Burden: The estimated annual burden and cost (as rounded) follow. (The estimated hourly cost used for the Form No. 3–Q is $78.66 (wages plus benefits) and is described above, under the Form No. 1.)

FORM NO. 3–Q

	Number of respondents	Annual number of responses per respondent	Total number of responses	Average burden hours & cost per response	Total annual burden hours & total annual cost	Annual cost per respondent ($)
		(1)	(2)(1) * (2) = (3)	(4)	(3) * (4) = (5)	(5) ÷ (1)
FERC 3–Q (electric)	[12] 213	3	639	168 hrs.; $13,214.88	107,352 hrs.; $8,444,308	$39,644.64
FERC 3–Q (gas)	167	3	501	167 hrs.; $13,136.22	83,667 hrs.; $6,581,246	39,408.66
Total for FERC 3–Q ...			1,140		191,019 hrs.; $15,025,554.	

The instructions to the Form 3–Q will be updated to reflect the current burden estimate and email addresses for FERC and OMB.

Dated: September 26, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–23681 Filed 9–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP16–502–000]

Southern Star Central Gas Pipeline, Inc.; Notice of Request Under Blanket Authorization

Take notice that on September 16, 2016, Southern Star Central Gas Pipeline, Inc. (Southern Star), 4700 State Highway 56, Owensboro, Kentucky 42301, filed in Docket No. CP16–502–000 a prior notice request pursuant to sections 157.205 and 157.216(b) of the Commission's regulations under the Natural Gas Act (NGA), as amended, requesting authorization to abandon in place Units 1, 2, 3, and 4, each compressor unit rated at 170 horsepower, and associated appurtenances at its Atchison

---

[9] 18 CFR 260.1(b) states that for natural gas companies, Major, as defined by the Natural Gas Act, pertains to a company whose combined gas transported or stored for a fee exceed 50 million Dth in each of the three previous calendar years. 18 CFR 260.2(b) states that for natural gas companies, Nonmajor as defined by the Natural Gas Act, pertains to a company not meeting the filing threshold for Major, but having total gas sales or volume transactions exceeding 200,000 Dth in each of the three previous calendar years.

[10] The submittal is posted at *http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14318234.*

[11] The submittal is posted at *http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14328920.*

[12] The estimated number of electric filers of the Form No. 3–Q is 213 (rather than the 215 total for the number of filers of the Form Nos. 1 and 1–F) due to waivers granted by the Commission in Docket No. AC04–105.

Compressor Station in Atchison County, Kansas. Southern Star notes that is Atchison Compressor will continue to operate using Unit 5. Southern Star asserts that these units are not needed operationally or to provide firm service, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or TTY, contact (202) 502–8659.

Any questions concerning this application may be directed to Ronnie C. Hensley II, Regulatory Compliance, Manager, Southern Star Central Gas Pipeline, Inc., 4700 State Highway 56, Owensboro, Kentucky 42301, by telephone at (270) 852–4658.

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenter's will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenter's will not be required to serve copies of filed documents on all other parties. However, the non-party commentary, will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy regulatory Commission, 888 First Street NE., Washington, DC 20426.

Dated: September 23, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–23675 Filed 9–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP16–456–000]

Southern Star Central Gas Pipeline, Inc.; Notice of Schedule for Environmental Review of the Shidler Line Abandonment Project

On May 6, 2016, Southern Star Central Gas Pipeline, Inc. (Southern Star) filed an application in Docket No. CP16–456–000 requesting authorization pursuant to Section 7(b) of the Natural Gas Act to abandon certain natural gas pipeline facilities. The proposed project is known as the Shidler Line Abandonment Project (Project), and would abandon about 31.2 miles of 16-inch-diameter natural gas pipeline and remove certain pipeline and aboveground facilities in Osage County, Oklahoma.

On May 19, 2016, the Federal Energy Regulatory Commission (Commission or FERC) issued its Notice of Application for the Project. Among other things, that notice alerted agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission staff's Environmental Assessment (EA) for the Project. This instant notice identifies the FERC staff's planned schedule for the completion of the EA for the Project.

Schedule for Environmental Review

Issuance of EA—October 28, 2016

90-day Federal Authorization Decision Deadline—January 26, 2017

If a schedule change becomes necessary, an additional notice will be provided so that the relevant agencies are kept informed of the Project's progress.

Project Description

Southern Star proposes to abandon about 31.2 miles of 16-inch-diameter pipeline and appurtenant facilities of the Shidler Line (also referred to as "Line ME" or the "Blackwell—Cotton Valley Line"), in Osage County, Oklahoma. The abandonment will require cutting and capping of the pipeline just east of the Shidler Town Border and slightly west of the Bowring Meter Station. The pipeline would be cut, capped, and abandoned in place by filling the pipe with grout at two improved road crossings. All associated aboveground facilities would be removed, including two mainline valve settings, three domestic taps, four rectifiers, 14 cathodic protection test stations, and the pipeline markers. The remainder of pipeline facilities would be abandoned in place.

Background

On June 9, 2016, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Proposed Shidler Line Abandonment Project and Request for Comments on Environmental Issues* (NOI). The NOI was sent to affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers. In response to the NOI, the Commission received comment letters from the Oklahoma Archeological Survey, the Oklahoma Natural Heritage Inventory, the Oklahoma Department of Wildlife Conservation, and the Osage Nation. The letters provided occurrence records for listed species, and requested cultural resources surveys and tribal consultations.

Additional Information

In order to receive notification of the issuance of the EA and to keep track of all formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/docs-filing/esubscription.asp*.

Additional information about the Project is available from the Commission's Office of External Affairs at (866) 208–FERC or on the FERC Web site (*www.ferc.gov*). Using the "eLibrary" link, select "General Search" from the eLibrary menu, enter the selected date range and "Docket Number" excluding the last three digits (*i.e.*, CP16–456), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866) 208–3676, TTY (202) 502–8659, or by email at *FERCOnlineSupport@ferc.gov*. The eLibrary link on the FERC Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Dated: September 26, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–23678 Filed 9–29–16; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2016–0439; FRL–9953–43–OW]

Request for Public Comments To Be Sent to Versar, Inc., on an Interim List of Perchlorate in Drinking Water Expert Peer Reviewers and Draft Peer Review Charge Questions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of request for public comment.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is announcing the release of materials for public comment that relate to the expert peer review of documents intended to support the EPA's Safe Drinking Water Act decision making for perchlorate. *This request is one of two* ***Federal Register*** *notices being published concurrently, seeking public comment on two separate sets of materials.* This notice requests comments on the interim list of peer review candidates and the draft charge for the expert peer review panel, to be sent to EPA's contractor, Versar, Inc. The comments will be considered to help inform the final selection of expert panelists and the development of the peer review panel's charge. A companion notice, published today, requests comments on draft materials to inform the EPA's Safe Drinking Water Act decision making on perchlorate; those materials are the draft Biologically Based Dose-Response Model and an accompanying draft model report entitled "Biologically Based Dose-Response Models for the Effect of Perchlorate on Thyroid Hormones in the Infant, Breast Feeding Mother, Pregnant Mother, and Fetus: Model Development, Revision, and Preliminary Dose-Response Analyses." Versar, Inc., will consider the comments received on this notice in selecting the final peer review panel, which will collectively provide appropriate expertise spanning the subject matter areas covered by the draft model and draft report and, to the extent feasible, best provide a balance of perspectives.

DATES: Comments on the draft peer review panel charge questions and interim list of peer review candidates must be received on or before October 21, 2016.

ADDRESSES: Submit your comments on the interim list of peer review candidates and draft charge to Versar, Inc., no later than October 21, 2016 by one of the following methods:

- *Email: perchlorate@versar.com* (subject line: Perchlorate Peer Review).
- *Mail:* Versar, Inc., 6850 Versar Center, Springfield, VA 22151 (ATTN: David Bottimore).

Please be advised that public comments are subject to release under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Questions concerning the interim list of expert peer review candidates and draft peer review charge questions should be directed to Versar, Inc., at 6850 Versar Center, Springfield, VA 22151; by email *perchlorate@versar.com* (subject line: Perchlorate Peer Review); or by phone: (703) 642–6815 (ask for David Bottimore).

SUPPLEMENTARY INFORMATION:

I. Process of Obtaining Candidate Reviewers

Versar, Inc., will assemble a panel of scientific experts to evaluate the draft BBDR model and draft report. As part of the peer review process, EPA announced a public nomination period from March 1, 2016, to March 31, 2016, in the **Federal Register** (81 FR 10617; March 1, 2016), during which members of the public were able to nominate scientific experts whom have knowledge and experience in one or more of the following areas: (1) Physiologically-based pharmacokinetic (PBPK), physiologically-based pharmacokinetic/pharmacodynamic (PBPK/PD) and/or Biologically Based Dose-Response (BBDR) modeling, (2) fetal and neonatal thyroid endocrinology (clinical and experimental), (3) iodide homeostasis, and (4) perchlorate toxicology and mode of action or adverse outcome pathway.

On June 3, 2016, the Agency announced in the **Federal Register** (81 FR 35760) that, to achieve efficiency, it was expanding the scope of the peer review announced in March to include review of a draft approach for application of the draft BBDR model, to inform the development of a perchlorate MCLG. EPA has reevaluated that approach in response to concerns that a simultaneous review of a methodology to applying the model to develop a perchlorate MCLG would not allow the Agency or peer reviews to consider peer reviewer comments on the draft BBDR model prior to evaluating the alternative methodologies to applying the model to derive an MCLG. Today's notice therefore seeks input only on the peer review of the model, not its application. EPA will seek input on a second peer review of methods for applying the model to inform development of a perchlorate MCLG in a future notice.

Versar, Inc., also conducted an independent search for scientific experts to augment the list of publically-nominated candidates. In total, the contractor evaluated 35 candidates, including those nominated during the public nomination periods and those identified by the contractor.

Selection Process

Versar, Inc., considered and screened all candidates against the selection criteria described in the March 1, 2016 **Federal Register** notice (81 FR 10617), which included the candidates being free of any conflict of interest and being available to participate in-person in the peer review meeting in the Washington, DC area, which will be open to the public, projected to occur in late 2016 (exact date to be determined). Following the screening process, the contractor narrowed the list of potential reviewers to 19 candidates. EPA is now soliciting comments on this list. EPA requests that the public provide relevant information or documentation on the experts that the contractor should consider in evaluating these candidates. Once the public comments on the interim list of candidates have been reviewed and considered, the contractor will select the final list of peer reviewers.

Responsibilities of Peer Reviewers

Peer reviewers will be charged with evaluating and preparing written comments on the draft BBDR model and draft report. Versar, Inc., will provide reviewers with a summary of public comments on the draft BBDR model and report submitted to EPA's docket (ID number EPA–HQ–OW–2016–0438) during the 45-day public comment period, for their consideration. Reviewers will participate in the meeting expected to be held in the Washington, DC metro area in early 2017 (exact date to be determined) to discuss the scientific basis supporting these materials. Following the meeting, Versar, Inc., will provide a report to EPA summarizing the peer reviewer's evaluation of the scientific and technical merit of the draft model and draft report and their responses to the charge questions. EPA will make the final report available to the public (exact date to be determined). In preparing the final BBDR model and report, EPA will consider Versar's report as well as the written public comments submitted to the docket.

II. Interim List of Peer Reviewers

Versar, Inc., is considering the following candidates for the peer review panel. Biosketches are available through the docket at *http://www.regulations.gov* (Docket ID No. EPA–HQ–OW–2016–0439). After review and consideration of public comments, Versar, Inc., will select the final peer reviewers from this list, who will, collectively, best provide expertise spanning the previously mentioned areas of knowledge and experience and, to the extent feasible, best provide a balance of perspectives. EPA will announce the peer review panel meeting date, location and registration details along with the final list of peer reviewers selected by Versar, Inc., at least 30 days prior to the meeting.

Name of Nominee, Degree, Place of Employment

1. Hugh A. Barton, Ph.D., Pfizer, Inc.
2. Nancy Carrasco, M.D., Yale School of Medicine
3. Jonathan Chevrier, Ph.D., McGill University Faculty of Medicine
4. Claude Emond, Ph.D., University of Montreal
5. John P. Gibbs, M.D., Tronox LLC
6. Dale Hattis, Ph.D., George Perkins Marsh Institute, Clark University
7. William L. Hayton, Ph.D., The Ohio State University/College of Pharmacy
8. Judy S. LaKind, Ph.D., LaKind Associates, LLC
9. Angela M. Leung, M.D., M.Sc., UCLA David Geffen School of Medicine
10. Paul H. Lipkin, M.D., Johns Hopkins University School of Medicine
11. Michael H. Lumpkin, Ph.D., DABT, Center for Toxicology and Environmental Health, LLC
12. Elaine A. Merrill, Ph.D., Henry Jackson Foundation for the Advancement of Military Medicine at Wright-Patterson Air Force Base
13. Elizabeth N. Pearce, M.D., M.Sc., Boston Medical Center/Boston University School of Medicine
14. Stephen M. Roberts, Ph.D., University of Florida
15. Joanne F. Rovet, Ph.D., The Hospital for Sick Children (Toronto)
16. Craig Steinmaus, M.D., M.P.H., University of California, Berkeley
17. Justin G. Teeguarden, Ph.D., Pacific Northwest National Laboratory
18. Graham R. Williams, Ph.D., Imperial College London
19. R. Thomas Zoeller, Ph.D., University of Massachusetts

III. Draft Peer Review Charge Questions

The draft peer review charge questions are available through the docket at *http://www.regulations.gov* (Docket ID No. EPA–HQ–OW–2016–0439).

Dated: September 23, 2016.

Joel Beauvais,

Deputy Assistant Administrator, Office of Water.

[FR Doc. 2016–23607 Filed 9–29–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9029–3]

Environmental Impact Statements; Notice of Availability

Responsible agency: Office of Federal Activities, General Information (202) 564–7146 or *http://www.epa.gov/nepa.*

Weekly receipt of Environmental Impact Statements (EISs)

Filed 09/19/2016 Through 09/23/2016

Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *http://www.epa.gov/compliance/nepa/eisdata.html.*

EIS No. 20160213, Final, USFS, WA, Forest-wide Site-Specific Invasive Plant Management, Review Period Ends: 10/31/2016, Contact: Brigitte Ranne 509–682–4941

EIS No. 20160214, Draft, BLM, ID, Craters of the Moon National Monument and Preserve Draft Management Plan Amendment, Comment Period Ends: 12/29/2016, Contact: Lisa Cresswell 208–732–7270

EIS No. 20160215, Draft, USFS, PR, El Yunque National Forest Plan Revision, Comment Period Ends: 12/29/2016, Contact: Pedro Rios 787–888–1880

EIS No. 20160216, Final, HUD, NY, Lambert Houses Redevelopment, Review Period Ends: 10/31/2016, Contact: Aaron Werner 212–863–5953. City of New York Department of Housing Preservation and Development is lead agency for this project.

EIS No. 20160217, Draft, USFS, ID, Sawtooth and Boise National Forest Invasive Species Project, Comment Period Ends: 11/14/2016, Contact: Carol Brown 208–622–0098

EIS No. 20160218, Draft, BR, AZ, Navajo Generating Station-Kayenta Mine Complex Project, Comment Period Ends: 11/29/2016, Contact: Sandra Eto 623–773–6254

EIS No. 20160219, Final, NRC, MI, Generic—License Renewal of Nuclear Plants Supplement 56 Regarding Fermi 2 Nuclear Power Plant, NUREG–1437, Review Period Ends: 10/31/2016, Contact: Elaine M. Keegan 301–415–8517

EIS No. 20160220, Draft, APHIS, REG, Petition (15–300–01p) for Determination of Nonregulated Status for ASR368 Creeping Bentgrass, Comment Period Ends: 11/14/2016, Contact: Sidney W. Abel 301–851–3896

EIS No. 20160221, Draft Supplement, USN, CA, Land Acquisition and Airspace to Support Large-Scale MAGTF Live-Fire and Maneuver Training at MCAGCC Twentynine Palms, Comment Period Ends: 11/14/2016, Contact: Scott Kerr 760–830–3737

EIS No. 20160222, Draft, BOEM, LA, Gulf of Mexico OCS, Proposed Geological and Geophysical Activities, Comment Period Ends: 11/29/2016, Contact: Dr. Jill Lewandowski 703–787–1703

EIS No. 20160223, Final, DOE, LA, Adoption—Magnolia LNG and Lake Charles Expansion Projects, Contact:

John Anderson 202–586–0521. The U.S Department of Energy (DOE) has adopted the Federal Energy Regulatory Commission's FEIS #20150325, filed with the U.S. EPA on 11/13/2015. DOE was a cooperating agency on the project. Therefore, recirculation of the document is not necessary under Section 1506.3(c) of the CEQ Regulations

EIS No. 20160224, Draft, AFS, CO, La Garita Hills Restoration Project, Comment Period Ends: 11/14/2016, Contact: Diana McGinn 719–852–6241

Amended Notices

EIS No. 20160211, Final, USAF, GU, Divert Activities and Exercises, Commonwealth of the Northern Mariana Islands, Review Period Ends: 10/25/2016, Contact: Mark Petersen 808–449–1078

Revision to FR Notice Published 09/26/2016; Correction to the Review Period to End 10/25/2016.

Dated: September 27, 2016

Dawn Roberts,

Management Analyst, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2016–23703 Filed 9–29–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2015–0365; FRL–9953–47–ORD]

Board of Scientific Counselors (BOSC) Air, Climate, and Energy Subcommittee Meeting—October 2016

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, the U.S. Environmental Protection Agency (EPA), Office of Research and Development (ORD), gives notice of a meeting of the Board of Scientific Counselors (BOSC) Air, Climate, and Energy Subcommittee.

DATES: The meeting will be held on Tuesday, October 25, 2016, from 8:00 a.m. to 5:00 p.m., and will continue on Wednesday, October 26, 2016, from 8:30 a.m. until 12:15 p.m. All times noted are Eastern Time. The meeting may adjourn early if all business is finished. Attendees should register by October 18, 2016. Requests for the draft agenda or for making oral presentations at the meeting will be accepted up to one business day before the meeting.

ADDRESS: The meeting will be held at the EPA's RTP Main Campus Facility, 109 T.W. Alexander Drive, Research Triangle Park, North Carolina 27711. Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2015–0365, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email:* Send comments by electronic mail (email) to: *ORD.Docket@epa.gov,* Attention Docket ID No. EPA–HQ–ORD–2015–0365.
- *Fax:* Fax comments to: (202) 566–0224, Attention Docket ID No. EPA–HQ–ORD–2015–0365.
- *Mail:* Send comments by mail to: Board of Scientific Counselors (BOSC) Air, Climate, and Energy Subcommittee Docket, Mail Code: 2822T, 1301 Constitution Ave. NW., Washington, DC 20004, Attention Docket ID No. EPA–HQ–ORD–2015–0365.
- *Hand Delivery or Courier:* Deliver comments to: EPA Docket Center (EPA/DC), Room 3334, William Jefferson Clinton West Building, 1301 Constitution Ave. NW., Washington, DC, Attention Docket ID No. EPA–HQ–ORD–2015–0365. Note: This is not a mailing address. Deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2015–0365. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/dockets/.*

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Board of Scientific Counselors (BOSC) Air, Climate, and Energy Subcommittee Docket, EPA/DC, William Jefferson Clinton West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the ORD Docket is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: The Designated Federal Officer via mail at: Tim Benner, Mail Code 8104R, Office of Science Policy, Office of Research and Development, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; via phone/voice mail at: (202) 564–6769; via fax at: (202) 565–2911; or via email at: *benner.tim@epa.gov.*

SUPPLEMENTARY INFORMATION:

General Information: The meeting is open to the public. Any member of the public interested in receiving a draft agenda, attending the meeting, or making a presentation at the meeting may contact Tim Benner, the Designated Federal Officer, via any of the contact methods listed in the **FOR FURTHER INFORMATION CONTACT** section above. In general, each individual making an oral presentation will be limited to a total of three minutes. For security purposes, all attendees must provide their names to the Designated Federal Officer or register online at *https://www.eventbrite.com/e/us-epa-bosc-air-climate-and-energy-subcommittee-meeting-tickets-28117149150* by October 18, 2016, and must go through a metal detector, sign in with the security desk, and show REAL ID Act-compliant government-issued photo identification to enter the building. Attendees are encouraged to arrive at least 15 minutes prior to the start of the meeting to allow sufficient time for security screening. Proposed agenda items for the meeting include, but are not limited to, the following: Overview of materials provided to the subcommittee; Update on ORD's Air, Climate, and Energy Research Program; Review of charge questions; Presentations on research efforts related to social science; and Subcommittee discussion.

Information on Services for Individuals with Disabilities: For information on access or services for individuals with disabilities, please contact Tim Benner at (202) 564–6769 or *benner.tim@epa.gov.* To request accommodation of a disability, please contact Tim Benner, preferably at least ten days prior to the meeting, to give the EPA as much time as possible to process your request.

Dated: September 26, 2016.

Fred S. Hauchman,

Director, Office of Science Policy.

[FR Doc. 2016–23687 Filed 9–29–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2016–0438; FRL–9953–44–OW]

Request for Public Comments To Be Sent to EPA on Peer Review Materials To Inform the Safe Drinking Water Act Decision Making on Perchlorate

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of request for public comment.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is announcing the release of materials for public comment that will undergo expert peer review in support of the EPA's Safe Drinking Water Act decision making on perchlorate. *This request is one of two* ***Federal Register*** *notices being published concurrently, seeking public comment on two separate sets of peer review materials.* The Agency requests comment on both the draft Biologically Based Dose-Response Model and an accompanying draft model report entitled "Biologically Based Dose-Response Models for the Effect of Perchlorate on Thyroid Hormones in the Infant, Breast Feeding Mother, Pregnant Mother, and Fetus: Model Development, Revision, and Preliminary Dose-Response Analyses." These materials will be reviewed by an expert peer review panel and the panelists will consider the public comments received. A companion notice published on this date requests comments on the interim list of peer reviewers and draft peer review charge questions to be sent to EPA's contractor, Versar, Inc.

DATES: Comments on the draft Biologically Based Dose-Response (BBDR) model and draft report must be received by EPA on or before November 14, 2016.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2016–0438, to the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: For additional information concerning the draft BBDR model and the draft report, please contact Russ Perkinson at U.S. EPA, Office of Ground Water and Drinking Water, Standards and Risk Management Division (Mail Code 4607M), 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone: 202–564–4901; or email:*perkinson.russ@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Information on EPA's Biologically Based Dose-Response (BBDR) Model for Perchlorate in Drinking Water

EPA has begun development of a national primary drinking water regulation (NPDWR) for perchlorate, in accordance with the requirements of the Safe Drinking Water Act (SDWA). One statutory requirement is that the Agency must request comment from EPA's Science Advisory Board (SAB) prior to proposal of a maximum contaminant level goal (MCLG) and a NPDWR.

In 2012, EPA sought guidance from the SAB on how best to consider and interpret life stage information, epidemiologic and biomonitoring data, physiologically-based pharmacokinetic (PBPK) analyses and the totality of perchlorate health information to derive an MCLG for perchlorate.

In 2013, the SAB recommended that, ". . . EPA derive a perchlorate MCLG that addresses sensitive life stages through physiologically-based pharmacokinetic/pharmacodynamic (PBPK/PD) modeling based upon its mode of action rather than the default MCLG approach using the reference dose and specific chemical exposure parameters" (Advice on Approaches to Derive a Maximum Contaminant Level Goal for Perchlorate, EPA–SAB–13–004).

Based on the SAB's recommendations, EPA, with contributions from Food and Drug Administration scientists, developed a BBDR (also known as a PBPK/PD) model. The BBDR model was developed by integrating PBPK models for perchlorate and iodide with BBDR models for thyroid hormones to predict the effect of perchlorate on the thyroid gland in formula-fed and breast-fed infants for the postnatal period from days 7 to 90, as well as lactating women. The draft model is focused on the condition of hypothyroxinemia as an indicator of the potential adverse health effects. This integrated draft model predicts the effects of perchlorate on serum thyroid hormone concentrations in the pregnant and lactating mother exposed to perchlorate in the diet and in infants exposed via ingestion of perchlorate in formula or breast milk.

II. How To Obtain the Draft BBDR Model and Draft Reports

EPA's draft model report entitled "Biologically Based Dose Response Models for the Effect of Perchlorate on Thyroid Hormones in the Infant, Breast Feeding Mother, Pregnant Mother, and Fetus: Model Development, Revision, and Preliminary Dose-Response Analyses" is available electronically and can be accessed using the Public Docket at *http://www.regulations.gov* (Docket ID No. EPA–HQ–OW–2016–0438). The draft BBDR model code files can be accessed at *https://hero.epa.gov/hero/index.cfm/reference/details/reference_id/3352518.* All written comments must be submitted during the public comment period.

III. Exclusion for Peer Review Candidates

Important: Anyone wishing to be considered as an expert peer reviewer must not submit comments during the public comment period. Candidates on the interim list not selected for the panel peer review (see companion Peer Review **Federal Register** notice, published on September 30, 2016 will be given a limited opportunity to submit public comments once the final peer reviewers are selected by Versar, Inc., the EPA contractor managing this peer review process.

Dated: September 23, 2016.

Joel Beauvais,

Deputy Assistant Administrator, Office of Water.

[FR Doc. 2016–23606 Filed 9–29–16; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0667 and 3060–1104]

Information Collections Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before November 29, 2016. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0667.

Title: Section 76.630, Compatibility with Consumer Electronics Equipment; Section 76.1621, Equipment Compatibility Offer; Section 76.1622, Consumer Education of Equipment Compatibility.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 8,250 respondents; 66,501 responses.

Estimated Time per Response: .017 hours-3 hours.

Frequency of Response: Recordkeeping and third party disclosure requirements; On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in Section 4(i) and Section 632 of the Communications Act of 1934, as amended.

Total Annual Burden: 17,353 hours.

Total Annual Cost: $1,355.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: 47 CFR 76.630(a) states a cable system operator shall not scramble or otherwise encrypt signals carried on the basic service tier. This requirement is subject to certain exemptions explained below. Requests for waivers of this prohibition, which are allowed under 47 CFR 76.630(a)(2), must demonstrate either a substantial problem with theft of basic tier service or a strong need to scramble basic signals for other reasons. As part of this showing, cable operators are required to notify subscribers by mail of waiver requests. The notice to subscribers must be mailed no later than thirty calendar days from the date the request waiver was filed with the Commission, and cable operators must inform the Commission in writing, as soon as possible, of that notification date. The notification to subscribers must state:

On (date of waiver request was filed with the Commission), (cable operator's name) filed with the Federal Communications Commission a request for waiver of the rule prohibiting scrambling of channels on the basic tier of service. The request for waiver states (a brief summary of the waiver request). A copy of the request for waiver is on file for public inspection at (the address of the cable operator's local place of business).

Individuals who wish to comment on this request for waiver should mail comments to the Federal Communications Commission by no later than 30 days from (the date the notification was mailed to subscribers). Those comments should be addressed to the: Federal Communications Commission, Media Bureau, Washington, DC 20554, and should include the name of the cable operator to whom the comments are applicable. Individuals should also send a copy of their comments to (the cable operator at its local place of business). Cable operators may file comments in reply no later than 7 days from the date subscriber comments must be filed.

47 CFR 76.1621 states a cable system operators that use scrambling, encryption or similar technologies in conjunction with cable system terminal devices, as defined in § 15.3(e) of this chapter, that may affect subscribers' reception of signals shall offer to supply each subscriber with special equipment that will enable the simultaneous reception of multiple signals. The equipment offered shall include a single terminal device with dual descramblers/decoders and/or timers and bypass switches. Other equipment, such as two independent set-top terminal devices may be offered at the same time that the single terminal device with dual tuners/descramblers is offered. For purposes of this rule, two set-top devices linked by a control system that provides functionality equivalent to that of a single device with dual descramblers is considered to be the same as a terminal device with dual descramblers/decoders.

(a) The offer of special equipment shall be made to new subscribers at the time they subscribe and to all subscribers at least once each year (*i.e.,* in subscriber billings or pre-printed information on the bill).

(b) Such special equipment shall, at a minimum, have the capability:

(1) To allow simultaneous reception of any two scrambled or encrypted signals and to provide for tuning to alternative channels on a pre-programmed schedule; and

(2) To allow direct reception of all other signals that do not need to be processed through descrambling or decryption circuitry (this capability can generally be provided through a separate by-pass switch or through internal by-pass circuitry in a cable system terminal device).

(c) Cable system operators shall determine the specific equipment needed by individual subscribers on a case-by-case basis, in consultation with the subscriber. Cable system operators are required to make a good faith effort to provide subscribers with the amount and types of special equipment needed to resolve their individual compatibility problems.

(d) Cable operators shall provide such equipment at the request of individual subscribers and may charge for purchase or lease of the equipment and its installation in accordance with the provisions of the rate regulation rules for customer premises equipment used to receive the basic service tier, as set forth in § 76.923. Notwithstanding the required annual offering, cable operators shall respond to subscriber requests for special equipment for reception of multiple signals that are made at any time.

Information Collection Requirements

In October 2012, the Commission loosened its prohibition on encryption of the basic service tier. This rule change allows all-digital cable operators to encrypt, subject to certain consumer protection measures. 77 FR 67290 (Nov. 9, 2012); 47 CFR 76.630(a)(1). Encryption of all-digital cable service will allow cable operators to activate and/or deactivate cable service remotely, thus relieving many consumers of the need to wait at home to receive a cable technician when they sign up for or cancel cable service, or expand service to an existing cable connection in their home.

In addition, encryption will reduce service theft by ensuring that only paying subscribers have decryption equipment. Encryption could reduce cable rates and reduce the theft that often degrades the quality of cable service received by paying subscribers. Encryption also will reduce the number of service calls necessary for manual installations and disconnections, which may have beneficial effects on vehicle traffic and the environment.

Because this rule change allows cable operators to encrypt the basic service tier without filing a request for waiver, we expect that the number of requests for waiver will decrease significantly.

47 CFR 76.1622 states that Cable system operators shall provide a consumer education program on compatibility matters to their subscribers in writing, as follows:

(a) The consumer information program shall be provided to subscribers at the time they first subscribe and at least once a year thereafter. Cable operators may choose the time and means by which they comply with the annual consumer information requirement. This requirement may be satisfied by a once-a-year mailing to all subscribers. The information may be included in one of the cable system's regular subscriber billings.

(b) The consumer information program shall include the following information:

(1) Cable system operators shall inform their subscribers that some models of TV receivers and videocassette recorders may not be able to receive all of the channels offered by the cable system when connected directly to the cable system. In conjunction with this information, cable system operators shall briefly explain, the types of channel compatibility problems that could occur if subscribers connected their equipment directly to the cable system and offer suggestions for resolving those problems. Such suggestions could include, for example, the use of a cable system terminal device such as a set-top channel converter. Cable system operators shall also indicate that channel compatibility problems associated with reception of programming that is not scrambled or encrypted programming could be resolved through use of simple converter devices without descrambling or decryption capabilities that can be obtained from either the cable system or a third party retail vendor.

(2) In cases where service is received through a cable system terminal device, cable system operators shall indicate that subscribers may not be able to use special features and functions of their TV receivers and videocassette recorders, including features that allow the subscriber to: View a program on one channel while simultaneously recording a program on another channel; record two or more consecutive programs that appear on different channels; and, use advanced picture generation and display features such as "Picture-in-Picture," channel review and other functions that necessitate channel selection by the consumer device.

(3) In cases where cable system operators offer remote control capability with cable system terminal devices and other customer premises equipment that is provided to subscribers, they shall advise their subscribers that remote control units that are compatible with that equipment may be obtained from other sources, such as retail outlets. Cable system operators shall also provide a representative list of the models of remote control units currently available from retailers that are compatible with the customer premises equipment they employ. Cable system operators are required to make a good faith effort in compiling this list and will not be liable for inadvertent omissions. This list shall be current as of no more than six months before the date the consumer education program is distributed to subscribers. Cable operators are also required to encourage subscribers to contact the cable operator to inquire about whether a particular remote control unit the subscriber might be considering for purchase would be compatible with the subscriber's customer premises equipment.

OMB Control Number: 3060–1104.

Title: Section 73.682(d), DTV Transmission and Program System and Information Protocol ("PSIP") Standards.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; not for-profit institutions.

Number of Respondents and Responses: 1,812 respondents and 1,812 respondents.

Estimated Hours per Response: 0.50 hours.

Frequency of Response: Third party disclosure requirement; weekly reporting requirement.

Total Annual Burden: 47,112 hours.

Total Annual Cost: None.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in Sections 309 and 337 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: Confidentiality is not required with this collection of information.

Privacy Impact Assessment: No impact(s).

Needs and Uses: Section 73.682(d) of the Commission's rules incorporates by reference the Advanced Television Systems Committee, Inc. ("ATSC") Program System and Information Protocol ("PSIP") standard "A/65C." PSIP data is transmitted along with a TV broadcast station's digital signal and provides viewers (via their DTV receivers) with information about the station and what is being broadcast, such as program information. The Commission has recognized the utility that the ATSC PSIP standard offers for both broadcasters and consumers (or viewers) of digital television ("DTV").

ATSC PSIP standard A/65C requires broadcasters to provide detailed programming information when transmitting their broadcast signal. This standard enhances consumers' viewing experience by providing detailed information about digital channels and programs, such as how to find a program's closed captions, multiple streams and V-chip information. This standard requires broadcasters to populate the Event Information Tables ("EITs") (or program guide) with accurate information about each event (or program) and to update the EIT if more accurate information becomes available. The previous ATSC PSIP standard A/65–B did not require broadcasters to provide such detailed programming information but only general information.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of Secretary.

[FR Doc. 2016–23613 Filed 9–29–16; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: National Study of Title IV–E Child Welfare Waiver Demonstrations.

OMB No.: New Collection.

Description: The National Study of the Title IV–E Child Welfare Waiver Demonstrations is sponsored by the Children's Bureau, Administration for Children and Families of the U.S. Department of Health and Human Services and involves the conduct of a cross-site study of jurisdictions (referred to as waiver jurisdictions) approved to operate demonstrations authorized by section 1130 of the Social Security Act, as amended by the Child and Family Services Improvement and Innovation Act, Public Law 112–34. The demonstrations involve waivers of certain provisions of the foster care program authorized by title IV–E of the Social Security Act. Child welfare agencies in waiver jurisdictions are operating demonstrations to implement a variety of programs and interventions that serve children and families in an effort to improve their safety, permanency, and well-being. Each waiver jurisdiction is required to conduct a third-party evaluation of its demonstration. The National Study will examine the extent to which safety, permanency, and well-being outcomes have improved for children and families; the characteristics of waiver jurisdictions where improvements in outcomes have occurred; expenditure patterns and the types of activities for which waiver jurisdictions have increased funding; and the extent to which waiver jurisdictions have experienced practice and systems-level changes.

The National Study uses a mixed-method approach to examine 25 waiver jurisdictions (including 23 states, the District of Columbia and one tribal government) with Terms and Conditions approved in Federal Fiscal years 2012, 2013, and 2014. Proposed data collection methods are two topically-focused telephone surveys: (a) A telephone survey of waiver jurisdiction representatives and evaluators who are focused on measuring well-being, and (b) a second telephone survey of waiver jurisdiction representatives and evaluators that is focused on understanding practice and systems-level changes within child welfare service systems. Also proposed is a Web-based survey of waiver jurisdiction representatives and evaluators that will look more broadly at the implementation of waiver demonstrations and corresponding changes in child welfare policy, practice, and financing. Two sampling survey forms are being proposed to collect the necessary contact information for respondents to the Web-based survey and the telephone survey focused on understanding practice and systems-level changes within child welfare service systems. Data collected through these instruments will be used by the Children's Bureau to gain an understanding of the jurisdictions' collective experience with implementing their demonstrations.

Respondents: The respondents to the Web-Based Survey will be a purposive sample of an estimated 250 waiver jurisdiction representatives and evaluators drawn from the 25 waiver jurisdictions with waiver demonstration projects (Arkansas, Arizona, Colorado, Hawaii, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Nebraska, Nevada, New York, Oklahoma, Oregon, Pennsylvania, Port Gamble S'Klallam Tribe, Rhode Island, Tennessee, Texas, Utah, Washington, Washington DC, West Virginia, Wisconsin). The respondents will be identified by the 25 jurisdiction demonstration project leaders using the Web-Based Survey Sampling Form. The Web-Based Survey Sampling Form and the Web-Based Survey will be administered once during the National Study. The respondents to the Measuring Well-Being telephone survey will be a census sample of the 23 evaluators identified from the 23 waiver jurisdictions who are involved with the assessment of child and family well-being in their waiver jurisdictions. The Measuring Well-Being telephone survey will be administered once during the National Study. The respondents to the Practice and Systems-Level Change telephone survey will be a purposive sample of 60 respondents identified from 14 waiver jurisdictions who are knowledgeable about practice, policy, and organizational changes in their respective waiver jurisdictions. The respondents will be identified by the 14 jurisdiction demonstration project leaders using the Practice- and Systems-Level Change Survey Sampling Form. The Practice- and Systems-Level Change Survey Sampling Form and the Practice and Systems-Level Change telephone survey will be administered once during the National Study.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Web-Based Survey Sampling Form	25	1	0.33	8.25
Web-Based Survey	250	1	0.33	82.5
Measuring Well-Being Telephone Survey	23	1	1	23
Practice- and Systems-Level Change Survey Sampling Form	14	1	0.25	3.5

ANNUAL BURDEN ESTIMATES—Continued

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Practice- and Systems-Level Change Telephone Survey	60	1	1	60

Estimated Total Annual Burden Hours: 177.25.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 330 C Street SW., Washington, DC 20201. Attention Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *infocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Email: *OIRA_SUBMISSION@OMB.EOP.GOV,* Attn: Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2016–23628 Filed 9–29–16; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Announcing the Domestic Violence Awareness Month YouTube Challenge; CFDA Number: 93.592

AGENCY: Family and Youth Services Bureau, ACYF, ACF, HHS

ACTION: Notice.

SUMMARY: The Administration for Children and Families (ACF), Administration on Children, Youth and Families (ACYF), Family and Youth Services Bureau (FYSB), Division of Family Violence and Prevention Services (FVPSA), announces a Domestic Violence Awareness Month YouTube Challenge. This Challenge is open to individuals and organizations that support children and youth exposed to domestic violence and their abused parents. The goal is to bring attention to the most innovative and inclusive approaches, practices, policies, programs, safe spaces, activities, and strategies that the public is using to improve safety, promote healing, and provide support for this special population.

DATES: Acceptance of video submissions will open on October 12, 2016, 12:00:00 a.m., ET. The video submission period will be open for exactly 3 weeks (21 calendar days) and will close November 2, 2016, at 11:59:59 p.m., ET. Waiver forms, video link, and written transcript of the video must be submitted on *www.challenge.gov/domestic-violence-video-challenge* by the deadline.

FOR FURTHER INFORMATION CONTACT: Mao Yang, Family and Youth Services Bureau, 300 C Street SW., Washington, DC 20201. Telephone: 202–401–5082, email: *mao.yang@acf.hhs.gov.*

SUPPLEMENTARY INFORMATION: In an effort to stimulate innovation, in this Challenge, FVPSA is asking the public (as Challenge-solvers) to submit videos featuring their most innovative means of helping to improve safety, promote healing, and build the resilience of children and youth exposed to domestic violence and their abused parents. The Challenge seeks innovative, creative, and inclusive practices, policies, programs, safe spaces, activities, and strategies to meet this end. Our goal is to learn more about, and bring attention to, new, emerging, and effective methods that go beyond traditional services, programs, and supports and that communities are using with this special population.

Eligibility

The Challenge is open to individuals and organizations. See the section on Video Submission Requirements.

To be eligible to win a prize under the Challenge, those entering:

(1) Must register to participate in the competition under the rules in this notice by submission of a waiver form with their video and script. The waiver form is available on the Domestic Violence YouTube Challenge as listed on *www.challenge.gov/domestic-violence-video-challenge;*

(2) Must comply with all submission, content, and format the requirements;

(3) In the case of a private entity, shall be incorporated in and maintain a primary place of business in the United States, and in the case of an individual, whether participating singly or in a group, shall be a citizen or permanent resident of the United States; and

(4) May not be a federal entity or federal employee acting within the scope of their employment.

Video Submission Requirements

Each individual or organization is limited to entering one video in the Challenge. Multiple submissions from the same source will be disqualified. Only the first 150 videos that fulfill the following requirements and are submitted by the deadline will be accepted for the competition.

To be eligible to participate in the Challenge, the Challenge solver must submit a video that meets the following requirements:

- Be 1–3 minutes long in length;
- Be in a compatible YouTube format with the proper codecs: WebM files, MPEG4, 3GPP, MOV, AVI, MPEGPS, WMV, FLV with suggested aspect of 16:9;
- Entrants must post their video submission to their favorite video sharing site and send the link to their video entry on the Domestic Violence YouTube Challenge listed on *www.challenge.gov/domestic-violence-video-challenge* by the deadline;
- Highlight one or more new, innovative, emerging, and effective approach(es), practice(s), policy(ies), program(s), safe space(s), activity(ies), strategy(ies), and any other way(s) that help to improve safety, promote healing, and build resilience of children exposed to domestic violence and their abused parents;
- Include a written transcript for the video (for closed captioning purposes); and
- Be aligned with the vision of FYSB (a future in which all of our nation's youth, individuals, and families, no matter what challenges they may face, can live healthy, productive, violence-free lives. More information can be found on *www.acf.hhs.gov/fysb.*)

Video Content

Videos must focus on children and youth exposed to domestic violence and their parents. In the 1–3 minute video, Challenge-solvers must highlight one or more approach(es), practice(s), policy(ies), program(s), safe space(s), activity(ies), and strategy(ies) that support children and youth beyond traditional services, programs, and supports. Videos should strive to raise awareness of available support for this special population. Challenge-solvers may focus on culturally specific and other groups of children and youth. Applicants should strive to be creative, innovative, and educational in their video content. Videos may include explanations or instruction on how the idea can be replicated in different communities. So that the privacy, confidentiality, and safety of survivors and clients of domestic violence prevention programs are respected, survivors and program clients may not be featured in contestant videos.

Each video entry must be accompanied by a written transcript.

Public Voting

After the submission period is closed, a public voting period will commence on *www.challenge.gov/domestic-violence-video-challenge.* To assist FVPSA in making this award, voters should vote for a video based on some of the criteria discussed in the Video Criteria section.

Voting will be open for 2 weeks (14 calendar days) that will begin after the submission deadline and end no later than November 30, 2016. The actual dates and deadline for public voting period will be posted on the *www.challenge.gov/domestic-violence-video-challenge* Web site.

Winner Selection

The top 15 videos with highest scores at the public voting deadline will move on to the next round of judging. In addition, FVPSA employees will select an additional five videos based on whether the videos demonstrate a new emerging and effective approach, to move on to the next round of judging by the panel of subject matter experts.

The judges, made up of the panel of subject matter experts, will evaluate, score, and rank the top 20 finalists' videos. The top three scoring videos will win the Challenge. FVPSA will award three prizes as follows: First Prize: $5,000; Second Prize: $3,000; and Third Prize: $2,000. All prize awards are subject to FVPSA verification of the winners' identity, eligibility, and participation in the Challenge. Awards will be paid using electronic funds transfer and may be subject to federal income taxes. FVPSA will comply with the International Revenue Service (IRS) withholding and reporting requirements, where applicable.

Judging Criteria

The judging panel of experts will use a 100-point scale to evaluate the top 15 videos from the public voting and the 5 videos selected by FVPSA staff. In case of tied results, the winners will be selected by majority vote. The judging criteria are:

- The extent to which the video content highlights one or more new, innovative, emerging, and effective approach(es), practice(s), policy(ies), program(s), safe space(s), activity(ies), strategy(ies), and any other way(s) that help to improve safety, promote healing, and build the resilience of children exposed to domestic violence and their abused parents. (25 points)
- The extent to which the video aligns with FYSB's vision of a future in which all our nation's youth, individuals, and families—no matter what challenges they may face—can live healthy, productive, violence-free lives (FYSB's vision can be found at *www.acf.hhs.gov/fysb*). (15 points)
- The extent to which the video content increases awareness of domestic violence issues. (15 points)
- The extent to which the video content is educational, imparts knowledge, or deepens understanding of supports for children, youth, and parents. (15 points)
- The extent to which the video content is innovative. (15 points)
- The extent to which the video content is creative. (15 points)

Waivers and Releases

To enter the Domestic Violence Awareness Month YouTube Challenge, registered participants must sign a waiver, agreeing to assume any and all risks and waive claims against the Federal Government and its related entities, except in the case of willful misconduct, for any injury, death, damage, or loss of property, revenue, or profits, whether direct, indirect, or consequential, arising from their participation in a competition, whether the injury, death, damage, or loss arises through negligence or otherwise. Participants shall be required to obtain liability insurance or demonstrate financial responsibility for claims, as detailed in 15 U.S.C. 3719(i)(2).

Challenge-solvers must also obtain a signed ACF photo/video release waiver for individuals featured on the videos and submit it with their video link by the submission deadline listed in the DATES section. The waiver is available at *www.challenge.gov/domestic-violence-video-challenge.*

Restrictions

Challenge-solvers cannot use funding from the Federal Government (either through grants or contracts) to compete in the Domestic Violence Awareness Month YouTube Challenge.

More details on the Challenge are available on *www.challenge.gov/domestic-violence-video-challenge.* Submitted videos may be featured at FVPSA meetings and events and posted on the FVPSA Web site.

Authority: 15 U.S.C. 3719 and 42 U.S.C. 10401(a)(1).

Dated: September 28, 2016.

Rafael López,

Commissioner, Administration for Children, Youth and Families.

[FR Doc. 2016–23853 Filed 9–29–16; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: Provision of Child Support Services in IV–D cases under the Hague Child Support Convention; Federally Approved Forms.

OMB No.: New Collection.

Description: On January 1, 2017, the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance will enter into force for the United States. This Convention contains groundbreaking provisions that, for the first time on a worldwide scale, will establish uniform, simple, fast, and inexpensive procedures for the processing of international child support cases. Once the Convention is in effect, U.S. states will process child support cases with other countries that have ratified the Convention under the requirements of the Convention and Article 7 of the Uniform Interstate Family Support Act (UIFSA 2008). In order to comply with the Convention, the U.S. must implement the Convention's case processing forms.

State and Federal law require states to use Federally-approved case processing forms. Section 311(b) of UIFSA 2008, which has been enacted by all 50 states, the District of Columbia, Guam, Puerto Rico and the Virgin Islands, requires States to use forms mandated by Federal law. 45 CFR 303.7 also requires child support programs to use federally-approved forms in intergovernmental IV–D cases unless a country has provided alternative forms as a part of its chapter in a Caseworker's Guide to Processing Cases with Foreign Reciprocating Countries.

Respondents: State agencies administering a child support program under title IV–D of the Social Security Act.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Annex I: Transmittal form under Article 12(2)	54	46	1	2,484
Annex II: Acknowledgment form under Article 12(3)	54	93	.5	2,511
Annex A: Application for Recognition and Enforcement, including restricted information on the applicant	54	19	.5	513
Annex A: Abstract of Decision	54	5	1	270
Annex A: Statement of Enforceability of Decision	54	19	0.17	174
Annex A: Statement of Proper Notice	54	5	.5	135
Annex A: Status of Application Report	54	37	.33	659
Annex B: Application for Enforcement of a Decision Made or Recognized in the Requested State, including restricted information on the applicant	54	19	.5	513
Annex B: Status of Application Report, Article 12	54	37	.33	659
Annex C: Application for Establishment of a Decision, including restricted information on the Applicant	54	5	.5	135
Annex C: Status of Application Report—Article 12	54	9	.33	160
Annex D: Application for Modification of a Decision, including Restricted Information on the Applicant	54	5	.5	135
Annex D: Status of Application Report—Article 12	54	9	.33	160
Annex E: Financial Circumstances Form	54	46	2	4,968
Estimated Total Annual Burden Hours				13,478

In compliance with the requirements of Section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. Email address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2016–23722 Filed 9–29–16; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–N–0007]

Fee for Using a Tropical Disease Priority Review Voucher in Fiscal Year 2017

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is announcing the fee rates for using a tropical disease priority review voucher for fiscal year (FY) 2017. The Federal Food, Drug, and Cosmetic Act (the FD&C Act), as amended by the Food and Drug Administration Amendments Act of 2007 (FDAAA), authorizes FDA to determine and collect priority review user fees for certain applications for approval of drug or biological products when those applications use a tropical disease priority review voucher awarded by the Secretary of Health and Human Services. These vouchers are awarded to the sponsors of certain tropical disease product applications, submitted after September 27, 2007, upon FDA approval of such applications. The amount of the fee submitted to FDA with applications using a tropical disease priority review voucher is determined each fiscal year based on the difference between the average cost incurred by FDA in the review of a human drug application subject to priority review in the previous fiscal year, and the average cost incurred in the review of an application that is not subject to priority review in the previous fiscal year. This notice establishes the tropical disease priority review fee rate for FY 2017.

FOR FURTHER INFORMATION CONTACT: Robert J. Marcarelli, Office of Financial Management, Food and Drug Administration, 8455 Colesville Rd., COLE–14202F, Silver Spring, MD 20993–0002, 301–796–7223.

SUPPLEMENTARY INFORMATION:

I. Background

Section 1102 of FDAAA (Pub. L. 110–85) added section 524 to the FD&C Act (21 U.S.C. 360n). In section 524, Congress encouraged development of new drug and biological products for prevention and treatment of certain tropical diseases by offering additional incentives for obtaining FDA approval of such products. Under section 524, the sponsor of an eligible human drug application submitted after September 27, 2007, for a tropical disease (as defined in section 524(a)(3) of the FD&C Act), shall receive a priority review voucher upon approval of the tropical disease product application. The recipient of a tropical disease priority review voucher may either use the voucher with a future submission to FDA under section 505(b)(1) of the FD&C Act (21 U.S.C. 355(b)(1)) or section 351 of the Public Health Service Act (42 U.S.C. 262), or transfer (including by sale) the voucher to another party. The voucher may be transferred (including by sale) repeatedly until it ultimately is used for a human drug application submitted to FDA under section 505(b)(1) of the FD&C Act or section 351(a) of the Public Health Service Act. A priority review is a review conducted with a Prescription Drug User Fee Act (PDUFA) goal date of 6 months after the receipt or filing date, depending upon the type of application. Information regarding the PDUFA goals is available at: *http://www.fda.gov/downloads/forindustry/userfees/prescriptiondruguserfee/ucm270412.pdf.*

The applicant that uses a priority review voucher is entitled to a priority review but must pay FDA a priority review user fee in addition to any other fee required by PDUFA. FDA published draft guidance on its Web site about how this tropical disease priority review voucher program operates (available at: *http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/ucm080599.pdf*).

This notice establishes the tropical disease priority review fee rate for FY 2017 as $2,706,000 and outlines FDA's process for implementing the collection of the priority review user fees. This rate is effective on October 1, 2016, and will remain in effect through September 30, 2017, for applications submitted with a tropical disease priority review voucher. The payment of this priority review user fee is required in addition to the payment of any other fee that would normally apply to such an application under PDUFA before FDA will consider the application complete and acceptable for filing.

II. Tropical Disease Priority Review User Fee for FY 2017

FDA interprets section 524(c)(2) of the FD&C Act as requiring that FDA determine the amount of the tropical disease priority review user fee each fiscal year based on the difference between the average cost incurred by FDA in the review of a human drug application subject to priority review in the previous fiscal year, and the average cost incurred by FDA in the review of a human drug application that is not subject to priority review in the previous fiscal year.

A priority review is a review conducted with a PDUFA goal date of 6 months after the receipt or filing date, depending on the type of application. Under the PDUFA goals letter, FDA has committed to reviewing and acting on 90 percent of the applications granted priority review status within this expedited timeframe. Normally, an application for a human drug or biological product will qualify for priority review if the product is intended to treat a serious condition and, if approved, would provide a significant improvement in safety or effectiveness. An application that does not receive a priority designation will receive a standard review. Under the PDUFA goals letter, FDA committed to reviewing and acting on 90 percent of standard applications within 10 months of the receipt or filing date, depending on the type of application. A priority review involves a more intensive level of effort and a higher level of resources than a standard review.

As interpreted by FDA, section 524(c)(2) of the FD&C Act requires that the fee amount should be based on the difference between the average cost incurred by the Agency in the review of a human drug application subject to a priority review in the previous fiscal year, and the average cost incurred by FDA in the review of a human drug application that is not subject to priority review in the previous fiscal year. FDA is setting fees for FY 2017, and the previous fiscal year is FY 2016. However, the FY 2016 submission cohort has not been closed out yet, and the cost data for FY 2016 are not complete. The latest year for which FDA has complete cost data is FY 2015. Furthermore, because FDA has never tracked the cost of reviewing applications that get priority review as a separate cost subset, FDA estimated this cost based on other data that the Agency has tracked. FDA uses data that the Agency estimates and publishes on its Web site each year—standard costs for review. FDA does not publish a standard cost for "the review of a human drug application subject to priority review in the previous fiscal year." However, we expect all such applications would contain clinical data. The standard cost application categories with clinical data that FDA does publish each year are: (1) New drug applications (NDAs) for a new molecular entity (NME) with clinical data and (2) biologics license applications (BLAs).

The worksheets for standard costs for FY 2015, show a standard cost (rounded to the nearest thousand dollars) of $5,251,000 for a NME NDA and $5,055,000 for a BLA. Based on these standard costs, the total cost to review the 56 applications in these two categories in FY 2015 (32 NME NDAs with clinical data and 24 BLAs) was $289,352,000. (Note: These numbers exclude the President's Emergency Plan for AIDS Relief NDAs; no investigational new drug review costs are included in this amount.) 25 of these applications (18 NDAs and 7 BLAs) received priority review, which would mean that the remaining 31 received standard reviews. Because a priority review compresses a review that ordinarily takes 10 months into 6 months, FDA estimates that a multiplier of 1.67 (10 months divided by 6 months) should be applied to non-priority review costs in estimating the effort and cost of a priority review as compared to a standard review. This multiplier is consistent with published research on this subject which supports a priority review multiplier in the range of 1.48 to 2.35 (Ref. 1). Using FY 2015 figures, the costs of a priority and standard review are estimated using the following formula:

$$(25\ \alpha \times 1.67) + (31\ \alpha) = \$289{,}352{,}000$$

where "α" is the cost of a standard review and "α times 1.67" is the cost of a priority review. Using this formula, the cost of a standard review for NME NDAs and BLAs is calculated to be $3,977,000 (rounded to the nearest thousand dollars) and the cost of a priority review for NME NDAs and BLAs is 1.67 times that amount, or $6,642,000 (rounded to the nearest thousand dollars). The difference between these two cost estimates, or $2,665,000, represents the incremental cost of conducting a priority review rather than a standard review.

For the FY 2017 fee, FDA will need to adjust the FY 2015 incremental cost by the average amount by which FDA's average costs increased in the three years prior to FY 2016, to adjust the FY 2015 amount for cost increases in FY 2016. That adjustment, published in the **Federal Register** on July 28, 2016 (see 81 FR 49674 at 49676), setting FY 2017 PDUFA fees, is 1.5468 percent for the most recent year, not compounded. Increasing the FY 2015 incremental priority review cost of $2,665,000 by 1.5468 percent results in an estimated cost of $2,706,000 (rounded to the nearest thousand dollars). This is the tropical disease priority review user fee amount for FY 2017 that must be submitted with a priority review voucher for a human drug application in FY 2017, in addition to any PDUFA fee that is required for such an application.

III. Fee Schedule for FY 2017

The fee rate for FY 2017 is set out in Table 1:

TABLE 1—TROPICAL DISEASE PRIORITY REVIEW SCHEDULE FOR FY 2017

Fee category	Fee rate for FY 2017
Application submitted with a tropical disease priority review voucher in addition to the normal PDUFA fee	$2,706,000

IV. Implementation of Tropical Disease Priority Review User Fee

Under section 524(c)(4)(A) of the FD&C Act, the priority review user fee is due upon submission of a human drug application for which the priority review voucher is used. Section 524(c)(4)(B) of the FD&C Act specifies that the application will be considered incomplete if the priority review user fee and all other applicable user fees are not paid in accordance with FDA payment procedures. In addition, FDA may not grant a waiver, exemption, reduction, or refund of any fees due and payable under this section of the FD&C Act and FDA may not collect priority review voucher fees "except to the extent provided in advance in appropriation Acts." Section 524(c)(4)(C) and 524(c)(5)(B). Beginning with FDA's appropriation for FY 2009, the annual appropriation language states specifically that "priority review user fees authorized by 21 U.S.C. 360n (section 524 of the FD&C Act) may be credited to this account, to remain available until expended." (Pub. L. 111–8, Section 5, Division A, Title VI).

The tropical disease priority review fee established in the new fee schedule must be paid for any application that is received on or after October 1, 2016, and submitted with a priority review voucher. This fee must be paid in addition to any other fee due under PDUFA. Payment must be made in U.S. currency by electronic check, check, bank draft, wire transfer, credit card, or U.S. postal money order payable to the order of the Food and Drug Administration. The preferred payment method is online using electronic check (Automated Clearing House (ACH) also known as eCheck). Secure electronic payments can be submitted using the User Fees Payment Portal at *https://userfees.fda.gov/pay.* Once you search for your invoice, click "Pay Now" to be redirected to *Pay.gov.* Note that electronic payment options are based on the balance due. Payments must be drawn on U.S bank accounts.

FDA has partnered with the U.S. Department of the Treasury to use *Pay.gov*, a Web-based payment application, for online electronic payment. The *Pay.gov* feature is available on the FDA Web site after the user fee ID number is generated.

The user fee identification (ID) number should be included on the check, followed by the words "Tropical Disease Priority Review." Payments can be mailed to: Food and Drug Administration, P.O. Box 979107, St. Louis, MO 63197–9000.

If checks are sent by a courier that requests a street address, the courier can deliver the checks to: U.S. Bank, Attention: Government Lockbox 979107, 1005 Convention Plaza, St. Louis, MO 63101. (Note: This U.S. Bank address is for courier delivery only. If you have any questions concerning courier delivery contact the U.S. Bank at 314–418–4013. This telephone number is only for questions about courier delivery.) The FDA post office box number (P.O. Box 979107) must be written on the check. The tax identification number of FDA is 53–0196965.

If paying by wire transfer, please reference your unique user fee ID number when completing your transfer. The originating financial institution may charge a wire transfer fee. Please ask your financial institution about the fee and include it with your payment to ensure that your fee is fully paid. The account information is as follows: U.S. Dept. of Treasury, TREAS NYC, 33 Liberty St., New York, NY 10045, Account Number: 75060099, Routing Number: 021030004, SWIFT: FRNYUS33, Beneficiary: FDA, 8455 Colesville Rd., 14th Floor, Silver Spring, MD 20993–0002.

Paying by credit card (Discover, VISA, MasterCard, American Express) is available for balances less than $25,000. If the balance exceeds this amount, only the ACH option is available. Payments must be drawn on U.S. credit cards.

V. Reference

The following reference is on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, and is available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Ridley, D.B., H.G. Grabowski, and J.L. Moe, "Developing Drugs for Developing Countries," *Health Affairs,* vol. 25, no. 2, pp. 313–324, 2006.

Dated: September 26, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–23623 Filed 9–29–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–N–2836]

Agency Information Collection Activities; Proposed Collection; Comment Request; Donor Risk Assessment Questionnaire for the Food and Drug Administration/National Heart, Lung, and Blood Institute-Sponsored Transfusion-Transmissible Infections Monitoring System—Risk Factor Elicitation

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information and to allow 60 days for public comment in response to the notice. This notice solicits comments on an information collection request regarding risk factors associated with transfusion-transmissible infections (TTI) in blood donors.

DATES: Submit either electronic or written comments on the collection of information by November 29, 2016.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA–2016–N–2836 for "Donor Risk Assessment Questionnaire for the Food and Drug Administration (FDA)/National Heart, Lung, and Blood Institute (NHLBI)-sponsored Transfusion-Transmissible Infections Monitoring System (TTIMS)—Risk Factor Elicitation (RFE)." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, Three White Flint North, 10A63, 11601 Landsdown St., North Bethesda, MD 20852, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Donor Risk Assessment Questionnaire for the Food and Drug Administration (FDA)/National Heart, Lung, and Blood Institute (NHLBI)-Sponsored Transfusion-Transmissible Infections Monitoring System (TTIMS)—Risk Factor Elicitation (RFE) OMB Control Number—New

FDA intends to interview blood donors to collect risk factor information associated with testing positive for a TTI. This collection of information is part of a larger initiative called TTIMS which is a collaborative project funded by FDA, the NHLBI of the National Institutes of Health (NIH), and the Department of Health and Human Services (HHS) Office of the Assistant Secretary of Health with input from other agencies in HHS including the Centers for Disease Control and Prevention (CDC). FDA will use these scientific data collected through such interview-based risk factor elicitation of blood donors to monitor and help ensure the safety of the United States blood supply.

Previous assessments of risk factor profiles among blood donors found to be positive for human immunodeficiency virus (HIV) were funded by CDC for approximately 10 years after implementation of HIV serologic screening of blood donors in the mid-1980s, whereas studies of Hepatitis C virus (HCV) seropositive donors, funded by NIH, were conducted in the early 1990s. Information on current risk factors in blood donors as assessed using analytical study designs was next evaluated by the Transfusion-Transmitted Retrovirus and Hepatitis Virus Rates and Risk Factors Study conducted by the NHLBI Retrovirus Epidemiology Donor Study-II (REDS–II) approved under OMB control number 0925–0630. Through a risk factor questionnaire, this study elicited risk factors in blood donors who tested confirmed positive for one of four transfusion-transmissible infections: HIV, HCV, Hepatitis B virus (HBV), and Human T-cell Lymphotropic virus. The study also elicited risk factors from donors who did not have any infections (controls) and compared their responses to those of the donors with confirmed infection (cases). Results from the REDS–II study were published in 2015.

FDA issued a document entitled "Revised Recommendations for Reducing the Risk of Human Immunodeficiency Virus Transmission by Blood and Blood Products, Guidance for Industry" dated December 2015 (*http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Blood/UCM446580.pdf*) which changed the blood donor criterion for men who have sex with men (MSM) from an indefinite (permanent) deferral to a 12-month deferral since last MSM contact. The impact of this change in the deferral criteria requires a national monitoring effort as part of TTIMS to assess if the relative proportions of risk factors for infection in blood donors have changed following the adoption of the 12-month donor deferral for MSM. TTIMS will use similar procedures as the ones used in the REDS–II study to monitor and evaluate risk factors among HIV-positive donors and recently HCV or HBV infected donors as well as controls.

This study will help identify the specific risk factors for TTI and their prevalence in blood donors, and help inform FDA on the proportion of incident (new) infections among all HIV positive blood donors. Donations with incident infections have the greatest potential transmission risk because they could be missed during routine blood screening. The study will help FDA evaluate the effectiveness of screening strategies in reducing the risk of HIV transmission from at-risk donors and to evaluate if there are unexpected consequences associated with the recent change in donor deferral policy such as an increase in HIV incidence among donors. These data also will inform FDA regarding future blood donor deferral policy options to reduce the risk of HIV transmission, including the feasibility of moving from the existing time-based deferrals related to risk behaviors to alternate deferral options, such as the use of individual risk assessments, and to inform the design of potential studies to evaluate the feasibility and effectiveness of such alternative deferral options.

TTIMS will include a comprehensive interview-based epidemiological study of risk factor information for viral infection-positive blood donors at the American Red Cross (ARC), Blood Systems, Inc. (BSI), New York Blood Center (NYBC), and OneBlood that will identify the current predominant risk factors and reasons for virus-positive donations. The TTIMS program establishes a new, ongoing donor hemovigilance capacity that currently does not exist in the United States. Using procedures developed by the REDS–II study, TTIMS will establish this capacity in greater than 50 percent of all blood donations collected in the country.

As part of the TTIMS project, a comprehensive hemovigilance database will be created that integrates the risk factor information collected through donor interviews of blood donor with the resulting data from disease marker testing and blood components collected by participating organizations into a research database. Following successful initiation of the risk factor interviews, the TTIMS network is poised to be expanded to include additional blood centers and/or re-focused on other safety threats as warranted. In this way, the TTIMS program will maintain standardized, statistically and scientifically robust processes for applying hemovigilance information across blood collection organizations.

The specific objectives are to:

- Determine current behavioral risk factors associated with all HIV infections, incident HBV, and incident HCV infections in blood donors (including parenteral and sexual risks) across the participating blood collection organizations using a case-control study design.
- Determine infectious disease marker prevalence and incidence for HIV, HBV, and HCV overall and by demographic characteristics of donors in the majority of blood donations collected in the country. This will be accomplished by forming epidemiological databases consisting of harmonized operational data from ARC, BSI, NYBC, and OneBlood.
- Analyze integrated risk factor and infectious marker testing data concurrently because when taken together these may suggest that blood centers are not achieving the same degree of success in educational efforts to prevent donation by donors with risk behaviors across all demographic groups.

The respondents will be persons who donated blood in the United States and these participants will be defined as cases and controls. The estimated number of respondents is based on an overall expected participation in the risk factor survey. We estimate a case to control ratio of 1:2 (200 to 400) with a 50 percent case enrollment.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Questionnaire/survey	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Cases and controls.[2]	600	1	600	0.75 (45 minutes)	450

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Cases consist of virus-positive donations, and controls represent uninfected donors.

Dated: September 26, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–23622 Filed 9–29–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–N–0007]

Fee for Using a Rare Pediatric Disease Priority Review Voucher in Fiscal Year 2017

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is announcing the fee rate for using a rare pediatric disease priority review voucher for fiscal year (FY) 2017. The Federal Food, Drug, and Cosmetic Act (the FD&C Act), as amended by the Food and Drug Administration Safety and Innovation Act (FDASIA), authorizes FDA to determine and collect rare pediatric disease priority review user

fees for certain applications for review of human drug or biological products when those applications use a rare pediatric disease priority review voucher. These vouchers are awarded to the sponsors of rare pediatric disease product applications that meet all of the requirements of this program, are submitted 90 days or more after July 9, 2012, and upon FDA approval of such applications. The amount of the fee for using a rare pediatric disease priority review voucher is determined each FY based on the difference between the average cost incurred by FDA in the review of a human drug application subject to priority review in the previous FY, and the average cost incurred in the review of an application that is not subject to priority review in the previous FY. This notice establishes the rare pediatric disease priority review fee rate for FY 2017 and outlines the payment procedures for such fees.

FOR FURTHER INFORMATION CONTACT: Robert J. Marcarelli, Office of Financial Management, Food and Drug Administration, 8455 Colesville Rd., COLE–14202F, Silver Spring, MD 20993–0002, 301–796–7223.

SUPPLEMENTARY INFORMATION:

I. Background

Section 908 of FDASIA (Pub. L. 112–144) added section 529 to the FD&C Act (21 U.S.C. 360ff). In section 529 of the FD&C Act, Congress encouraged development of new human drugs and biological products for prevention and treatment of certain rare pediatric diseases by offering additional incentives for obtaining FDA approval of such products. Under section 529 of the FD&C Act, the sponsor of an eligible human drug application submitted 90 days or more after July 9, 2012, for a rare pediatric disease (as defined in section 529(a)(3)) shall receive a priority review voucher upon approval of the rare pediatric disease product application. The recipient of a rare pediatric disease priority review voucher may either use the voucher for a future human drug application submitted to FDA under section 505(b)(1) of the FD&C Act (21 U.S.C. 355(b)(1)) or section 351(a) of the Public Health Service Act (42 U.S.C. 262(a)), or transfer (including by sale) the voucher to another party. The voucher may be transferred (including by sale) repeatedly until it ultimately is used for a human drug application submitted to FDA under section 505(b)(1) of the FD&C Act or section 351(a) of the Public Health Service Act. A priority review is a review conducted with a Prescription Drug User Fee Act (PDUFA) goal date of 6 months after the receipt or filing date, depending on the type of application. Information regarding PDUFA goals is available at *http://www.fda.gov/downloads/forindustry/userfees/prescriptiondruguserfee/ucm270412.pdf.*

The applicant that uses a rare pediatric disease priority review voucher is entitled to a priority review of its eligible human drug application, but must pay FDA a rare pediatric disease priority review user fee in addition to any user fee required by PDUFA for the application. Information regarding the rare pediatric disease priority review voucher program is available at: *http://www.fda.gov/Drugs/DevelopmentApprovalProcess/DevelopmentResources/ucm375479.htm.*

This notice establishes the rare pediatric disease priority review fee rate for FY 2017 at $2,706,000 and outlines FDA's procedures for payment of rare pediatric disease priority review user fees. This rate is effective on October 1, 2016, and will remain in effect through September 30, 2017.

II. Rare Pediatric Priority Review User Fee for FY 2017

Under section 529(c)(2) of the FD&C Act, the amount of the rare pediatric disease priority review user fee is determined each fiscal year based on the difference between the average cost incurred by FDA in the review of a human drug application subject to priority review in the previous fiscal year, and the average cost incurred by FDA in the review of a human drug application that is not subject to priority review in the previous fiscal year.

A priority review is a review conducted with a PDUFA goal date of 6 months after the receipt or filing date, depending on the type of application. Under the PDUFA goals letter, FDA has committed to reviewing and acting on 90 percent of the applications granted priority review status within this expedited timeframe. Normally, an application for a human drug or biological product will qualify for priority review if the product is intended to treat a serious condition and, if approved, would provide a significant improvement in safety or effectiveness. An application that does not receive a priority designation will receive a standard review. Under the PDUFA goals letter, FDA has committed to reviewing and acting on 90 percent of standard applications within 10 months of the receipt or filing date depending on the type of application. A priority review involves a more intensive level of effort and a higher level of resources than a standard review.

Section 529 of the FD&C Act specifies that the rare pediatric disease priority review voucher fee amount must be based on the difference between the average cost incurred by the Agency in the review of a human drug application subject to a priority review in the previous fiscal year, and the average cost incurred by the Agency in the review of a human drug application not subject to a priority review in the previous fiscal year. FDA is setting a fee for FY 2017, which is to be based on standard cost data from the previous fiscal year, FY 2016. However, the FY 2016 submission cohort has not been closed out yet, thus the cost data for FY 2016 are not complete. The latest year for which FDA has complete cost data is FY 2015. Furthermore, because FDA has never tracked the cost of reviewing applications that get priority review as a separate cost subset, FDA estimated this cost based on other data that the Agency has tracked. FDA uses data that the Agency estimates and publishes on its Web site each year—standard costs for review. FDA does not publish a standard cost for "the review of a human drug application subject to priority review in the previous fiscal year." However, we expect all such applications would contain clinical data. The standard cost application categories with clinical data that FDA publishes each year are: (1) New drug applications (NDAs) for a new molecular entity (NME) with clinical data and (2) biologics license applications (BLAs) with clinical data.

The standard cost worksheets for FY 2015 show standard costs (rounded to the nearest thousand dollars) of $5,251,000 for an NME NDA, and $5,055,000 for a BLA. Based on these standard costs, the total cost to review the 56 applications in these two categories in FY 2015 (32 NME NDAs and 24 BLAs with clinical data) was $289,352,000. (Note: These numbers exclude the President's Emergency Plan for AIDS Relief NDAs; no investigational new drug (IND) review costs are included in this amount.) Twenty-five of these applications (18 NDAs and 7 BLAs) received priority review, which would mean that the remaining 31 received standard reviews. Because a priority review compresses a review schedule that ordinarily takes 10 months into 6 months, FDA estimates that a multiplier of 1.67 (10 months divided by 6 months) should be applied to non-priority review costs in estimating the effort and cost of a priority review as compared to a standard review. This multiplier is consistent with published research on this subject which supports a priority review multiplier in the range of 1.48 to 2.35 (Ref. 1). Using FY 2015 figures, the costs of a priority and standard review are estimated using the following formula:

$(25\ \alpha \times 1.67) + (31\ \alpha) = \$289{,}352{,}000$

Where "α" is the cost of a standard review and "α times 1.67" is the cost of a priority review. Using this formula, the cost of a standard review for NME NDAs and BLAs is calculated to be $3,977,000 (rounded to the nearest thousand dollars) and the cost of a priority review for NME NDAs and BLAs is 1.67 times that amount, or $6,642,000 (rounded to the nearest thousand dollars). The difference between these two cost estimates, or $2,665,000, represents the incremental cost of conducting a priority review rather than a standard review.

For the FY 2017 fee, FDA will need to adjust the FY 2015 incremental cost by the average amount by which FDA's average costs increased in the 3 years prior to FY 2016, to adjust the FY 2015 amount for cost increases in FY 2016. That adjustment, published in the **Federal Register** on July 28, 2016 (see 81 FR 49674 at 49676), setting the FY 2017 PDUFA fee, is 1.5468 percent for the most recent year, not compounded. Increasing the FY 2015 incremental priority review cost of $2,665,000 by 1.5468 percent results in an estimated cost of $2,706,000 (rounded to the nearest thousand dollars). This is the rare pediatric disease priority review user fee amount for FY 2017 that must be submitted with a priority review voucher for a human drug application in FY 2017, in addition to any PDUFA fee that is required for such an application.

III. Fee Schedule for FY 2017

The fee rate for FY 2017 is set out in table 1:

TABLE 1—RARE PEDIATRIC DISEASE PRIORITY REVIEW SCHEDULE FOR FY 2017

Fee category	Fee rate for FY 2017
Application submitted with a rare pediatric disease priority review voucher in addition to the normal PDUFA fee	$2,706,000

IV. Implementation of Rare Pediatric Disease Priority Review User Fee

Under section 529(c)(4)(A) of the FD&C Act, the priority review user fee is due (*i.e.* the obligation to pay the fee is incurred) when a sponsor notifies FDA of its intent to use the voucher. Section 529(c)(4)(B) of the FD&C Act specifies that the application will be considered incomplete if the priority review user fee and all other applicable user fees are not paid in accordance with FDA payment procedures. In addition, section 529(c)(4)(C) specifies that FDA may not grant a waiver, exemption, reduction, or refund of any fees due and payable under this section of the FD&C Act. Beginning with FDA's appropriation for FY 2015, the annual appropriation language states specifically that "priority review user fees authorized by 21 U.S.C. 360n and 360ff (section 529 of the FD&C Act) shall be credited to this account, to remain available until expended." (Pub. L. 113–235, Section 5, Division A, Title VI).

The rare pediatric disease priority review fee established in the new fee schedule must be paid for any application that is received on or after October 1, 2016. In order to comply with this requirement, the sponsor must notify FDA 90 days prior to submission of the human drug application that is the subject of a priority review voucher of an intent to submit the human drug application, including the date on which the sponsor intends to submit the application.

Upon receipt of this notification, FDA will issue an invoice to the sponsor who has incurred a rare pediatric disease priority review voucher fee. The invoice will include instructions on how to pay the fee via wire transfer or check.

As noted in section II, if a sponsor uses a rare pediatric disease priority review voucher for a human drug application, the sponsor would incur the rare pediatric disease priority review voucher fee in addition to any PDUFA fee that is required for the application. The sponsor would need to follow FDA's normal procedures for timely payment of the PDUFA fee for the human drug application.

V. Reference

The following reference is on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, and is available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Ridley, D.B., H.G. Grabowski, and J.L. Moe, "Developing Drugs for Developing Countries," *Health Affairs*, vol. 25, no. 2, pp. 313–324, 2006.

Dated: September 26, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–23624 Filed 9–29–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

State Health Departments Coordinating Center of the Jurisdictional Approach To Curing Hepatitis C Among HIV/HCV Coinfected People of Color Demonstration Project Supported by the Secretary's Minority AIDS Initiative Fund

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice of a deviation from competition requirements to make a single-source award related to the Jurisdictional Approach to Curing Hepatitis C (HCV) among HIV/HCV Coinfected People of Color demonstration project.

SUMMARY: HRSA's HIV/AIDS Bureau (HAB) awarded a non-competitive single source cooperative agreement to National Alliance of State and Territorial AIDS Directors (NASTAD) for approximately $977,400 in the Secretary's Minority AIDS Initiative Funds (SMAIF) as authorized under the Consolidated Appropriations Act, 2016 (Pub L. 114–113), Division H, Title II. Subject to the availability of funds and NASTAD's satisfactory performance, HAB will also issue non-competitive, single-source awards of approximately $750,000 each in fiscal years (FY) 2017 and 2018. This will allow NASTAD to facilitate the participation of up to two Ryan White HIV/AIDS Program Part B recipients in the Jurisdictional Approach to Curing Hepatitis C among HIV/HCV Coinfected People of Color demonstration project over its 3-year project period.

FOR FURTHER INFORMATION CONTACT: Harold J. Phillips, Director, Office of Training and Capacity Development, HAB/HRSA, 5600 Fishers Lane, Room 9N–114, Rockville, MD 20857, by email at *hphillips@hrsa.gov* or by phone at (301) 443–8109.

SUPPLEMENTARY INFORMATION:

Recipient of the Award: National Alliance of State and Territorial AIDS Directors.

Period of Supplemental Funding: September 30, 2016–September 29, 2019.

Funding Amount: Up to $977,400 in FY 2016, and subject to availability of appropriated funds, approximately $750,000 in FYs 2017 and 2018.

Authority: Consolidated Appropriations Act, 2016 (Pub L. 114–113), Division H, Title II CFDA Number: 93.928.

Justification: The Jurisdictional Approach to Curing Hepatitis C among HIV/HCV Coinfected People of Color demonstration project seeks to: (1) Increase jurisdiction-level capacity to provide comprehensive screening, care and treatment for HCV among HIV/HCV co-infected people particularly in disproportionately affected racial and ethnic minority communities; (2) increase the numbers of HIV/HCV co-infected people who are diagnosed with hepatitis C, treated, and cured; (3) identify and provide technical assistance for jurisdictions to reach goals (1) and (2); and, (4) develop a plan for evaluation of the program impact.

During the original application period, as outlined in Funding Opportunity Announcement HRSA–16–189, no Ryan White Part B recipients (States) applied. This non-competitive single source cooperative agreement award will provide important resources in a part of the country that would not otherwise have any coverage.

NASTAD is a national non-profit alliance of state health department program directors who are responsible for administering HIV/AIDS and viral hepatitis health care, prevention, education, and supportive services programs funded by state and federal governments. These include programs funded by the Centers for Disease Control and Prevention and HRSA. In working closely with its members, NASTAD is dedicated to reducing the incidence of HIV/AIDS and HCV infections in the U.S. and its territories, and supports the provision of comprehensive, compassionate, and high quality care and prevention services to all persons living with HIV/AIDS and HCV, by ensuring responsible and sound public policies and practices.

NASTAD's hepatitis team provides guidance and technical assistance to strengthen the capacity of state and local health departments to develop, maintain, and enhance comprehensive hepatitis programs that address the continuum from prevention through cure. This infrastructure, experience, and strategic partnership between state hepatitis coordinators and AIDS directors make NASTAD the appropriate entity to receive a single-source funding award in an effort to facilitate engagement between the states and HRSA's viral hepatitis efforts.

Dated: September 26, 2016.

James Macrae,

Acting Administrator.

[FR Doc. 2016–23693 Filed 9–29–16; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: 0990–New—60D]

Agency Information Collection Activities; Proposed Collection; Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, announces plans to submit a new Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, OS seeks comments from the public regarding the burden estimate below or any other aspect of the ICR.

DATES: Comments on the ICR must be received on or before November 29, 2016.

ADDRESSES: Submit your comments to *Information.CollectionClearance@hhs.gov* or by calling (202) 690–5683.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the document identifier 0990–New—60D for reference.

Information Collection Request Title: Assessment of the Impact of Energy Development on the Behavioral Health of Women in Western North Dakota and Eastern Montana.

Abstract: Region VIII Office of the Assistant Secretary for Health (OASH), Office on Women's Health (OWH) is requesting approval from the Office of Management and Budget (OMB). The Office on Women's Health (OWH) in the Office of the Assistant Secretary for Health, U.S. Department of Health and Human Services (HHS) was established in 1991. Its mission is to provide national leadership and coordination to improve the health of women and girls through policy, education and model programs. The vision of the Office on Women's Health is that all women and girls achieve the best possible health. OASH/OWH has ten regional offices located throughout the country. As a leader in women health, OWH supports the development of culturally-based, gender-sensitive programs to address health disparities. Region VIII OASH/OWH is interested in improving women's behavioral health associated with the impact of energy development through gender based data collection and analysis. The discovery and subsequent development of the Parshall Oil Field within the Bakken region of Western North Dakota has led to significant economic opportunity and population growth in the region (Eastern Montana and Western North Dakota). Rapid population growth has many intended and unintended consequences, both positive and negative, on the social and economic environment of the region and, consequently, the population's health and well-being. There are well-documented environmental health issues associated with oil and gas development, including air, water, soil, noise, and light pollution. However, there are additional social, physical and mental health effects that are less well documented. Current research is very limited, but preliminary evidence suggests that women have unmet behavioral health needs due in part to the energy development and population surge in region. In 2013, The U.S. Department of Health and Human Services (HHS), Region VIII Offices, including the Office of the Assistant Secretary for Health (OASH), Office on Women's Health (OWH) began to have discussions directly with state/local contacts about the impact this was having on public health and the specific impacts on women. Given this history and context, the Region VIII OASH/OWH, is undertaking an assessment to examine the impact of energy development on women's behavioral health in Western North Dakota and Eastern Montana.

Likely Respondents: Data for this assessment will be collected through three mechanisms—a survey of women living in the assessment geography, approximately 20 focus groups with a cross-section of women and other key groups living in the assessment geography, and approximately 40 interviews with key leaders and stakeholders across a variety of governmental and non-governmental sectors. Combined, these data collection mechanisms will provide a quantitative and qualitative portrait of women's behavioral health in the region.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Community Survey	500	1	15/60	125
Focus Groups	240	1	90/60	360
Interviews	40	1	1/60	40
Total				

OS specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Darius Taylor,

Information Collection Clearance Officer.

[FR Doc. 2016–23619 Filed 9–29–16; 8:45 am]

BILLING CODE 4150–33–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Investigator Initiated Program Project Applications (P01).

Date: October 13, 2016.

Time: 11:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5601 Fishers Lane, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Jay R. Radke, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room #3G11B National Institutes of Health, NIAID, 5601 Fishers Lane MSC–9823, Bethesda, MD 20892–9823, (240) 669–5046, *jay.radke@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: September 26, 2016.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–23605 Filed 9–29–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Genes, Genomes, and Genetics.

Date: October 24–25, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Baltimore Marriot Inner Harbor at Camden Yards, 110 South Eutaw St., Baltimore, MD 21202.

Contact Person: Tatiana V. Cohen, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive Room 5213, Bethesda, Md 20892, 301–455–2364, *tatiana.cohen@nih.gov.*

Name of Committee: Oncology 1—Basic Translational Integrated Review Group; Cancer Genetics Study Section.

Date: October 27–28, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Kabuki, 1625 Post Street, San Francisco, CA 94115.

Contact Person: Juraj Bies, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Dr., Rm. 4158, MSC 7806, Bethesda, MD 20892, 301 435 1256, *biesj@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Retinal Degeneration, Signaling and Circuitry.

Date: October 31, 2016.

Time: 12:00 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Afia Sultana, Scientific Review Officer, National Institutes of Health, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 435–1220, *sultanaa@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Language.

Date: November 1, 2016.

Time: 10:30 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Maribeth Champoux, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3170, MSC 7848, Bethesda, MD 20892, 301–594–3163, *champoum@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 26, 2016.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–23604 Filed 9–29–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Clinical and Translational Imaging Applications.

Date: October 20, 2016.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Eileen W. Bradley, DSC, Chief, SBIB IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5100, MSC 7854, Bethesda, MD 20892, (301) 435–1179, *bradleye@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–14–066 Early Phase Clinical Trials in Imaging and Image-guided Interventions.

Date: October 21, 2016.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Chiayeng Wang, Ph.D., Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Room 5213, MSC 7852, Bethesda, MD 20892, 301–435–2397, *chiayeng.wang@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Blood Brain Barrier and Drug Delivery.

Date: October 21, 2016.

Time: 12:30 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Afia Sultana, Scientific Review Officer, National Institutes of Health, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 435–1220, *sultanaa@mail.nih.gov.*

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Cancer, Heart, and Sleep Epidemiology B Study Section.

Date: October 24–25, 2016.

Time: 8:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Ellen K. Schwartz, EDD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3144, MSC 7770, Bethesda, MD 20892, 301–828–6146, *schwarel@mail.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Acute Neural Injury and Epilepsy Study Section.

Date: October 26–27, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Contact Person: Seetha Bhagavan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5194, MSC 7846, Bethesda, MD 20892, (301) 237–9838, *bhagavas@csr.nih.gov.*

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Societal and Ethical Issues in Research Study Section.

Date: October 26, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Kabuki, 1625 Post Street, San Francisco, CA 94115.

Contact Person: Karin F. Helmers, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3148, MSC 7770, Bethesda, MD 20892, (301) 254–9975, *helmersk@csr.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Somatosensory and Chemosensory Systems Study Section.

Date: October 26–27, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Washington Plaza Hotel, 10 Thomas Circle NW., Washington, DC 20005.

Contact Person: M. Catherine Bennett, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5182, MSC 7846, Bethesda, MD 20892, 301–435–1766, *bennettc3@csr.nih.gov.*

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Genetics of Health and Disease Study Section.

Date: October 26–27, 2016.

Time: 8:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Wardman Park Washington DC Hotel, 2660 Woodley Road NW., Washington, DC 20008.

Contact Person: Cheryl M. Corsaro, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2204, MSC 7890, Bethesda, MD 20892, (301) 435–1045, *corsaroc@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Neural Trauma and Stroke.

Date: October 26, 2016.

Time: 12:00 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Alexei Kondratyev, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5200, MSC 7846, Bethesda, MD 20892, 301–435–1785, *kondratyevad@csr.nih.gov.*

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Cellular and Molecular Biology of Glia Study Section.

Date: October 27–28, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Old Town, 1767 King Street, Alexandria, VA 22314.

Contact Person: Linda MacArthur, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4187, Bethesda, MD 20892, 301–537–9986, *macarthurlh@csr.nih.gov.*

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Drug Discovery for the Nervous System Study Section.

Date: October 27, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Baltimore Marriott Waterfront, 700 Aliceanna Street, Baltimore, MD 21202.

Contact Person: Mary Custer, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4148, MSC 7850, Bethesda, MD 20892, (301) 435–1164, *custerm@csr.nih.gov.*

Name of Committee: Immunology Integrated Review Group; Immunity and Host Defense Study Section.

Date: October 27–28, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Washington Plaza Hotel, 10 Thomas Circle NW., Washington, DC 20005.

Contact Person: Scott Jakes, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4198, MSC 7812, Bethesda, MD 20892, 301–435–1506, *jakesse@mail.nih.gov.*

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Cancer, Heart, and Sleep Epidemiology A Study Section.

Date: October 27–28, 2016.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 2430 Pennsylvania Ave. NW., Washington, DC 20037.

Contact Person: Denise Wiesch, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3138, MSC 7770, Bethesda, MD 20892, (301) 437–3478, *wieschd@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Using the NIMH Research Domain Criteria (RDOC) Approach to Understand Psychosis (R01).

Date: October 27, 2016.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Julius Cinque, MS, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5186, MSC 7846, Bethesda, MD 20892, (301) 435–1252, *cinquej@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846- 3.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 26, 2016.

Carolyn Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–23603 Filed 9–29–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2016–0061]

Meeting of the Homeland Security Academic Advisory Council

AGENCY: Department of Homeland Security.

ACTION: Committee Management; Notice of Federal Advisory Committee Meeting.

SUMMARY: The Homeland Security Academic Advisory Council will meet on October 19, 2016 in Washington, DC. The meeting will be open to the public.

DATES: The Homeland Security Academic Advisory Council will meet Wednesday, October 19, 2016, from 10:00 a.m. to 3:30 p.m. Please note that the meeting may close early if the Council has completed its business.

ADDRESSES: The meeting will be held at the Woodrow Wilson International Center (Wilson Center) for Scholars, 1300 Pennsylvania Ave. NW., 6th Floor, Moynihan Board Room, Washington, DC 20004. All visitors to the Wilson Center must bring a Government-issued photo ID.

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, send an email to *AcademicEngagement@hq.dhs.gov* or contact Lindsay Burton at 202–447–4686 as soon as possible.

To facilitate public participation, we are inviting public comment on the issues to be considered by the Council prior to the adoption of the recommendations as listed in the **SUPPLEMENTARY INFORMATION** section below. Comments must be submitted in writing no later than Tuesday, October 11, 2016, must include DHS–2016–0061 as the identification number, and may be submitted using *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: AcademicEngagement@hq.dhs.gov.* Include the docket number in the subject line of the message.
- *Fax:* 202–282–1044.
- *Mail:* Academic Engagement; Office of Academic Engagement/Mailstop 0440; Department of Homeland Security; 245 Murray Lane SW., Washington, DC 20528–0440

Instructions: All submissions received must include the words "Department of Homeland Security" and the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket, to read background documents or comments received by the Homeland Security Academic Advisory Council, go to *http://www.regulations.gov* and search for "Homeland Security Academic Advisory Council" then select the notice dated September 30, 2016.

One thirty-minute public comment period will be held during the meeting on October 19, 2016 after the conclusion of the presentation of draft recommendations, but before the Council deliberates. Speakers will be requested to limit their comments to three minutes. Contact the Office of Academic Engagement as indicated below to register as a speaker.

FOR FURTHER INFORMATION CONTACT: Lindsay Burton, Office of Academic Engagement/Mailstop 0440; Department of Homeland Security; 245 Murray Lane SW., Washington, DC 20528–0440, email: *AcademicEngagement@hq.dhs.gov,* tel: 202–447–4686 and fax: 202–282–1044.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the *Federal Advisory Committee Act,* 5 U.S.C. appendix. The Homeland Security Academic Advisory Council provides advice and recommendations to the Secretary and senior leadership on matters relating to student and recent graduate recruitment; international students; academic research; campus and community resiliency, security and preparedness; faculty exchanges; and cybersecurity.

Agenda: Department of Homeland Security senior leadership will provide an update on the Department's efforts in implementing the Council's approved recommendations as well as its recent initiatives with the academic community. The Council subcommittees may provide progress reports and present draft recommendations for action in response to the taskings issued by the Department.

The meeting materials will be posted to the Council Web site at: *http://www.dhs.gov/homeland-security-academic-advisory-council-hsaac* on or before October 14, 2016.

Responsible Dhs Official: Trent Frazier, *AcademicEngagement@hq.dhs.gov,* 202–447–4686.

Dated: September 8, 2016.

Trent Frazier,

Executive Director for Academic Engagement.

[FR Doc. 2016–22123 Filed 9–29–16; 8:45 am]

BILLING CODE 9110–9B–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2591–16; DHS Docket No. USCIS–2011–0014]

RIN 1615–ZB60

Filing Procedures for Employment Authorization and Automatic Extension of Existing Employment Authorization Documents for Liberians Eligible for Deferred Enforced Departure

AGENCY: U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS).

ACTION: Notice.

SUMMARY: On September 28, 2016, President Obama issued a memorandum to the Secretary of Homeland Security

(Secretary), Jeh Charles Johnson, directing him to extend for an additional 18 months the deferred enforced departure (DED) of certain Liberians and to provide for work authorization during that period. The DED extension runs from October 1, 2016 through March 31, 2018. This Notice provides instructions for eligible Liberians on how to apply for the full 18-month extension of employment authorization. Finally, this Notice provides instructions for DED-eligible Liberians on how to apply for permission to travel outside the United States during the 18-month DED period.

USCIS will issue new employment authorization documents (EADs) with a March 31, 2018 expiration date to Liberians whose DED has been extended under the Presidential Memorandum of September 28, 2016, and who apply for EADs under this extension. Given the timeframes involved with processing EAD applications, DHS recognizes that not all DED-eligible Liberians will receive new EADs before their current EADs expire on September 30, 2016. Accordingly, through this Notice, DHS also automatically extends the validity of DED-related EADs for 6 months, through March 31, 2017, and explains how Liberians covered under DED and their employers may determine which EADs are automatically extended and their impact on Employment Eligibility Verification (Form I–9) and E-Verify processes.

DATES: The 18-month extension of DED is valid through March 31, 2018. The 6-month automatic extension of employment authorization for Liberians who are covered under DED, including the extension of their EADs as specified in this Notice, is effective on October 1, 2016, and expires on March 31, 2017.

FOR FURTHER INFORMATION CONTACT:

- You can contact Guillermo Roman-Riefkohl, TPS Program Manager at the Waivers and Temporary Services Branch, Service Center Operations Directorate, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW., Washington, DC 20529–2060; or by phone at 202–272–1533 (this is not a toll-free number).

Note: The phone number provided here is solely for questions regarding this Notice. It is not for individual case status inquiries.

- For further information on DED, including guidance on the application process and additional information on eligibility, please visit the USCIS DED Web page at *http://www.uscis.gov/humanitarian/temporary-protected-status/deferred-enforced-departure.* You can find specific information about DED for Liberians by selecting "DED Granted Country: Liberia" from the menu on the left of the DED Web page.
- Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS Web site at *http://www.USCIS.gov,* or call the USCIS National Customer Service Center at 1–800–375–5283 (TTY 1–800–767–1833). Service is available in English and Spanish.
- Further information will also be available at local USCIS offices upon publication of this Notice.

SUPPLEMENTARY INFORMATION:

Table of Abbreviations

DED—Deferred Enforced Departure
DHS—Department of Homeland Security
EAD—Employment Authorization Document
FNC—Final Nonconfirmation
OSC—Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices
SAVE—USCIS Systematic Alien Verification for Entitlements Program
Secretary—Secretary of Homeland Security
TNC—Tentative Nonconfirmation
TPS—Temporary Protected Status
TTY—Text Telephone
USCIS—U.S. Citizenship and Immigration Services

Presidential Memorandum Extending DED for Certain Liberians

Pursuant to his constitutional authority to conduct the foreign relations of the United States, President Obama has determined that there are compelling foreign policy reasons to again extend Deferred Enforced Departure ("DED") to Liberian nationals who are currently residing in the United States under the existing grant of DED. The President accordingly directed that Liberian nationals (and eligible persons without nationality who last resided in Liberia) who are physically present in the United States, have continuously resided in the United States since October 1, 2002, and who remain eligible for DED through September 30, 2016, be provided DED for an additional 18-month period. *See Presidential Memorandum—Deferred Enforced Departure for Liberians,* September 28, 2016 ("Presidential Memorandum") at *https://www.whitehouse.gov/the-press-office/2016/09/28/presidential-memorandum-deferred-enforced-departure-liberians.* Note that only individuals who held Temporary Protected Status (TPS) on September 30, 2007, the date that a former TPS designation of Liberia terminated, are eligible for DED, provided they have continued to meet all other eligibility criteria established by the President. The President also directed the Secretary to implement the necessary steps to authorize employment authorization for eligible Liberians for 18 months, from October 1, 2016 through March 31, 2018.

Employment Authorization and Filing Requirements

How will I know if I am eligible for employment authorization under the Presidential Memorandum that extended DED for certain Liberians for 18 months?

The DED extension and the procedures for employment authorization in this Notice apply only to Liberian nationals (and persons without nationality who last habitually resided in Liberia) who:

- Are physically present in the United States;
- Have continuously resided in the United States since October 1, 2002; and
- Are under a grant of DED as of September 30, 2016.

The above eligibility criteria are described in the Presidential Memorandum. Only individuals who held TPS on September 30, 2007, the date that a former TPS designation of Liberia terminated, are eligible for DED under this extension, provided they have continued to meet all other eligibility criteria established by the President. This DED extension does not include any individual:

- Who would be ineligible for TPS for the reasons provided in section 244(c)(2)(B) of the Immigration and Nationality Act, 8 U.S.C. 1254a(c)(2)(B);
- Whose removal the Secretary determines is in the interest of the United States;
- Whose presence or activities in the United States the Secretary of State has reasonable grounds to believe would have potentially serious adverse foreign policy consequences for the United States;
- Who has voluntarily returned to Liberia or his or her country of last habitual residence outside the United States;
- Who was deported, excluded, or removed prior to September 26, 2014; or
- Who is subject to extradition.

What will I need to file if I am covered by DED and would like to have evidence of employment authorization?

If you are covered under DED for Liberia, and would like evidence of your employment authorization during the 18-month extension of DED, you must apply for an EAD by filing an Application for Employment Authorization (Form I–765). USCIS will begin accepting these applications on

September 30, 2016. Although this Notice automatically extends DED-related EADs that have a printed validity date of September 30, 2016, for an additional 6 months through March 31, 2017, if you would like evidence of your continued employment authorization through March 31, 2018, you must file an Application for Employment Authorization (Form I–765) as soon as possible to avoid gaps in work authorization. Please carefully follow the Application for Employment Authorization (Form I–765) instructions when completing the application for an EAD. When filing the Application for Employment Authorization (Form I–765), you must:

- Indicate that you are eligible for DED by putting "(a)(11)" in response to Question 16 on Application for Employment Authorization (Form I–765);
- Include a copy of your last Notice of Action (Form I–797) showing that you were approved for TPS as of September 30, 2007, if such copy is available. Please note that evidence of TPS as of September 30, 2007, is necessary to show that you were covered under the previous DED for Liberia through September 30, 2016; and
- Submit the fee for the Application for Employment Authorization (Form I–765).

The regulations require individuals covered under DED who request an EAD to pay the fee prescribed in 8 CFR 103.7 for the Application for Employment Authorization (Form I–765). *See also* 8 CFR 274a.12(a)(11) (employment authorization for DED-covered aliens); and 8 CFR 274a.13(a) (requirement to file EAD application if EAD desired). If you are unable to pay the fee, you may apply for an application fee waiver by completing a Request for Fee Waiver (Form I–912) or submitting a personal letter requesting a fee waiver, and providing satisfactory supporting documentation.

How will I know if USCIS will need to obtain biometrics?

If biometrics are required to produce the secure EAD, you will be notified by USCIS and scheduled for an appointment at a USCIS Application Support Center.

Where do I submit my completed Application for Employment Authorization (Form I–765)?

Mail your completed Application for Employment Authorization (Form I–765) and supporting documentation to the proper address in Table 1.

TABLE 1—MAILING ADDRESSES

If . . .	Mail to . . .
You are applying through the U.S. Postal Service	USCIS, Attn: DED Liberia, P.O. Box 6943, Chicago, IL 60680–6943.
You are using a non-U.S. Postal Service delivery service	USCIS, Attn: DED Liberia, 131 S. Dearborn 3rd Floor, Chicago, IL 60603–5517.

Can I file my Application for Employment Authorization (Form I–765) electronically?

No. Electronic filing is not available when filing Application for Employment Authorization (Form I–765) based on DED.

Extension of Employment Authorization and EADs

May I request an interim EAD at my local USCIS office?

No. USCIS will not issue interim EADs to individuals eligible for DED under the Presidential Memorandum at local offices.

Am I eligible to receive an automatic 6-month extension of my current EAD through March 31, 2017?

You are eligible for an automatic 6-month extension of your EAD if you are a national of Liberia (or person having no nationality who last habitually resided in Liberia), you are currently covered by DED through September 30, 2016, and you are within the class of persons approved for DED by the President.

This automatic extension covers EADs issued on the Employment Authorization Document (Form I–766) bearing an expiration date of September 30, 2016. These EADs must also bear the notation "A–11" on the face of the card under "Category."

When hired, what documentation may I show to my employer as proof of employment authorization and identity when completing Employment Eligibility Verification (Form I–9)?

You can find a list of acceptable document choices on the "Lists of Acceptable Documents" for Employment Eligibility Verification (Form I–9). You can find additional detailed information on the USCIS I–9 Central Web page at *http://www.uscis.gov/I-9Central*. Employers are required to verify the identity and employment authorization of all new employees by using Employment Eligibility Verification (Form I–9). Within 3 days of hire, an employee must present proof of identity and employment authorization to his or her employer.

You may present any document from List A (reflecting both your identity and employment authorization), or one document from List B (reflecting identity) together with one document from List C (reflecting employment authorization). You may present an acceptable receipt for List A, List B, or List C documents as described in the Employment Eligibility Verification (Form I–9) Instructions. An EAD is an acceptable document under "List A." Employers may not reject a document based on a future expiration date.

If your EAD has an expiration date of September 30, 2016, and states "A–11" under "Category," it has been extended automatically for 6 months by virtue of this **Federal Register** Notice, and you may choose to present your EAD to your employer as proof of identity and employment authorization for Employment Eligibility Verification (Form I–9) through March 31, 2017 (see the subsection titled "*How do my employer and I complete the Employment Eligibility Verification (Form I–9) using an automatically extended EAD for a new job?*" for further information). To minimize confusion over this extension at the time of hire, you may also show your employer a copy of this **Federal Register** Notice confirming the automatic extension of employment authorization through March 31, 2017. As an alternative to presenting your automatically extended EAD, you may choose to present any other acceptable document from List A, a combination of one selection from List B and one selection from List C, or a valid receipt.

What documentation may I show my employer if I am already employed but my current DED-related EAD is set to expire?

Even though EADs with an expiration date of September 30, 2016 that state "A–11" under "Category" have been automatically extended for 6 months by virtue of this **Federal Register** Notice, your employer will need to ask you about your continued employment authorization by September 30, 2016 to meet its responsibilities for Employment Eligibility Verification (Form I–9) compliance. You should explain to your employer that USCIS has automatically extended your EAD through March 31, 2017. Your employer may need to reinspect your automatically extended EAD to check the expiration date and code and to record the updated expiration date on your Employment Eligibility Verification (Form I–9) if he or she did not keep a copy of this EAD when you initially presented it. However, your employer does not need a new document to reverify your employment authorization until March 31, 2017, the expiration date of the automatic extension. Instead, you and your employer must make corrections to the employment authorization expiration dates in Section 1 and Section 2 of Employment Eligibility Verification (Form I–9) (see the subsection titled "*What corrections should my current employer and I make to Employment Eligibility Verification (Form I–9) if my EAD has been automatically extended?*" for further information). In addition, you may also show this **Federal Register** Notice to your employer to explain what to do for Employment Eligibility Verification (Form I–9).

By March 31, 2017, the expiration date of the automatic extension, your employer must reverify your employment authorization. At that time, you must present any document from List A or any document from List C on Employment Eligibility Verification (Form I–9) to reverify employment authorization, or an acceptable List A or List C receipt described in the Employment Eligibility Verification (Form I–9) Instructions. Your employer should complete either Section 3 of the Employment Eligibility Verification (Form I–9) originally completed for the employee or, if this Section has already been completed or if the version of Employment Eligibility Verification (Form I–9) has expired (check the date in the upper right-hand corner of the form), complete Section 3 of a new Employment Eligibility Verification (Form I–9) of the most current version. Note that employers may not specify which List A or List C document employees must present, and cannot reject an acceptable receipt.

Can my employer require that I produce any other documentation to prove my status, such as proof of my Liberian citizenship?

No. When completing Employment Eligibility Verification (Form I–9), including re-verifying employment authorization, employers must accept any documentation that appears on the "Lists of Acceptable Documents" for Employment Eligibility Verification (Form I–9) that reasonably appears to be genuine and that relates to you, or an acceptable List A, List B, or List C receipt. Employers may not request documentation that does not appear on the Lists of Acceptable Documents for Employment Eligibility Verification (Form I–9). Therefore, employers may not request proof of Liberian citizenship when completing Employment Eligibility Verification (Form I–9) for new hires, making corrections, or reverifying the employment authorization of current employees. If presented with EADs that have been automatically extended, employers should accept such EADs as valid List A documents so long as the EADs reasonably appear to be genuine and to relate to the employee. Refer to the *Note to Employees* section of this Notice for important information about your rights if your employer rejects lawful documentation, requires additional documentation, or otherwise discriminates against you based on your citizenship or immigration status, or your national origin.

What happens after March 31, 2017, for purposes of employment authorization?

After March 31, 2017, employers may no longer accept the EADs that were issued under the previous DED extension of Liberia that this **Federal Register** Notice automatically extended. Before that time, however, USCIS will endeavor to issue new EADs to eligible individuals covered by DED who request them. These new EADs will have an expiration date of March 31, 2018, and can be presented to your employer for completion of Employment Eligibility Verification (Form I–9). Alternatively, you may choose to present any other legally acceptable document or combination of documents listed on the Lists of Acceptable Documents for Employment Eligibility Verification (Form I–9).

How do my employer and I complete Employment Eligibility Verification (Form I–9) using an automatically extended EAD for a new job?

When using an automatically extended EAD to fill out Employment Eligibility Verification (Form I–9) for a new job prior to March 31, 2017, you and your employer should do the following:

1. For Section 1, you should:
   a. Check "An alien authorized to work";
   b. Write your alien number (USCIS number or A-number) in the first space (your EAD or other document from DHS will have your USCIS number or A-number printed on it; the USCIS Number is the same as your A-number without the A prefix); and
   c. Write the automatically extended EAD expiration date (March 31, 2017) in the second space.
2. For Section 2, employers should record the:
   a. Document title;
   b. Document number; and
   c. Automatically extended EAD expiration date (March 31, 2017).

By March 31, 2017, employers must reverify the employee's employment authorization in Section 3 of Employment Eligibility Verification (Form I–9).

What corrections should my current employer and I make to Employment Eligibility Verification (Form I–9) if my EAD has been automatically extended?

If you are an existing employee who presented a DED-related EAD that was valid when you first started your job, but that EAD has now been automatically extended, your employer may need to reinspect your automatically extended EAD if your employer does not have a copy of the EAD on file, and you and your employer should correct your previously completed Employment Eligibility Verification (Form I–9) as follows:

1. For Section 1, you should:
   a. Draw a line through the expiration date in the second space;
   b. Write "March 31, 2017" above the previous date;
   c. Write "DED Ext." in the margin of Section 1; and
   d. Initial and date the correction in the margin of Section 1.
2. For Section 2, employers should:
   a. Draw a line through the expiration date written in Section 2;
   b. Write "March 31, 2017" above the previous date;
   c. Write "DED Ext." in the margin of Section 2; and
   d. Initial and date the correction in the margin of Section 2.

By March 31, 2017, when the automatic extension of EADs expires, employers must reverify the employee's employment authorization in Section 3.

If I am an employer enrolled in E-Verify, what do I do when I receive a "Work Authorization Documents Expiring" alert for an automatically extended EAD?

E-Verify has automated the verification process for employees whose DED was automatically extended in a **Federal Register** notice. If you have an employee covered under DED who provided a DED-related EAD when he or she first started working for you, you may receive a "Work Authorization Documents Expiring" case alert when the auto-extension period for this EAD is about to expire. By March 31, 2017, you must reverify employment authorization in Section 3 of the Employment Eligibility Verification (Form I–9). Employers should not use E-Verify for reverification.

Note to All Employers

Employers are reminded that the laws requiring proper employment eligibility verification and prohibiting unfair immigration-related employment practices remain in full force. This Notice does not supersede or in any way limit applicable employment verification rules and policy guidance, including those rules setting forth reverification requirements. For general questions about the employment eligibility verification process, employers may call USCIS at 888–464–4218 (TTY 877–875–6028) or email USCIS at *I–9Central@dhs.gov.* Calls and emails are accepted in English and many other languages. For questions about avoiding discrimination during the employment eligibility verification process (I–9 and E-Verify), employers may also call the U.S. Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) Employer Hotline, at 800–255–8155 (TTY 800–237–2515), which offers language interpretation in numerous languages, or email OSC at *osccrt@usdoj.gov.*

Note to Employees

For general questions about the employment eligibility verification process, employees may call USCIS at 888–897–7781 (TTY 877–875–6028) or email at *I–9Central@dhs.gov.* Calls are accepted in English, Spanish and many other languages. Employees or applicants may also call the OSC Worker Information Hotline at 800–255–7688 (TTY 800–237–2515) for information regarding employment discrimination based upon citizenship, immigration status, or national origin, including discrimination related to Employment Eligibility Verification (Form I–9) and E-Verify. The OSC Worker Information Hotline provides language interpretation in numerous languages.

To comply with the law, employers must accept any document or combination of documents from the List of Acceptable Documents if the documentation reasonably appears to be genuine and to relate to the employee, or an acceptable List A, List B, or List C receipt described in the Employment Eligibility Verification (Form I–9) Instructions. Employers may not require extra or additional documentation beyond what is required for Employment Eligibility Verification (Form I–9) completion. Further, employers participating in E-Verify who receive an E-Verify case result of "Tentative Nonconfirmation" (TNC) must promptly inform employees of the TNC and give such employees an opportunity to contest the TNC. A TNC case result means that the information entered into E-Verify from Employment Eligibility Verification (Form I–9) differs from Federal or State government records.

Employers may not terminate, suspend, delay training, withhold pay, lower pay, or take any adverse action against an employee based on the employee's decision to contest a TNC or because the case is still pending with E-Verify. A Final Nonconfirmation (FNC) case result is received when E-Verify cannot verify an employee's employment eligibility. An employer may terminate employment based on a case result of FNC. Work-authorized employees who receive an FNC may call USCIS for assistance at 888–897–7781 (TTY for the hearing impaired is at 877–875–6028). To report an employer for discrimination in the E-Verify process based on citizenship or immigration status, or based on national origin, contact OSC's Worker Information Hotline at 800–255–7688 (TTY 800–237–2515). Additional information about proper nondiscriminatory Employment Eligibility Verification (Form I–9) and E-Verify procedures is available on the OSC Web site at *http://www.justice.gov/crt/about/osc/* and the USCIS Web site at *http://www.dhs.gov/E-verify.*

Note Regarding Federal, State, and Local Government Agencies (Such as Departments of Motor Vehicles)

While Federal Government agencies must follow the guidelines laid out by the Federal Government, state and local government agencies establish their own rules and guidelines when granting certain benefits. Each State may have different laws, requirements, and determinations about what documents you need to provide to prove eligibility for certain benefits. Whether you are applying for a Federal, State, or local government benefit, you may need to provide the government agency with documents that show you are covered by DED and/or show you are authorized to work based on DED. Examples are:

(1) Your unexpired EAD that has been automatically extended, or your EAD that has not expired;

(2) A copy of this **Federal Register** Notice if your EAD is automatically extended under this Notice;

(3) A copy of your past Application for Temporary Protected Status Notice of Action (Form I–797), if you received one from USCIS, coupled with a copy of the Presidential Memorandum extending DED for Liberians; and/or

(4) If there is an automatic extension of work authorization, a copy of the fact sheet from the USCIS DED Web site that provides information on the automatic extension.

Check with the government agency regarding which document(s) the agency will accept. You may also provide the agency with a copy of this **Federal Register** Notice.

Some benefit-granting agencies use the USCIS Systematic Alien Verification for Entitlements Program (SAVE) to verify the current immigration status of applicants for public benefits. You can check the status of your SAVE verification by using CaseCheck at the following link: *https://save.uscis.gov/casecheck/,* then by clicking the "Check Your Case" button. CaseCheck is a free and fast service that lets you follow the progress of your SAVE verification using your date of birth and one immigration identifier number. If such an agency has denied your application based solely or in part on a SAVE response, the agency must offer you the opportunity to appeal the decision in accordance with the agency's procedures. If the agency has received and acted upon or will act upon a SAVE verification and you do not believe the response is correct, you may make an InfoPass appointment for an in-person interview at a local USCIS office. Detailed information on how to make corrections or make an appointment can be found at the SAVE Web site at *http://www.uscis.gov/save,* then by choosing "For Benefit Applicants" from the menu on the left and then selecting "Questions about Your Records?"

Travel Authorization and Advance Parole

Individuals covered under DED who would like to travel outside of the United States must apply for and receive advance parole by filing an Application for Travel Document (Form I–131) with required fee before departing from the United States. *See* 8 CFR 223.2(a). DHS has the discretion to determine whether to grant advance parole and cannot guarantee advance parole in all cases. In addition, possession of an advance parole document does not guarantee that you will be permitted to re-enter the United States, as that is a decision that will be made by an immigration officer at the port of entry upon your return. If you seek advance parole to travel to Liberia or to your country of last habitual residence outside the United States, you will risk being found ineligible to re-enter the United States under DED because the Presidential Memorandum excludes persons "who have voluntarily returned to Liberia or his or her country of last habitual residence outside the United States."

You may submit your completed Application for Travel Document (Form I–131) with your Application for Employment Authorization (Form I–765). If you are filing the Application for Travel Document (Form I–131) concurrently with your Application for Employment Authorization (Form I–765), please submit both applications and supporting documentation to the proper address in Table 1.

If you choose to file an Application for Travel Document (Form I–131) separately, please submit the application along with supporting documentation that you qualify for DED to the proper address in Table 2.

TABLE 2—MAILING ADDRESSES

If . . .	Mail to . . .
You are applying through the U.S. Postal Service	USCIS, Attn: DED Liberia, P.O. Box 6943, Chicago, IL 60680–6943.
You are using a non-U.S. Postal Service delivery service	USCIS, Attn: DED Liberia, 131 S. Dearborn, 3rd Floor, Chicago, IL 60603–5517.

If you have a pending or approved Application for Employment Authorization (Form I–765), please submit the Notice of Action (Form I–797) along with your Application for Travel Document (Form I–131) and supporting documentation.

León Rodríguez,

Director, U.S. Citizenship and Immigration Services.

[FR Doc. 2016–23798 Filed 9–28–16; 4:15 pm]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0009]

Agency Information Collection Activities: Petition for Nonimmigrant Worker, Form I–129; Extension, Without Change, of a Currently Approved Collection

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 30-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection notice was previously published in the **Federal Register** on July 19, 2016, at 81 FR 46951, allowing for a 60-day public comment period. USCIS did receive 16 comments in connection with the 60-day notice.

DATES: The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until October 31, 2016. This process is conducted in accordance with 5 CFR 1320.10.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be directed to the OMB USCIS Desk Officer via email at *oira_submission@omb.eop.gov.* Comments may also be submitted via fax at (202) 395–5806. (This is not a toll-free number.) All submissions received must include the agency name and the OMB Control Number 1615–0009.

You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make. For additional information please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, 20 Massachusetts Avenue NW., Washington, DC 20529–2140, Telephone number (202) 272–8377 (This is not a toll-free number; comments are not accepted via telephone message.). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS Web site at *http://www.uscis.gov,* or call the USCIS National Customer Service Center at (800) 375–5283; TTY (800) 767–1833.

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2005–0030 in the search box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection Request:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition for Nonimmigrant Worker.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–129; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or other for-profit; Not-for-profit institutions. This form is used by an employer to petition for aliens to come to the U.S. temporarily to perform services, labor, and training or to request extensions of stay or changes in nonimmigrant status for nonimmigrant workers.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–129 is 333,891 and the estimated hour burden per response is 2.34 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,631,400 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $78,027,021.25.

Dated: September 27, 2016.

Samantha Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2016–23682 Filed 9–29–16; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5909–N–71]

30-Day Notice of Proposed Information Collection: Promise Zones Reporting

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* October 31, 2016.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Anna P. Guido, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email Anna P. Guido at *Anna.P.Guido@hud.gov* or telephone 202–402–5533. This is not a toll-free number. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Guido.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on July 21, 2016 at 81 FR 47404.

A. Overview of Information Collection

Title of Information Collection: Promise Zones Reporting.

OMB Control Number: 2501—New.

Type of Request: New collection.

HUD–XXXX—Monthly Grant Report.

HUD–XXXX—Quarterly and Annual Strategic Plan.

HUD–XXXX—Non-Federal Investments.

HUD–XXXX—New Neighborhood Amenities.

HUD–XXXX—Annual Report.

Description of the need for the information and proposed use: This collection is a new collection that will be collecting information for reporting purposes. This collection will reference the actual application collection that was approved under OMB 2501–033. HUD designated fourteen communities as urban Promise Zones between 2014 and 2016. Under the Promise Zones initiative, the federal government will invest and partner with high-poverty urban, rural, and tribal communities to create jobs, increase economic activity, improve educational opportunities, leverage private investment, and reduce violent crime. Additional information about the Promise Zones initiative can be found at *www.hud.gov/promisezones,* and questions can be addressed to *promisezones@hud.gov.* The federal administrative duties pertaining to these designations shall be managed and executed by HUD for ten years from the designation dates pursuant. The Promise Zone Initiative supports HUD's responsibilities under sections 2 and 3 of the HUD Act, 42 U.S.C. 3531–32, to assist the President in achieving maximum coordination of the various federal activities which have a major effect upon urban community, suburban, or metropolitan development; to develop and recommend the President policies for fostering orderly growth and development of the Nation's urban areas; and to exercise leadership, at the direction of the President, in coordinating federal activities affecting housing and urban development.

To facilitate communication between local and federal partners, HUD proposes that Promise Zone Lead Organizations submit minimal reports and documents to support collaboration and problem solving between local and federal partners. These reports will also assist in communications and stakeholder engagement, both locally and nationally.

Respondents (*i.e.* affected public): Fourteen Promise Zone Lead Organizations.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
Monthly Federal Grants Update	14	12	168	2	336	$30	$10,080
Quarterly Report: Quarterly and Annual Strategic Plan	14	4	56	10	560	30	16,800
Quarterly Report: Non-Federal Investments	14	4	56	15	840	30	25,200
Quarterly Report: New Neighborhood Amenities	14	4	56	4	224	30	6,720
Annual Report	14	1	14	4	56	30	1,680
Public Communications materials	14	4	56	5	280	30	8,400

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
Total	14				2,296		68,880

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: September 23, 2016.

Anna P. Guido,

Department Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. 2016–23686 Filed 9–29–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5909–N–70]

30-Day Notice of Proposed Information Collection: Notice of Proposed Information Collection for License for the Use of Personally Identifiable Information Protected Under the Privacy Act of 1974

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for renewal of the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* October 31, 2016.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Anna P. Guido, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Room 4176, Washington, DC 20410–5000; telephone 202–402–5535 (this is not a toll-free number) or email at *Anna.P.Guido@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Anna P. Guido, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; email Anna P. Guido at *Anna.P.Guido@hud.gov* or telephone 202–402–5535. This is not a toll-free number. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

Copies of available documents submitted to OMB may be obtained from Ms. Guido.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for renewal of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on July 27, 2016 at 81 FR 49247.

A. Overview of Information Collection

Title of Information Collection: License for the Use of Personally Identifiable Information Protected Under the Privacy Act of 1974.

OMB Control Number: 2528–0297.

Type of Request: Revision of a currently approved collection.

Form Number: None.

Description of the need for the information and proposed use: The United States Department of Housing and Urban Department (HUD) has collected and maintains personally identifiable information, the confidentiality of which is protected by the Privacy Act of 1974 (5 U.S.C 522A). HUD wishes to make the data available for statistical, research, or evaluation purposes for qualified organizations capable of research and analysis consistent with the statistical, research, or evaluation purposes for which the data were provided or are maintained, but only if the data are used and protected in accordance with the terms and conditions stated in this license (License). Upon receipt of such assurance of qualification and capability, it is hereby agreed between HUD and (Name of the organization to be licensed) that the license be granted.

TABLE 1—DATA COLLECTION ACTIVITIES AND ANTICIPATED BURDEN

Information collection (instruments)	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
Applicants	12	1	12	1	12	$50.00	$600.00
Quarterly Reports	0	0	0	0	0	0	0
Annual Reports	40	1	40	1	40	44.00	1,760.00
Final Reports	6	1	6	0.25 (15 minutes)	1.5	50.00	75.00
Recordkeeping	12	3	36	0.5 (30 minutes)	18	20.00	360.00
Total Burden Hours					71.5	164.00	2,795.00

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

HUD encourages interested parties to submit comments in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: September 22, 2016.

Anna P. Guido,

Department Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. 2016–23685 Filed 9–29–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5907–N–40]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7266, Washington, DC 20410; telephone (202) 402–3970; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), call the toll-free Title V information line at 800–927–7588 or send an email to *title5@hud.gov.*

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, and suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for ''off-site use only'' recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to: Ms. Theresa M. Ritta, Chief Real Property Branch, The Department of Health and Human Services, Room 12–07, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, (301)–443–2265 (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 or send an email to *title5@hud.gov* for detailed instructions, or write a letter to Ann Marie Oliva at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*e.g.*, acreage, floor plan, condition of property, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: COE: Ms. Brenda Johnson-Turner, HQUSACE/CEMP–CR, 441 G Street NW., Washington, DC 20314, (202)–761–7238; GSA: Mr. Flavio Peres, General Services Administration, Office of Real Property Utilization and Disposal, 1800 F Street NW., Room 7040, Washington, DC 20405, (202) 501–0084; INTERIOR: Mr. Michael Wright, Acquisition & Property Management, Department of the Interior, 3960 N. 56th Ave. #104, Hollywood, FL 33021; (443) 223–4639; NASA: Mr. William Brodt, National Aeronautics AND Space Administration, 300 E Street SW., Room 2P85, Washington, DC 20546, (202)–358–1117; NAVY: Ms. Nikki Hunt, Department of the Navy, Asset Management Division, Naval Facilities Engineering Command, Washington Navy Yard, 1330 Patterson Ave. SW., Suite 1000, Washington, DC 20374; (202)–685–9426; (These are not toll-free numbers).

Dated: September 22, 2016.

Tonya Proctor,

Deputy Director, Office of Special Needs Assistance Programs.

TITLE V, FEDERAL SURPLUS PROPERTY PROGRAM FEDERAL REGISTER REPORT FOR 09/30/2016

Suitable/Available Properties

Building

Maryland

Suitland Trailer
4401 Suitland Rd.
Suitland MD 20746
Landholding Agency: GSA
Property Number: 54201630016
Status: Unutilized
GSA Number: MD1838
Directions: Off-site removal only; no future agency need; 12,000 gsf; office; relocation extremely difficult due to size; transferee responsible for all expenses related to removal of property; property mothballed for 8+ years; located on highly secured federal campus; major repairs/rehab needed
Comments: contact GSA for more details on accessibility and other conditions.

Texas

Sierra Border Patrol Station
908 West El Paso Street
Sierra Blanco TX 79851
Landholding Agency: GSA
Property Number: 54201630013
Status: Surplus
GSA Number: 7–X–TX–11641–AB
Directions: Landholding Agency: U.S. Customs Border Protection; Disposal Agency: GSA
Comments: office 1,200 sq. ft.; storage; 1,200 sq. ft.; 12+ months vacant; good to fair conditions; contact GSA for more information.

Unsuitable Properties

Building

Alabama

Naval Air Station
Whiting Field
21754 Woodlawn Rd.
Summerdale AL 36580
Landholding Agency: Navy
Property Number: 77201630033
Status: Underutilized
Comments: public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

Alaska

Carpentry Shop Building 28
Katmai National Park & Preserve
No. 4688 Lot 4
King Salmon AK 99613
Landholding Agency: Interior
Property Number: 61201630018
Status: Unutilized
Comments: documented deficiencies: structure has extensive deterioration, found to be structurally unsound or in collapsed condition.
Reasons: Extensive deterioration

California

NASA Ames Research Center
NASA/BE 1063/SAP Property ID 127; Property
Number: T–20; Name: Mixed Use Modular Fac.
Moffett CA 94035
Landholding Agency: NASA
Property Number: 71201630014
Status: Underutilized
Comments: documented deficiencies: roof leaking; caving in; clear threat to physical safety.
Reasons: Extensive deterioration

Guam

Administrative Office,
Building 100 Tumon Tank Farm
Building 100, Marine Corps Drive
Tamuning GU
Landholding Agency: Navy
Property Number: 77201630031
Status: Underutilized
Comments: public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

Idaho

CF–637 Waste Storage Bunker
Idaho National Laboratory #950990
Scoville ID 83415
Landholding Agency: GSA
Property Number: 54201630012
Status: Excess
GSA Number: 9–B–WA–00013–S
Directions: Disposal Agency: GSA; Land Holding Agency: DOE
Comments: located entirely w/in Idaho Nat'l Lab, a Dept. of Energy secured facility where public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

Kansas

2 Buildings
2453 Lake Road
Fall River KS 67047
Landholding Agency: COE
Property Number: 31201630024
Status: Unutilized
Comments: documented deficiencies: very dilapidated, ceiling has fallen in, flooring has rotted & walls have considerable damage.
Reasons: Extensive deterioration

Maryland

Admiral House A; FRC White Oak
10705–A Crouch Rd.
Silver Springs MD 20903
Landholding Agency: GSA
Property Number: 54201630014
Status: Unutilized
GSA Number: MD1832ZZ
Directions: Highly secured federal campus; only federal agencies allowed to occupy space on campus
Comments: property located within floodway which has not been corrected or contained; public access denied and no alternative method to gain access without compromising national security.
Reasons: Floodway

Admiral House B
10705–B Crouch Rd.
Silver Springs MD 20903
Landholding Agency: GSA
Property Number: 54201630015
Status: Unutilized
GSA Number: MD1833ZZ
Directions: Highly secured federal campus; only federal agencies allowed to occupy space on campus
Comments: property located within floodway which has not been corrected or contained; public access denied and no alternative method to gain access without compromising national security.
Reasons: Floodway

Suitland Federal Building 2
4301 Suitland Rd.
Suitland MD 20746
Landholding Agency: GSA
Property Number: 54201630017
Status: Unutilized
GSA Number: MD0044
Comments: highly secured federal campus; only federal agencies allowed to occupy space on campus; public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

Suitland Heating/Cooling Plant
4105 Suitland Rd.
Suitland MD 20746
Landholding Agency: GSA
Property Number: 54201630018
Status: Underutilized
GSA Number: MD0106
Directions: GSA Inventory Nos.: MD0106 & MD0182
Comments: highly secured federal campus; only federal agencies allowed to occupy space on campus; public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

6 Buildings
Assateague Island National Seashore
Berlin MD 21811
Landholding Agency: Interior
Property Number: 61201630017
Status: Excess
Directions: Storage Shed #1, 2, 3, 4, 5, 6
Comments: documented deficiencies: Structures has extensive deterioration, found to be structurally unsound or in collapsed condition.
Reasons: Extensive deterioration

3 Buildings
Webster Field Rd.
Inigoes MD 20684
Landholding Agency: Navy
Property Number: 77201630032
Status: Underutilized
Directions: 8108; 8136; 8143
Comments: public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

[FR Doc. 2016–23558 Filed 9–29–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–ES–2015–N163; FXES11130400000EA–123–FF04EF1000]

Endangered and Threatened Wildlife and Plants; Availability of Proposed Low-Effect Habitat Conservation Plans, Clay, Lake, Marion, and Putnam County, FL

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comment/information.

SUMMARY: We, the Fish and Wildlife Service (Service, USFWS), have received an application for an incidental take permit (ITP) under the Endangered Species Act of 1973, as amended (Act). Vulcan Materials Company requests a 30-year ITP. We request public comment on the permit application and accompanying proposed habitat conservation plan (HCP), as well as on our preliminary determination that the plan qualifies as low-effect under the National Environmental Policy Act (NEPA). To make this determination, we used our environmental action statement and low-effect screening form, which are also available for review.

DATES: To ensure consideration, please send your written comments by October 31, 2016.

ADDRESSES: If you wish to review the application and HCP, you may request documents by email, U.S. mail, or phone (see below). These documents are also available for public inspection by appointment during normal business hours at the office below. Send your comments or requests by any one of the following methods.

Email: northflorida@fws.gov, Attn: Permit number TE96856B–0.

Fax: Field Supervisor, (904) 731–3191, Attn: Permit number TE96856B–0.

U.S. mail: Field Supervisor, Jacksonville Ecological Services Field Office, Attn: Permit number TE96856B–0, U.S. Fish and Wildlife Service, 7915 Baymeadows Way, Suite 200, Jacksonville, FL 32256.

In-person drop-off: You may drop off information during regular business hours at the above office address.

FOR FURTHER INFORMATION CONTACT: Erin M. Gawera, telephone: (904) 731–3121; email: *erin_gawera@fws.gov.*

SUPPLEMENTARY INFORMATION:

Background

Section 9 of the Act (16 U.S.C. 1531 *et seq.*) and our implementing Federal regulations in the Code of Federal Regulations (CFR) at 50 CFR 17 prohibit the "take" of fish or wildlife species listed as endangered or threatened. Take of listed fish or wildlife is defined under the Act as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" (16 U.S.C. 1532). However, under limited circumstances, we issue permits to authorize incidental take—*i.e.,* take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

Regulations governing incidental take permits for threatened and endangered species are at 50 CFR 17.32 and 17.22, respectively. The Act's take prohibitions do not apply to federally listed plants on private lands unless such take would violate State law. In addition to meeting other criteria, an incidental take permit's proposed actions must not jeopardize the existence of federally listed fish, wildlife, or plants.

Applicants' Proposal

Vulcan Materials Company

Vulcan Materials Company proposes incremental mining of sand reserves throughout the 8,660.71-acre permitted mining limits of seven mine sites (Astatula Sand Plant, Goldhead Sand Plant, Keuka Sand Plant, Lake Sand Plant, Marion Sand Plant, Turnpike Sand Plant, and Weirsdale Sand Plant) over the life of the mines, and seeks a 30-year permit for take of foraging and sheltering habitat occupied by scrub-jay and sand skink. The project sites are located in Clay, Lake, Marion, and Putnam Counties within North and Central Florida, Florida. The extent of direct impacts in future phases is currently undetermined; however, based on the current USFWS guidelines, approximately 1,489.31 acres of the site appear to be suitable for the sand skink, and approximately 26 acres of the site appear to be occupied by the Florida scrub-jay. In advance of the progression of the mining operations into future phases, quantitative surveys will be conducted for the Florida scrub-jay and sand skinks, to determine the occupancy and extent of occupancy within suitable areas. The completion of these surveys will be subject to the Service's approved survey guidelines at the time the surveys are conducted. The applicant proposes to mitigate for impacts to occupied skink habitat within future phases at a ratio of 2:1 by purchasing two mitigation bank credits at the Tiger Creek Conservation Bank or another permitted USFWS skink conservation bank per every 1 acre of impact. The applicant proposes to mitigate for impacts to occupied scrub-jay habitat within future phases at a ratio of 2:1 by purchasing credits at a permitted USFWS approved scrub-jay conservation bank or contributing an appropriate amount to the Florida Scrub-jay Conservation Fund as per mitigation guidelines at the time the surveys are conducted.

Our Preliminary Determination

We have determined that the applicants' proposals, including the proposed mitigation and minimization measures, would have minor or negligible effects on the species covered in their HCPs. Therefore, we have determined that the incidental take permit for this project is "low effect" and qualifies for categorical exclusion under the National Environmental Policy Act (NEPA), as provided by 43 CFR 46.205 and 43 CFR 46.210. A low-effect HCP is one involving (1) Minor or negligible effects on federally listed or candidate species and their habitats, and (2) minor or negligible effects on other environmental values or resources.

Next Steps

We will evaluate the HCPs and comments we receive to determine whether the ITP applications meet the requirements of section 10(a) of the Act (16 U.S.C. 1531 *et seq.*). If we determine that the application meets these requirements, we will issue ITP number #TE96856B–0. We will also evaluate whether issuance of the section 10(a)(1)(B) ITPs complies with section 7 of the Act by conducting an intra-Service section 7 consultation. We will use the results of this consultation, in combination with the above findings, in our final analysis to determine whether or not to issue the ITP. If the requirements are met, we will issue the permit to the applicant.

Public Comments

If you wish to comment on the permit application, HCP, and associated documents, you may submit comments by any one of the methods in **ADDRESSES**.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comments, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

We provide this notice under Section 10 of the Act and NEPA regulations (40 CFR 1506.6).

Dated: September 22, 2016.

Jay B. Herrington,

Field Supervisor, Jacksonville Field Office, Southeast Region.

[FR Doc. 2016–23646 Filed 9–29–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[16X L1109AF LLUT980300–L12200000.XZ0000–24–1A]

Postponement of Utah Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Postponement of October 2016 Utah Resource Advisory Council meeting.

SUMMARY: The October 2016 Utah Resource Advisory Council meeting has been postponed.

DATES: The meeting was scheduled for Oct. 17–18, 2016, in Green River, Utah and will be rescheduled at a later date.

FOR FURTHER INFORMATION CONTACT: Lola Bird, Public Affairs Specialist, Bureau of Land Management, Utah State Office, 440 West 200 South, Suite 500, Salt Lake City, Utah 84101; phone (801) 539–4033; or, *lbird@blm.gov.*

Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to leave a message or question for the above individual. The FIRS is available 24 hours a day, seven days a week. Replies are provided during normal business hours.

Authority: 43 CFR 1784.4–1.

Jenna Whitlock,

Acting State Director.

[FR Doc. 2016–23640 Filed 9–29–16; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLOR936000.L1440000.ET0000. 16XL1109AF; HAG 16–0207]

Notice of Amended Proposed Withdrawal and Notice of Public Meetings; Oregon

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Assistant Secretary of the Interior for Land and Minerals Management has approved an amendment to a previously filed application to withdraw public domain and Revested Oregon California Railroad lands (O&C) managed by the Bureau of Land Management (BLM) and National Forest System (NFS) lands managed by the U.S. Forest Service (Forest Service) while Congress considers legislation to permanently withdraw those lands. Such legislation is currently pending in the 114th Congress as S. 346 and H.R. 682 and identified as the "Southwestern Oregon Watershed and Salmon Protection Act of 2015." This Notice amends the prior proposal notice of which was published in the **Federal Register** on June 29, 2015, to increase the proposed withdrawal term from 5 years to 20 years, and to add that the withdrawal is also being proposed at the request of the BLM and the Forest Service, to protect the Southwestern Oregon watershed from possible adverse effects of mineral development. This notice gives the public an opportunity to comment on the amended application and announces the dates, times, and locations of public meetings.

DATES: Comments must be received by December 29, 2016.

FOR FURTHER INFORMATION CONTACT: Jacob Childers, Oregon State Office, Bureau of Land Management, at 503–808–6225 or by email *jcchilders@blm.gov,* or Candice Polisky, USFS Pacific Northwest Region, at 503–808–2479. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to reach either of the above individuals. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individuals. You will receive a reply during normal business hours.

ADDRESSES: Written comments should be sent to the Bureau of Land Management, Oregon State Office (OR936), P.O. Box 2965, Portland, Oregon 97208–2965.

SUPPLEMENTARY INFORMATION: The BLM and Forest Service amended petition/application requests the Secretary to withdraw, subject to valid existing rights, approximately 5,216.18 acres of BLM-managed public domain and O&C lands and 95,805.53 acres of Forest Service-managed NFS lands from settlement, sale, location, and entry under the public land laws; location and entry under the United States mining laws, and operation of the mineral and geothermal leasing laws, for a period of 20 years while Congress considers legislation to permanently withdraw those areas and, at the request of the BLM and the Forest Service, to protect the Southwestern Oregon watershed from possible adverse effects of mineral development. The lands identified by notice in the **Federal Register** on June 29, 2015 (80 FR 37015), are incorporated by reference. The areas described aggregate 101,021.71 acres in Josephine and Curry Counties.

The approved petition/application constitutes a withdrawal proposal of the Secretary of the Interior (43 CFR 2310.1–3(e)).

Records relating to the application may be examined by contacting the BLM at the above address and phone number.

For a period until December 29, 2016, all persons who wish to submit comments, suggestions, or objections in connection with the amended withdrawal application may present their views in writing to the Oregon State Director, BLM, at the above address or by email at *blm_or_wa_withdrawals@blm.gov.* Information regarding the amended withdrawal application will be available for public review at the BLM Oregon State Office during regular business hours, 8:45 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. Individuals who submit written comments may request confidentiality by asking us in your comment to withhold your personal identifying information from public review; however, we cannot guarantee that we will be able to do so.

Notice is hereby given that public meetings will be held in connection with the amended proposed withdrawal. A notice of the times and places of the public meetings will be announced at least 30 days in advance in the **Federal Register** and through local media, newspapers, and the BLM and the USFS Web sites.

The amended application does not affect the current segregation, which expires June 28, 2017, unless the application is denied or canceled or the withdrawal is approved prior to that date.

The application will be processed in accordance with the regulations set forth in 43 CFR part 2300.

Leslie A. Frewing,

Chief, Branch of Land, Minerals, and Energy Resources, Acting.

[FR Doc. 2016–23797 Filed 9–29–16; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[14X LLIDT03100.L17110000.DF0000.241A00; 4500073052]

Notice of Availability of the Draft Craters of the Moon National Monument and Preserve Plan Amendment and Environmental Impact Statement, Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended (FLPMA), the Bureau of Land Management (BLM) has prepared a Draft Monument Management Plan (MMP) Amendment and Draft Environmental Impact Statement (EIS) for the Craters of the Moon National Monument and Preserve (Monument) and by this notice is announcing the opening of the public comment period.

DATES: To ensure that comments will be considered, the BLM must receive written comments on the Draft MMP Amendment/Draft EIS by December 29, 2016. The BLM will announce future meetings or hearings and any other public participation activities at least 15 days in advance through public notices, media releases, and/or mailings.

ADDRESSES: You may submit comments related to the Draft MMP Amendment/Draft EIS by any of the following methods:

- *Web site: http://www.blm.gov/id/st/en/prog/nepa_register/Craters-plan-amdt_2013.html.*
- *email: BLM_ID_CRMO@blm.gov.*
- *fax:* 208–732–7317.
- *mail:* BLM Shoshone FO, 400 West F Street, Shoshone, ID 83352.

Copies of the Draft MMP Amendment/Draft EIS are available in the Shoshone Field Office at the above address.

FOR FURTHER INFORMATION CONTACT: Lisa Cresswell, Planning Team Lead, telephone 208–732–7200; BLM Shoshone Field Office, 400 West F Street Shoshone, ID 83352; email *BLM_ID_CRMO@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact Ms. Cresswell. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question for Ms. Cresswell. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The Draft MMP Amendment/Draft EIS for the Craters of the Moon National Monument and Preserve (Monument) is now available. The BLM prepared this document in consultation with cooperating agencies and in accordance with NEPA, FLPMA, implementing regulations, the BLM's Land Use Planning Handbook (H–1601–1) and National Environmental Policy Handbook (H–1790–1), and other applicable law and policy, including BLM Instruction Memorandum No. 2016–105, Land Use Planning and Environmental Policy Act Compliance within Greater Sage-Grouse Approved Resource Management Plans and Plan Amendments Decision Area.

The original Monument was created in 1924 by President Calvin Coolidge and was expanded in 2000 by President Bill Clinton. The Monument is part of the BLM's National Conservation Lands and one of two BLM national monuments jointly managed with the National Park Service. The MMP covers the approximately 275,100 BLM-managed acres of the 753,200-acre Monument.

In 2011, the U.S. District Court for the District of Idaho found that the 2007 MMP/EIS did not adequately consider current science and agency policies designed to protect Greater Sage-Grouse (GRSG) habitat, particularly with regard to managing livestock grazing in the Monument. The court also found that BLM violated NEPA by failing to analyze a sufficient range of livestock grazing alternatives. In September 2015, the BLM issued a decision amending BLM land use plans in Idaho and Southwestern Montana to address GRSG conservation, including the 2007 Craters of the Moon MMP. The 2015 decision and supporting analysis addressed several of the deficiencies identified by the Court with regard to GRSG conservation in the Monument, but the BLM determined that issues such as the location and amount of livestock grazing and protection of Monument values required additional analysis, which is addressed in this Draft MMP Amendment/Draft EIS.

The Draft MMP Amendment/Draft EIS analyzes management options for the BLM-managed portions of the Monument that were not evaluated in the EIS for the 2007 MMP, as amended by the 2015 Sage-Grouse Approved Resource Management Plan Amendment (ARMPA). This Draft MMPA/EIS will amend the 2007 plan, but will not change decisions from the 2015 Sage-Grouse ARMPA. Its purpose is to consider a range of reasonable alternatives for managing livestock grazing and GRSG on BLM-managed lands in the Monument in a manner that maintains the values identified in the Presidential Proclamations that established and expanded it. The range of alternatives is broad, from those that would reduce the area available for grazing to those that would make the entire planning area unavailable for grazing.

The Draft MMP Amendment/Draft EIS analyzes five alternatives that provide a range of livestock grazing levels and availability. Alternative C is the BLM's preferred alternative. Alternative A, the no action alternative, would continue the management established in the 2007 MMP as amended by the 2015 Sage-Grouse ARMPA. Under the No Action Alternative, 273,900 acres would be available for livestock grazing, with 38,187 animal unit months (AUMs).

Alternative B would reduce AUMs available for livestock grazing by 75 percent (making 9,432 AUMs available) and close five areas to grazing: Little Park kipuka, the North Pasture of Laidlaw Park Allotment, Larkspur Park kipuka, the North Pasture of Bowl Crater Allotment, and Park Field kipuka. This alternative would adjust two allotment boundaries to make 21,000 acres unavailable for livestock grazing and for the protection of GRSG and other Monument values. A total of 254,100 acres would be available for livestock grazing.

Alternative C, the agency-preferred alternative, would make 273,600 acres available for livestock grazing and adjust two allotment boundaries, which would set the maximum number of AUMs at 37,792. Where appropriate, livestock grazing would be used as a tool to improve and/or protect wildlife habitat. Guidelines for livestock grazing management would be set based on vegetation and wildlife habitat conditions and needs, consistent with the 2015 Sage-Grouse ARMPA.

Alternative D would eliminate livestock grazing from BLM-managed lands within the Monument boundary (0 acres and 0 AUMs available) and adjust two allotment boundaries. All livestock-related developments would be removed, while some fences might be required to exclude livestock from the Monument.

Alternative E would reduce AUMs available for livestock grazing by approximately 50 percent (making 19,388 AUMs available) and close Larkspur Park kipuka to grazing. This alternative would adjust two allotment boundaries and make 272,900 acres available for grazing. No net gain in livestock-related infrastructure would be allowed.

The land use planning process was initiated on June 28, 2013, through a Notice of Intent published in the **Federal Register**, notifying the public of a formal scoping period and soliciting public participation in the planning process. Four scoping meetings were held in July 2013 in Arco, Carey, Rupert, and American Falls, Idaho. Based on public input regarding relevant issues to consider in the planning process and BLM goals and objectives, the BLM formulated the five alternatives considered and analyzed in the Draft MMP Amendment/Draft EIS. Because nominations for the designation of areas of critical environmental concern (ACECs) were previously analyzed for the 2007 MMP, the BLM did not solicit new ACEC nominations during scoping.

Following the close of the public review and comment period, the Draft MMP Amendment/Draft EIS will be revised in preparation for its release as the Proposed MMP Amendment and Final EIS. The BLM will respond to substantive comments by making appropriate revisions to the document or explain why a comment did not warrant a change.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 40 CFR 1506.6, 40 CFR 1506.10, 43 CFR 1610.2.

Timothy M. Murphy,
BLM Idaho State Director.

[FR Doc. 2016–23566 Filed 9–29–16; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–MWR–THRO–21168; PPMWTHRO00/PROIESUC1.380000]

Notice of 30 Day Comment Period for an Environmental Assessment on a Special Use Permit for a Wireless Telecommunication Facility

AGENCY: National Park Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: The National Park Service (NPS) is announcing a 30-day review period for an environmental assessment prepared for a permit request from Verizon Wireless to obtain a right-of-way to replace an existing communication tower with a shorter tower at Theodore Roosevelt National Park, North Dakota. This notice is issued in accordance with the procedures of Director's Order 53, Special Park Uses.

DATES: Comments must be received on, or before October 31, 2016.

ADDRESSES: Information on this application process can be obtained by contacting the Superintendent at Theodore Roosevelt National Park, P.O. Box 7, Medora, North Dakota, 58645–0007, or by telephone at 701–623–4466.

FOR FURTHER INFORMATION CONTACT: Please contact Superintendent Wendy Ross at the address and telephone number listed above.

SUPPLEMENTARY INFORMATION: Theodore Roosevelt National Park (the Park) has received an application from Verizon Wireless to obtain a right of way to replace the park's existing communication tower with a shorter tower to accommodate Verizon Wireless equipment and to mitigate adverse impacts to park resources.

The current and proposed telecommunications site, located just northeast of U.S. Highway 85 at the park's east boundary, is in Township 148 North, Range 99 West, in the northwest quarter of Section 26, in McKenzie County, North Dakota. The current tower accommodates U.S. Forest Service equipment as well as communications equipment belonging to the park that would be relocated to the new tower. The proposed project includes removing the current tower and blinking aviation lighting, and constructing a tower not to exceed 190 feet in height, a 12-foot by 30-foot equipment shed, a small graveled parking area, and supporting underground utilities. The new tower would not have blinking aviation lighting.

The no-action alternative would result in the park continuing to maintain its current tower and require Verizon to construct a second tower just outside the park boundary. The NPS is continuing to evaluate the proposal pursuant to the National Environmental Policy Act, the National Historic Preservation Act, the Telecommunications Act of 1966, and other NPS requirements, policies, and regulations. Impact analyses, including the effects, if any, on cultural resources, will be available for public review on the NPS planning, Environment, and Public Comment (PEPC) Web site at: *http://parkplanning.nps.gov/publicHome.cfm*. A 30-day public review period for the environmental assessment will be held after the publishing of this notice. Project related background material, including press releases, site photographs, public scoping material, and other project related documents previously released, are available on the PEPC Web site at the address listed above.

Dated: July 13, 2016.

Cameron H. Sholly,
Regional Director.

[FR Doc. 2016–23668 Filed 9–29–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–21915; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting comments on the significance of properties nominated before September 2, 2016, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted by October 17, 2016.

ADDRESSES: Comments may be sent via U.S. Postal Service to the National Register of Historic Places, National Park Service, 1849 C St. NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St. NW., 8th Floor, Washington, DC 20005; or by fax, 202–371–6447.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic

Places. Nominations for their consideration were received by the National Park Service before September 2, 2016. Pursuant to section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

ARIZONA

Maricopa County

Encanto—Palmcroft Historic District (Boundary Increase III), 2700 N. 15th Ave., Phoenix, 16000722

COLORADO

Denver County

U.S. Courthouse and Federal Office Building, 1929–1961 Stout St., Denver, 16000723

CONNECTICUT

Fairfield County

Hubbard Heights Historic District, Hubbard Ave. and vicinity, Stamford, 16000724

DELAWARE

Kent County

St. Paul A.M.E. Church, 103 W. Mispillion St., Harrington, 16000726

DISTRICT OF COLUMBIA

District of Columbia

Park Vista and Pine Manor Apartments, (Apartment Buildings in Washington, DC, MPS) 5807–5825 14th St. NW., Washington, 16000725

MISSOURI

Lawrence County

Coleman, Lewis Shaw, House, 227 E. College St., Aurora, 16000727

St. Charles County

Lindenwood Neighborhood Historic District, Roughly bounded by Watson, Gamble, Sibley & Elm Sts. & alley between Houston & N. Kings Highway, St. Charles, 16000728

MONTANA

Carbon County

Rock Creek Ranger Station Historic District, 6811 US 212, Red Lodge, 16000729

SOUTH CAROLINA

Greenville County

American Spinning Company Mill No. 2, 300 Hammett St., Greenville, 16000730

Spartanburg County

Pine Street Elementary School, 500 S. Pine St., Spartanburg, 16000731

WYOMING

Natrona County

Casper Downtown Historic District, Generally bounded by Midwest Ave., W.B. W.C., & Beech Sts., Casper, 16000732

Authority: 60.13 of 36 CFR part 60.

Dated: September 9, 2016.

Christopher Hetzel,

Acting Chief, National Register of Historic Places/National Historic Landmarks Program.

[FR Doc. 2016–23614 Filed 9–29–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[Docket No. BOEM–2016–0068]

Draft Programmatic Environmental Impact Statement for Geological and Geophysical Activities on the Gulf of Mexico Outer Continental Shelf (OCS) MMAA104000

AGENCY: Bureau of Ocean Energy Management (BOEM), Interior.

ACTION: Notice of availability.

SUMMARY: BOEM has prepared a Draft Programmatic Environmental Impact Statement (PEIS) to evaluate potential environmental effects of multiple Geological and Geophysical (G&G) activities on the Gulf of Mexico OCS. These activities include, but are not limited to, seismic surveys, sidescan-sonar surveys, electromagnetic surveys, and geological and geochemical sampling. The Draft PEIS considers G&G activities for the three program areas managed by BOEM: Oil and gas exploration and development; renewable energy; and marine minerals. This notice initiates the public review and comment period and also serves to announce public meetings on the Draft PEIS. After the public meetings and written comments on the Draft PEIS have been reviewed and considered, a Final PEIS will be prepared.

A Notice of Intent (NOI) to prepare the PEIS was published in the **Federal Register** on May 10, 2013, and scoping comments were received during a comment period that was initially scheduled to close on June 24, 2013. The closing date of the public comment period was corrected to July 9, 2013, by publication of a **Federal Register** Notice on June 5, 2013.

DATES: Comments on this Draft PEIS will be accepted until November 29, 2016. BOEM has determined that a 60-day public comment period is warranted given the complex and technical nature of this Draft PEIS along with possible requests for extending the comment period. Additionally, due to litigation deadlines, no more than 60-days for public comment will be granted. See public meeting dates in the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: Jill Lewandowski, Ph.D., Chief, Division of Environmental Assessment, Office of Environmental Programs, Bureau of Ocean Energy Management, 45600 Woodland Road, VAM–OEP, Sterling, VA 20166 or by email at *gomggeis@boem.gov.*

SUPPLEMENTARY INFORMATION:

Public Availability: In keeping with the Department of the Interior's mission to protect natural resources and to limit costs, while ensuring availability to the public, the Draft PEIS and associated information are available on BOEM's Web site at *http://www.boem.gov/nepaprocess/.* BOEM will also distribute digital copies of the Draft PEIS on compact discs. BOEM will also be printing and distributing a very limited number of paper copies. You may request a digital or paper copy of the Draft PEIS from the Bureau of Ocean Energy Management, Gulf of Mexico OCS Region, Public Information Office (GM 250C), 1201 Elmwood Park Boulevard, Room 250, New Orleans, Louisiana 70123–2394 (1–800–200–GULF).

Comments: Governmental agencies, Native American tribes, the scientific community, industry groups, environmental interest groups, and any other interested parties may submit written comments on Draft PEIS through the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* In the field entitled "Search," enter "BOEM" and then click "search." Follow the instructions to submit public comments and view supporting and related materials available for this notice;
2. U.S. mail in an envelope labeled "Comments on the Draft Programmatic Environmental Impact Statement" and addressed to Ms. Jill Lewandowski, Ph.D., Chief, Division of Environmental Assessment, Office of Environmental Programs, Bureau of Ocean Energy Management, 45600 Woodland Road, VAM–OEP, Sterling, VA 20166. Comments must be postmarked by the last day of the comment period to be considered.
3. Via electronic mail to *gomggeis@boem.gov.*

Public Meetings: BOEM will also hold public meetings to solicit comment regarding the Draft Programmatic Environmental Impact Statement. The meetings are scheduled as follows:

- *New Orleans, Louisiana:* Wednesday, November 9, 2016, Wyndham Garden New Orleans Airport, 6401 Veterans Memorial Boulevard, Metairie, Louisiana 70003; one meeting beginning at 4:00 p.m. CST and ending at 7:00 p.m. CST;
- *Gulfport, Mississippi:* Thursday, November 10, 2016, Courtyard by Marriott, Gulfport Beachfront MS Hotel, 1600 East Beach Boulevard, Gulfport, Mississippi 39501; one meeting beginning at 4:00 p.m. CST and ending at 7:00 p.m. CST;
- *Fort Walton Beach, Florida:* Monday, November 14, 2016, Four Points By Sheraton Destin-Fort Walton Beach, 1325 Miracle Strip Parkway SE., Fort Walton Beach, Florida 32548; one meeting beginning at 4:00 p.m. CST and ending at 7:00 p.m. CST;
- *Mobile, Alabama:* Tuesday, November 15, 2016, The Admiral Hotel Mobile, Curio Collection by Hilton, 251 Government Street, Mobile, Alabama 36602; one meeting beginning at 4:00 p.m. CST and ending at 7:00 p.m. CST; and
- *Houston, Texas:* Thursday, November 17, 2016, Houston Marriott North, 255 North Sam Houston Pkwy. East, Houston, Texas 77060; one meeting beginning at 4:00 p.m. CST and ending at 7:00 p.m. CST.

Public Disclosure of Names and Addresses: Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comments to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: This Notice of Availability is published pursuant to the regulations (40 CFR part 1503 and 43 CFR part 46) implementing the provisions of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.* (1988)).

Dated: September 22, 2016.

Abigail Ross Hopper,

Director, Bureau of Ocean Energy Management.

[FR Doc. 2016–23664 Filed 9–29–16; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR04310000, 16XR0680A1, RX002361010021000]

Notice of Availability for the Final Environmental Impact Statement for the Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, New Mexico and Texas

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, the Bureau of Reclamation (Reclamation) has prepared a Final Environmental Impact Statement (FEIS) to analyze the environmental impacts of continuing to implement the 2008 Rio Grande Project Operating Agreement (Operating Agreement) through 2050, and by this Notice is announcing its availability. The Operating Agreement is a written agreement describing how Reclamation allocates, releases from storage, and delivers Rio Grande Project water to the Elephant Butte Irrigation District (EBID) in New Mexico, the El Paso County Water Improvement District No. 1 (EPCWID) in Texas, and to Mexico. In addition, the FEIS evaluates the environmental effects of a proposal to renew a contract to store San Juan-Chama Project water in Elephant Butte Reservoir.

DATES: Reclamation will not issue a final decision on the proposed action for a minimum of 30 days after the date that the Environmental Protection Agency publishes its Notice of Availability of Weekly Receipt of Environmental Impact Statements in the **Federal Register**. After the 30-day public review period, Reclamation will complete a Record of Decision (ROD). The ROD will state the action that will be implemented and discuss all factors leading to that decision.

ADDRESSES: Copies of the FEIS are available for public inspection at the following locations:

- Bureau of Reclamation, Albuquerque Area Office, 555 Broadway NE., Suite 100, Albuquerque, New Mexico 87102.
- Bureau of Reclamation, El Paso Field Division, 10737 Gateway West, Suite 350, El Paso, Texas 79935.
- Bureau of Reclamation, Upper Colorado Regional Office, 125 South State Street, Room 8100, Salt Lake City, Utah 84138.

Libraries

- New Mexico State University—Branson Library, 1305 Frenger Street, Las Cruces, New Mexico 88003.
- University of Texas at El Paso, 500 West University Avenue, El Paso, Texas 79968.

Electronic copies of the FEIS are available at: *http://www.usbr.gov/uc/envdocs/eis.html.*

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer Faler, Area Manager, Albuquerque Area Office, telephone: (505) 462–3600; address: 555 Broadway NE., Suite 100, Albuquerque, New Mexico 87102; email: *jfaler@usbr.gov.* Any persons wishing to be added to a mailing list of interested parties may write or call Ms. Faler at this address or telephone number.

Persons who use a telecommunications device for the deaf may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, in order to leave a message or question with the above named individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: Reclamation prepared the FEIS in cooperation with five agencies:

- United States Section of the International Boundary and Water Commission,
- Colorado Division of Water Resources,
- EBID,
- EPCWID, and
- Texas Rio Grande Compact Commissioner.

The purpose for the proposed Federal action is to meet contractual obligations of Reclamation to EBID and EPCWID, and to comply with applicable law governing water allocation, delivery, and accounting. These obligations are currently fulfilled under the Operating Agreement. The need for the proposed Federal action is to resolve the long and litigious history of the Rio Grande Project, and to enter into mutually agreeable operational criteria that comply with applicable law, court decrees, settlement agreements, and contracts. The purpose and need for similar action is to respond to a request to store San Juan-Chama Project water in Elephant Butte Reservoir.

The FEIS Analyzes Five Alternatives

The FEIS describes and analyzes five alternatives: The Preferred Alternative (Alternative 1) is continuation of the Operating Agreement and the San Juan-Chama storage contract through 2050.

Alternative 2 would not store San Juan-Chama Project water in Elephant Butte Reservoir. Alternative 3 would not include the carryover accounting provision. Alternative 4 would not include the diversion ratio adjustment. Alternative 5 is the No Action Alternative and it would eliminate both the carryover accounting and diversion ratio adjustment from Rio Grande Project allocation and accounting procedures.

The FEIS analyzes the effect of these five alternatives on (1) water resources (total storage, Elephant Butte Reservoir elevations, allocation, releases, net diversion, farm surface water deliveries, farm groundwater deliveries, groundwater elevations, and water quality); (2) biological resources (vegetation communities including wetlands, wildlife, aquatic species, and special status species and critical habitat); (3) cultural resources (historic properties, Indian sacred sites, and resources of tribal concern); and (4) socioeconomic resources (Indian trust assets, recreation, hydropower, regional economic impacts and economic benefits, and environmental justice).

On January 15, 2014, a Notice of Intent was published in the **Federal Register** (79 FR 2691) inviting public scoping comments on the proposed action of continuing to implement the Operating Agreement through 2050. A Notice of Availability was published in the **Federal Register** on March 18, 2016 (81 FR 14886), and the public was invited to provide comments on the Draft EIS during an 83-day comment period ending on June 8, 2016.

Public Disclosure

Before including your address, phone number, email address, or other personal identifying information in your comment, please be advised that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: September 7, 2016.

Brent Rhees,

Regional Director, Upper Colorado Region.

[FR Doc. 2016–23525 Filed 9–29–16; 8:45 am]

BILLING CODE 4332–90–P

DEPARTMENT OF DEFENSE

Department of the Army, U.S. Army Corps of Engineers

DEPARTMENT OF ENERGY

Bonneville Power Administration

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR01041000, 16XR0680G3, RX.16786921.2000100]

Notice of Intent To Prepare the Columbia River System Operations Environmental Impact Statement

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD; Bonneville Power Administration, Energy; Bureau of Reclamation, Interior.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: In accordance with the National Environmental Policy Act, the U.S. Army Corps of Engineers (Corps), Bureau of Reclamation (Reclamation), and the Bonneville Power Administration (BPA) (Action Agencies) intend to prepare an environmental impact statement (EIS) on the system operation and maintenance of fourteen Federal multiple purpose dams and related facilities located throughout the Columbia River basin. The Action Agencies will use this EIS process to assess and update their approach for long-term system operations and configuration through the analysis of alternatives and evaluation of potential effects to the human and natural environments, including effects to socio-economics and species listed under the Endangered Species Act (ESA). The Action Agencies will serve as joint lead agencies in developing the EIS.

DATES: Written comments for the Action Agencies' consideration are due to the addresses below no later than January 17, 2017. Comments may also be made at public meetings. Information on the public meetings is provided under the **SUPPLEMENTARY INFORMATION** section of this notice.

ADDRESSES: Written comments, requests to be placed on the project mailing list, and requests for information may be mailed by letter to U.S. Army Corps of Engineers Northwestern Division Attn: CRSO EIS, P.O. Box 2870, Portland, OR 97208–2870; or online at *comment@crso.info.* All comment letters will be available via the project Web site at *www.crso.info.* All personally identifiable information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Call the toll-free telephone 1–(800) 290–5033 or email *info@crso.info.* Additional information can be found at the project Web site: *www.crso.info.*

SUPPLEMENTARY INFORMATION:

Background

The fourteen Federal multiple purpose dams and related facilities are operated as a coordinated system within the interior Columbia River basin in Idaho, Montana, Oregon, and Washington. A map identifying the locations of these dams can be found on the project Web site at *www.crso.info.* The Corps was authorized by Congress to construct, operate and maintain twelve of these projects for flood control, power generation, navigation, fish and wildlife, recreation, and municipal and industrial water supply purposes. The Corps' projects that will be addressed in this EIS include Libby, Albeni Falls, Dworshak, Chief Joseph, Lower Granite, Little Goose, Lower Monumental, Ice Harbor, McNary, John Day, The Dalles, and Bonneville. Reclamation was authorized to construct, operate, and maintain two projects for purposes of flood control, power generation, navigation, and irrigation. The Reclamation projects that will be addressed in this EIS include Hungry Horse and Grand Coulee. BPA is responsible for marketing and transmitting the power generated by these dams. Together, these Action Agencies are responsible for managing the system for these various purposes.

In the 1990s, the Action Agencies analyzed the socio-economic and environmental effects of operating the system in the Columbia River System Operation Review (SOR) EIS and issued respective Records of Decision in 1997 that adopted a system operation strategy, which included operations supporting ESA-listed fish while fulfilling all other congressionally-authorized purposes. Since the completion of the SOR EIS, the Action Agencies have operated the system consistent with the analyses in the SOR EIS, while some changes to system operations have been adopted under subsequent ESA consultations and project-specific National Environmental Policy Act documents.

Proposal for New EIS

The proposed Columbia River System Operations EIS will assess and update the approach for long-term system operations and configuration. In addition to evaluating a range of alternatives, the EIS will consider the direct, indirect, and cumulative impacts of these alternatives on affected resources, including geology, soils, water quality and quantity, air quality, fish and wildlife (*e.g.*, ESA-listed species and their designated critical habitat), floodplains, wetlands, climate, cultural resources, tribal resources, social and economic resources, and other resources that are identified during the scoping process. The impacts to the resources will be addressed in light of anticipated climate change impacts, such as warmer water temperatures, diminished snow-pack, and altered flows. The Action Agencies will evaluate a range of alternatives in the EIS, including a no-action alternative (current system operations and configuration). Other alternatives will be developed through the scoping period based on public input and Action Agency expertise, and will likely include an array of alternatives for different system operations and additional structural modifications to existing projects to improve fish passage including breaching one or more dams.

The EIS will also identify measures to avoid, offset or minimize impacts to resources affected by system operations and configuration, where feasible. For instance, non-operational mitigation measures to address impacts to the fish resources, such as habitat actions in the tributaries and estuary, avian predation management actions, and conservation and safety net hatcheries, may be proposed.

Additionally, the Action Agencies will comply with all applicable statutory and regulatory requirements in evaluating the proposed action, such as the ESA, Clean Water Act, Section 106 of the National Historic Preservation Act (NHPA), and Executive Orders, including E.O. 12898 *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.*

Request for Comments

The Action Agencies are issuing this notice to: (1) Advise other Federal and state agencies, tribes, and the public of their plan to analyze effects related to system operations and configuration; (2) obtain suggestions and information that may inform the scope of issues and range of alternatives to evaluate in the EIS; and (3) provide notice and request public input on potential effects on historic properties from system operations and configuration in accordance with Section 106 of the NHPA (36 Code of Federal Regulations 800.2(d)(3)).

The Action Agencies are inviting interested parties to provide specific comments no later than January 17, 2017, on issues the agencies should evaluate related to the Columbia River System Operations EIS. All comments and materials received, including names and addresses, will become part of the administrative record and may be released to the public.

Public Meetings

The Action Agencies will hold 15 public scoping meetings during the fall and winter of 2016 to invite the public to comment on the scope of the EIS. The 15 public meetings will be held on:

- Monday, October 24, 2016, 4 p.m. to 7 p.m., Wenatchee Community Center, 504 S. Chelan Ave., Wenatchee, Washington.
- Tuesday, October 25, 2016, 4 p.m. to 7 p.m., The Town of Coulee Dam, City Hall, 300 Lincoln Ave., Coulee Dam, Washington.
- Wednesday, October 26, 2016, 4 p.m. to 7 p.m., Priest River Community Center, 5399 Highway 2, Priest River, Idaho.
- Thursday, October 27, 2016, 4 p.m. to 7 p.m., Kootenai River Inn Casino & Spa, 7169 Plaza St., Bonners Ferry, Idaho.
- Tuesday, November 1, 2016, 4 p.m. to 7 p.m., Red Lion Hotel Kalispell, 20 North Main St., Kalispell, Montana.
- Wednesday, November 2, 2016, 4 p.m. to 7 p.m., City of Libby City Hall, 952 E. Spruce St., Libby, Montana.
- Thursday, November 3, 2016, 4 p.m. to 7 p.m., Hilton Garden Inn Missoula, 3720 N. Reserve St., Missoula, Montana.
- Monday, November 14, 2016, 4 p.m. to 7 p.m., The Historic Davenport Hotel, 10 South Post Street, Spokane, Washington.
- Wednesday, November 16, 2016, 4 p.m. to 7 p.m., Red Lion Hotel Lewiston, Seaport Room, 621 21st St., Lewiston, Idaho.
- Thursday, November 17, 2016, 4 p.m. to 7 p.m., Courtyard Walla Walla, The Blues Room, 550 West Rose St., Walla Walla, Washington.
- Tuesday, November 29, 2016, 4 p.m. to 7 p.m., The Grove Hotel, 245 S. Capitol Blvd., Boise, Idaho.
- Thursday, December 1, 2016, 4 p.m. to 7 p.m., Town Hall, Great Room, 1119 8th Ave., Seattle, Washington.
- Tuesday, December 6, 2016, 4 p.m. to 7 p.m., The Columbia Gorge Discovery Center, River Gallery Room, 5000 Discovery Drive, The Dalles, Oregon.
- Wednesday, December 7, 2016, 4 p.m. to 7 p.m., Oregon Convention Center, 777 NE Martin Luther King Jr. Blvd., Portland, Oregon.
- Thursday, December 8, 2016, 4 p.m. to 7 p.m., The Loft at the Red Building, 20 Basin St., Astoria, Oregon.
- Tuesday, December 13, 2016, 10 a.m. to 11:30 a.m., and 3 p.m. to 4:30 p.m., PST, webinar. For those that cannot participate in person, an online webinar will be provided to interested parties. The webinar will cover the material discussed in the in-person public scoping meetings. Detailed instructions on how to participate in the webinar may be found on the project Web site at *www.crso.info*. To submit written comments, please follow the instructions in the **ADDRESSES** section of this notice.

The Action Agencies will consider requests for an extension of time for public comment and additional opportunities for public involvement if requests are received in writing by December 1, 2016. Requests for additional time to comment and opportunities for public involvement should be sent to the address listed in the **ADDRESSES** section of this notice. Requests should include an explanation of the specific purposes served by the requested extension, and should explain how the extension could benefit the National Environmental Policy Act process and analysis. Announcements for any such further opportunities for public involvement, if appropriate given the court-ordered schedule for this EIS, will be published in the **Federal Register** and by news releases to the media, newsletter mailings, and posting on the project Web site.

The draft EIS is scheduled to be published by March 2020 for public review and comment, and after it is published, the Action Agencies will hold public comment meetings. The Action Agencies will consider public comments received on the draft EIS and provide responses in the final EIS.

Scott A. Spellmon,

Brigadier General, US Army, Division Commander.

Elliot E. Mainzer,

Administrator, Bonneville Power Administration.

Lorri J. Lee,

Regional Director—Pacific Northwest Region, Bureau of Reclamation.

[FR Doc. 2016–23346 Filed 9–29–16; 8:45 am]

BILLING CODE 4332–90–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR04310000, 16XR0680A1, RX002361010021000]

Notice of Availability and Notice of Public Meetings for the Draft Environmental Impact Statement for the Navajo Generating Station-Kayenta Mine Complex Project, Arizona

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Reclamation has made available for public review and comment the Draft Environmental Impact Statement for the Navajo Generating Station-Kayenta Mine Complex Project. The Proposed Action would provide Federal approvals and/or decisions necessary to continue the operation and maintenance of the Navajo Generating Station and associated facilities, the proposed Kayenta Mine Complex, and existing transmission systems.

DATES: Written comments on the Draft Environmental Impact Statement should be submitted on or before Tuesday, November 29, 2016.

Eleven public meetings will be held to receive comments, answer questions, and facilitate public involvement. See the **SUPPLEMENTARY INFORMATION** section for meeting dates and times.

ADDRESSES: Send written comments to the Phoenix Area Office, Bureau of Reclamation (ATTN: NGSKMC–EIS), 6150 W. Thunderbird Road, Glendale, Arizona 85306–4001; via facsimile to (623) 773–6486; or email to *NGSKMC–EIS@usbr.gov.*

To request a compact disc of the Draft Environmental Impact Statement, please use the contact information above, or call (623) 773–6254. The document may also be viewed at the Project Web site at *http://www.ngskmc-eis.net.* For those without Internet access, a copy is available for public review and inspection at specified government and tribal offices during normal business hours. See the **SUPPLEMENTARY INFORMATION** section for specific locations.

FOR FURTHER INFORMATION CONTACT: Ms. Sandra Eto, (623) 773–6254, or by email at *NGSKMC–EIS@usbr.gov.* Additional information is available online at *http://www.ngskmc-eis.net.*

SUPPLEMENTARY INFORMATION: Pursuant to the National Environmental Policy Act (NEPA) of 1969, as amended, 42 U.S.C. 4231–4347; the Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of NEPA, 40 CFR parts 1500 through 1508; and the Department of the Interior's (DOI) regulations, 43 CFR part 46, the Bureau of Reclamation (Reclamation) has prepared this Draft Environmental Impact Statement (Draft EIS) that examines the potential environmental impacts from the Navajo Generating Station-Kayenta Mine Complex Project (Project). Cooperating agencies on the Draft EIS include the following:

- *Federal Agencies*—U.S. Department of Agriculture, Forest Service; U.S. Department of the Interior, Bureau of Indian Affairs, Bureau of Land Management, Fish and Wildlife Service, National Park Service, Office of Surface Mining and Reclamation Enforcement; U.S. Environmental Protection Agency
- *Tribal Governments*—Gila River Indian Community; Navajo Nation; Pueblo of Zuni
- *Other Agencies*—Arizona Game and Fish Department; Central Arizona Water Conservation District

The Proposed Action would provide Federal approvals and/or decisions necessary to continue the operation and maintenance of the Navajo Generating Station (NGS) and associated facilities, the proposed Kayenta Mine Complex (KMC), and existing transmission systems for an additional 25 years, from December 23, 2019, through December 22, 2044, plus decommissioning.

Background

The NGS is a coal-fired power plant located on trust lands leased from the Navajo Nation near Page, Arizona. The NGS provides continuous, long-term, reliable, and cost-effective baseload power to over one million customers in the region using coal from the nearby Kayenta Mine located on trust lands leased from the Navajo Nation and Hopi Tribe. The NGS and Kayenta Mine provide significant economic benefit to the Navajo Nation and Hopi Tribe, primarily through lease and mining-related revenue (*e.g.*, coal royalties), and employment. The NGS is also the primary source of electricity for operation of the Central Arizona Project (CAP), and provides significant cost-savings to Native American tribes that receive CAP water. The CAP, a Federal reclamation project constructed by Reclamation, delivers over 1.5 million acre-feet of Colorado River water annually to tribal, agricultural, municipal, and industrial water users in Maricopa, Pinal, and Pima counties, Arizona.

The Salt River Project Agricultural Improvement and Power District (SRP) is the operating agent of NGS and holds a 42.9% ownership interest in NGS on its own behalf. The other NGS co-owners and their proportionate share are Arizona Public Service Company (14.0%), NV Energy (11.3%), and Tucson Electric Power Company (7.5%). SRP also holds a 24.3% interest in NGS for the use and benefit of the United States of America (U.S.). The NGS co-owners and the U.S. are collectively referred to as the "NGS Participants."

Current NGS Operation

SRP operates NGS pursuant to an Indenture of Lease with the Navajo Nation for the plant site, which has been in effect since December 23, 1969 (the NGS Lease). The initial term of the NGS Lease is 50 years (*i.e.*, through December 22, 2019). Additionally, a Grant of Right-of-Way and Easement issued by DOI (323 Grant) encompasses the plant site, and another 323 Grant and Easement was issued for an adjoining railroad. The initial term of the 323 Grant for the NGS plant site expires at the end of 2019, while the initial term of the 323 Grant for the railroad expires in 2021. Because of the expiring leases and rights-of-way, continued operation of NGS beyond December 22, 2019, requires approval from multiple Federal agencies.

Current Kayenta Mine Operation

Coal that fuels NGS is supplied by the Kayenta Mine operated by Peabody Western Coal Company (PWCC). Like NGS, the operation of the Kayenta Mine requires approval from multiple Federal agencies. PWCC currently holds an active Surface Mining Control and Reclamation Act of 1977 (SMCRA) Permit (Federal Permit Number AZ–0001E) that authorizes PWCC to mine within the Kayenta Mine permit area. PWCC is seeking to revise its SMCRA Permit and life-of-mine (LOM) plan for the Kayenta Mine in order to adjust and identify the timing and sequence of mining operations in certain coal resource areas through 2044, and to relocate portions of an existing road. PWCC is currently authorized to continue mining at the Kayenta Mine post-2019; the proposed revisions to the SMCRA Permit and LOM plan would increase operational efficiency. Additionally, PWCC is seeking to modify the existing permit boundary to incorporate into the Kayenta Mine permanent program permit area facilities located on the adjacent and now closed former Black Mesa Mine that are currently being used to support Kayenta Mine operations. Upon incorporation of these mining support facilities into the Kayenta Mine permit area, the future operation, if approved, would be identified as the KMC. The proposed KMC permit boundary expansion does not propose future mining of the coal resources remaining at the former Black Mesa Mine.

Current Transmission System Operation

The NGS is served by the Western and Southern transmission systems, each of which is supported by a 323 Grant. Off-reservation, these systems are supported by grants of easement from other agencies. The Southern Transmission System extends south from NGS to just north of Phoenix, Arizona; the Western Transmission System extends west from NGS to near Las Vegas, Nevada. Both transmission systems are part of the Western Interconnection, providing integrated and reliable transmission across the region well beyond the power generated by the NGS.

Under the Proposed Action, no construction, major replacement, or other activities beyond continued operation and as-needed maintenance are anticipated for the transmission line systems, substations, and communications sites. Ongoing maintenance, repair, replacement, and improvement of the transmission lines would continue. These activities include infrequent aerial and ground inspection, repair and replacement of transmission system components, and right-of-way vegetation treatment to reduce safety hazards. The majority of all inspection and maintenance activities would occur along the existing right-of-way, serviced by existing roads leading to the regional highway system.

Other Compliance-related Activities

As part of its consideration of impacts on threatened and endangered species, Reclamation is in the process of formal consultation with the U.S. Fish and Wildlife Service (Service) pursuant to Section 7 of the Endangered Species Act, 16 U.S.C. 1536, and its implementing regulations, 50 CFR part 400. The biological assessment of the Proposed Action prepared by Reclamation for consideration by the Service is available on the Project Web site: *http://www.ngskmc-eis.net.*

Reclamation is also conducting compliance activities pursuant to Section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, as provided for in 36 CFR 800.2(d)(3) concurrently with the NEPA process, including public involvement requirements and consultation with the State Historic Preservation Officer(s) and Tribal Historic Preservation Officer(s). The draft programmatic agreements regarding management of historic properties potentially affected by the Proposed Action are available on the Project Web site: *http://www.ngskmc-eis.net.*

Alternatives Considered

The Draft EIS analyzes the direct, indirect and cumulative effects of the Proposed Action, three action alternatives, and a No Action Alternative.

a. Proposed Action.

Under the Proposed Action, all Federal approvals and/or decisions necessary to continue the operation and maintenance of the NGS and associated facilities, the proposed KMC, and existing transmission systems would be granted through December 22, 2044, plus decommissioning.

b. Natural Gas Partial Federal Replacement Alternative

Under this action alternative, the same Federal approvals and/or decisions required for the Proposed Action would be granted; however, a portion of the energy produced at NGS for the U.S. would be curtailed and replaced by a corresponding amount of energy from existing natural gas resources.

c. Renewable Partial Federal Replacement Alternative

Under this action alternative, the same Federal approvals and/or decisions required for the Proposed Action would be granted; however, a portion of the energy produced at NGS for the U.S. would be curtailed and replaced by a corresponding amount of energy from existing renewable energy resources.

d. Tribal Partial Federal Replacement Alternative

Under this action alternative, the same Federal approvals and/or decisions required for the Proposed Action would be granted; however, a portion of the energy produced at NGS for the U.S. would be curtailed and replaced by a corresponding amount of energy from a newly constructed photovoltaic solar facility on tribal land.

e. No Action Alternative

Under the No Action Alternative, Federal approvals and/or decisions required for the continued operation and maintenance of NGS and associated facilities would not be granted and NGS would be decommissioned by 2020. The proposed KMC would not be authorized and final reclamation of the Kayenta Mine would commence when power generation ends at NGS. The right-of-way for the existing transmission systems would not be granted; however, because these power lines are part of the Western Interconnection, the transmission owners would likely seek authorization of the transmission system under a separate and future process.

Public Meeting Information

Eleven public meetings to receive comments, answer questions, and facilitate public involvement will be held on:

1. Monday, October 24, 2016, 10 a.m. to 1 p.m., Burton Barr Central Library, Pulliam Auditorium, 1221 N. Central Ave., Phoenix, Arizona.
2. Monday, October 24, 2016, 5 p.m. to 8 p.m., Dorothy Powell Senior Adult Center, Dining Room, 405 E. Sixth St., Casa Grande, Arizona.
3. Tuesday, October 25, 2016, 4 p.m. to 7 p.m., Page Community Center, Cafeteria, 699 S. Navajo Dr., Page, Arizona.
4. Wednesday, October 26, 2016, 9 a.m. to 12 p.m., LeChee Chapter House, 5 miles south of Page off of Coppermine Road, LeChee, Arizona.
5. Wednesday, October 26, 2016, 4 p.m. to 7 p.m., Tuba City Chapter House, 220 S. Main St., Tuba City, Arizona.
6. Thursday, October 27, 2016, 10 a.m. to 1 p.m., Shonto Chapter House, E. Navajo Route 221, Shonto, Arizona.
7. Tuesday, November 1, 2016, 4 p.m. to 7 p.m., Monument Valley High School, Cafeteria, Highway 163 and Monument Valley Blvd., Kayenta, Arizona.
8. Wednesday, November 2, 2016, 10 a.m. to 1 p.m., Tewa Community Center, Multipurpose Room, Highway 264 at Milepost 392.8, Polacca, Arizona.
9. Wednesday, November 2, 2016, 4 p.m. to 7 p.m., Hopi Day School, Gym, ¼ mile east of the Village Store on Main St., Kykotsmovi, Arizona.
10. Thursday, November 3, 2016, 10 a.m. to 1 p.m., Forest Lake Chapter House, 17 miles north of Pinon on Navajo Route 41, Pinon, Arizona.
11. Friday, November 4, 2016, 10 a.m. to 1 p.m., Navajo Nation Museum, Conference Room, Highway 264 and Postal Loop Road, Window Rock, Arizona.

Navajo interpreters will be present at meetings on the Navajo Nation and Hopi Reservation; Hopi interpreters will be present at meetings on the Hopi Reservation and Tuba City, Arizona. A court recorder will be available to take oral comments from the public during all meetings.

Public Review and Where To Find Copies of the Draft EIS

A copy of the Draft EIS is available for public review and inspection at the following locations:

- Bureau of Reclamation, Phoenix Area Office, 6150 W. Thunderbird Road, Glendale, Arizona.

- Natural Resources Library, U.S. Department of the Interior, 1849 C Street NW, Main Interior Building, Washington, DC.
- Bureau of Indian Affairs, Navajo Regional Office, 301 West Hill Street, Gallup, New Mexico.
- Office of Surface Mining and Reclamation Enforcement, Western Regional Office, 1999 Broadway Street, Suite 3320, Denver, Colorado.
- Glen Canyon National Recreation Area Headquarters, 691 Scenic View Road, Page, Arizona.
- Casa Grande Public Library, 449 N. Drylake Street, Casa Grande, Arizona.
- Hopi Tribal Headquarters, Main Lobby, 123 Main St., Kykotsmovi, Arizona.
- Navajo Nation Library, Highway 264 and Postal Loop Road, Window Rock, Arizona.
- LeChee Chapter House, 5 miles south of Page off of Coppermine Road, LeChee, Arizona.
- Tuba City Chapter House, 220 S. Main St., Tuba City, Arizona.
- Shonto Chapter House, E. Navajo Route 221, Shonto, Arizona.
- Kayenta Chapter House, Highway 163, Kayenta, Arizona.
- Forest Lake Chapter House, 17 miles north of Pinon on Navajo Route 41, Pinon, Arizona.

Special Assistance for Public Meetings

If special assistance is required at the public meetings, please contact Ms. Tania Fragomeno at (858) 926–4022, or email your assistance needs to *NGSKMC–EIS@usbr.gov,* along with your name and telephone number. Please indicate your needs at least two weeks in advance of the meeting to enable Reclamation to secure the needed services. The requestor will be notified if a request cannot be honored.

Public Disclosure

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: September 2, 2016.

David Palumbo,

Deputy Commissioner for Operations.

[FR Doc. 2016–23310 Filed 9–29–16; 8:45 am]

BILLING CODE 4332–90–P

DEPARTMENT OF THE INTERIOR

Bureau of Safety and Environmental Enforcement

[167E1700D2 EEAA010000 ET1EX0000.SZH000]

Privacy Act of 1974, as Amended; Notice of a New System of Records

AGENCY: Bureau of Safety and Environmental Enforcement, Interior.

ACTION: Notice of creation of a new system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, as amended, the Department of the Interior is issuing a public notice of its intent to create the Bureau of Safety and Environmental Enforcement, ''Investigations Case Management System,'' system of records. The system will enable the Bureau of Safety and Environmental Enforcement to conduct and document incident investigations related to the Outer Continental Shelf and employee misconduct investigations. The Investigations Case Management System stores, tracks and analyzes reportable injuries, the loss or damage of property, possible violations of Federal laws and regulations, and investigation information related to operation of the Outer Continental Shelf to identify safety concerns or environmental risks. This newly established system will be included in the Bureau of Safety and Environmental Enforcement's inventory of record systems.

DATES: Comments must be received by October 31, 2016. This new system will be effective October 31, 2016.

ADDRESSES: Any person interested in commenting on this notice may do so by: Submitting comments in to Teri Barnett, Departmental Privacy Officer, U.S. Department of the Interior, 1849 C Street NW., Mail Stop 7456 MIB, Washington, DC 20240; hand-delivering comments to Teri Barnett, Departmental Privacy Officer, U.S. Department of the Interior, 1849 C Street NW., Mail Stop 7456 MIB, Washington, DC 20240; or emailing comments to *Privacy@ios.doi.gov.*

FOR FURTHER INFORMATION CONTACT: Rowena Dufford, Bureau of Safety and Environmental Enforcement Privacy Act Officer, 45600 Woodland Road, Mail Stop VAE–MSD, Sterling, VA 20166; or email at *Rowena.Dufford@bsee.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Department of the Interior (DOI), Bureau of Safety and Environmental Enforcement (BSEE), maintains the Investigations Case Management System (CMS) system of records. CMS is an incident investigation management and reporting application that will enable BSEE to conduct and document civil administrative investigations related to incidents, operations on the Outer Continental Shelf (OCS), and employee misconduct investigations. The CMS will store, track and analyze reportable injuries, the loss or damage of property, possible violations of Federal laws and regulations, and investigation information related to operations on the OCS to identify safety concerns or environmental risks.

The CMS is used to conduct civil administrative investigations and is not used for the conduct of criminal investigations. However, the CMS does support referrals of possible criminal activity to internal and external law enforcement organizations as appropriate for investigation. The CMS manages known or suspected civil violations; provides law enforcement agencies with appropriate referral information related to possible criminal activities; captures, integrates, and shares incident related information and observations from other sources; analyzes and prioritizes protection efforts; provides information to justify funding requests and expenditures; assists in managing investigator training; tracks referrals and/or recommendations related to incident investigations; and manages and preserves evidence.

Incident and non-incident data related to activity occurring on the OCS will be collected in support of investigations, regulatory enforcement, homeland security, and security (physical, personnel, stability, environmental, and industrial) activities. This may include data documenting investigation activities, enforcement recommendations, recommendation results, property damage, injuries and fatalities, and analytical or statistical reports. CMS will also provide information for BSEE management to make informed decisions on recommendations for enforcement, civil penalties, and other administrative actions.

In a notice of proposed rulemaking, which is published separately in the **Federal Register**, DOI is proposing to exempt records maintained in this system from certain provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2).

The system will be effective as proposed at the end of the comment period (the comment period will end 30 days after the publication of this notice in the **Federal Register**), unless comments are received which would require a contrary determination. DOI will publish a revised notice if changes are made, based upon a review of the comments received.

II. Privacy Act

The Privacy Act of 1974, as amended, embodies fair information practice principles in a statutory framework governing the means by which Federal Agencies collect, maintain, use, and disseminate individuals' personal information. The Privacy Act applies to records about individuals that are maintained in a "system of records." A "system of records" is a group of any records under the control of an agency for which information about an individual is retrieved by the name or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined as a U.S. citizen or lawful permanent resident. As a matter of policy, DOI extends administrative Privacy Act protections to all individuals. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DOI by complying with DOI Privacy Act regulations, 43 CFR part 2, subpart K.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses of their records, and to assist individuals to more easily find such records within the agency. Below is the description of the BSEE–01, Investigations Case Management System, system of records.

In accordance with 5 U.S.C. 552a(r), DOI has provided a report of this system of records to the Office of Management and Budget and to Congress.

III. Public Disclosure

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: September 27, 2016.

Teri Barnett,

Departmental Privacy Officer.

SYSTEM NAME:

Investigations Case Management System (CMS), BSEE–01.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records in this system are maintained and centrally managed by the Department of the Interior, Bureau of Safety and Environmental Enforcement, 1849 C Street NW., Washington, DC 20240. Records are also located at Bureau of Safety and Environmental Enforcement regional offices and regional sub-offices, and at DOI contractor locations. A current listing of these offices may be obtained by writing to the System Manager or by visiting the BSEE Web site at *http://www.bsee.gov.*

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The categories of individuals covered in the system include current and former Bureau of Safety and Environmental Enforcement (BSEE) employees, potential employees, and contractors; other employees and contractors of Federal, tribal, state, and local law enforcement organizations; complainants, informants, suspects, and witnesses; members of the general public, including individuals and/or groups of individuals involved with incidents related to operations on the Outer Continental Shelf (OCS); and individuals or corporations being investigated due to their involvement in incidents occurring on the OCS.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system includes incident reports, investigative activity reports, personnel records, investigative training records, and records related to incidents occurring on the OCS. Records may contain the following information: Names, Social Security numbers, gender, date of birth, place of birth, citizenship status, race or ethnicity, home and work addresses, personal and official phone numbers, personal and official email addresses, emergency contact information, other contact information, medical information, work history, educational history, affiliations, employer information, associated case or activity number, identification numbers assigned to individuals, and other data that may be included in records compiled during investigations.

Incident reports and records may include attachments such as photos, videos, sketches, audio recordings, email and text messages, medical reports, personnel records, written statements, witness interviews, depositions, evidence and information obtained in the course of an investigation, evidence in support of the Action Referral Memoranda and Case Closure Memoranda, administrative agreements, action determinations, company documentation, and other documents related to incidents occurring on the OCS. Incident reports may also include information concerning criminal activity and documentation related to the response and outcome of an incident. Records in this system also contain information concerning Federal, tribal, state and local law enforcement officers such as an officer's name, contact information, station, and career history.

This system may also contain the names and addresses of business entities, which are not subject to the Privacy Act. However, records pertaining to individuals acting on behalf of corporations and other business entities may reflect personal information that is covered by this system of records notice.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Outer Continental Shelf Lands Act of 1953, 43 U.S.C. 1331–1356b; and Oil and Gas and Sulphur Operations in the Outer Continental Shelf, 30 CFR 250.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The primary purpose of the CMS system of records is to conduct and document incident investigations and employee misconduct investigations related to operations on the Outer Continental Shelf. The CMS will be used to manage known and suspected civil violations; capture, integrate, and share incident related information and observations from other sources; measure performance of investigative programs and management of investigations; meet incident reporting requirements; analyze and prioritize investigative efforts; provide information to justify funding requests and expenditures; provide employee training; provide referrals to appropriate criminal law enforcement agencies for individuals suspected of committing crimes on or in support of activities conducted on the OCS; collect and preserve evidence; and investigate and prevent injuries on the OCS.

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DOI as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

(1) (a) To any of the following entities or individuals, when the circumstances set forth in paragraph (b) are met:

(i) The U.S. Department of Justice (DOJ);

(ii) A court or an adjudicative or other administrative body;

(iii) A party in litigation before a court or an adjudicative or other administrative body; or

(iv) Any DOI employee acting in his or her individual capacity if DOI or DOJ has agreed to represent that employee or pay for private representation of the employee;

(b) When:

(i) One of the following is a party to the proceeding or has an interest in the proceeding:

(A) DOI or any component of DOI;

(B) Any other Federal agency appearing before the Office of Hearings and Appeals;

(C) Any DOI employee acting in his or her official capacity;

(D) Any DOI employee acting in his or her individual capacity if DOI or DOJ has agreed to represent that employee or pay for private representation of the employee;

(E) The United States, when DOJ determines that DOI is likely to be affected by the proceeding; and

(ii) DOI deems the disclosure to be:

(A) Relevant and necessary to the proceeding; and

(B) Compatible with the purpose for which the records were compiled.

(2) To a congressional office in response to a written inquiry that an individual covered by the system, or the heir of such individual if the covered individual is deceased, has made to the office.

(3) To the Executive Office of the President in response to an inquiry from that office made at the request of the subject of a record or a third party on that person's behalf, or for a purpose compatible with the reason for which the records are collected or maintained.

(4) To any criminal, civil, or regulatory law enforcement authority (whether Federal, state, territorial, local, tribal or foreign) when a record, either alone or in conjunction with other information, indicates a violation or potential violation of law—criminal, civil, or regulatory in nature, and the disclosure is compatible with the purpose for which the records were compiled.

(5) To an official of another Federal agency to provide information needed in the performance of official duties related to reconciling or reconstructing data files or to enable that agency to respond to an inquiry by the individual to whom the record pertains.

(6) To Federal, state, territorial, local, tribal, or foreign agencies that have requested information relevant or necessary to the hiring, firing or retention of an employee or contractor, or the issuance of a security clearance, license, contract, grant or other benefit, when the disclosure is compatible with the purpose for which the records were compiled.

(7) To representatives of the National Archives and Records Administration (NARA) to conduct records management inspections under the authority of 44 U.S.C. 2904 and 2906.

(8) To state, territorial and local governments and tribal organizations to provide information needed in response to court order and/or discovery purposes related to litigation, when the disclosure is compatible with the purpose for which the records were compiled.

(9) To an expert, consultant, or contractor (including employees of the contractor) of DOI that performs services requiring access to these records on DOI's behalf to carry out the purposes of the system.

(10) To appropriate agencies, entities, and persons when:

(a) It is suspected or confirmed that the security or confidentiality of information in the system of records has been compromised; and

(b) DOI has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interest, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and

(c) The disclosure is made to such agencies, entities and persons who are reasonably necessary to assist in connection with the DOI's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

(11) To the Office of Management and Budget (OMB) during the coordination and clearance process in connection with legislative affairs as mandated by OMB Circular A–19.

(12) To the Department of the Treasury to recover debts owed to the United States.

(13) To the news media and the public, with the approval of the Public Affairs Officer in consultation with Counsel and the Senior Agency Official for Privacy, where there exists a legitimate public interest in the disclosure of the information, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

(14) To DOJ, the Federal Bureau of Investigation, the Department of Homeland Security, and other Federal, state and local law enforcement agencies for the purpose of reporting possible violations of Federal laws and regulations, referring criminal related activities, and providing information exchange on law enforcement activity.

(15) To agency contractors, grantees, or volunteers for DOI or other Federal agencies that assist in the performance of a contract, grant, cooperative agreement, or other activity related to this system of records and who need to have access to the records in order to perform the activity.

(16) To any of the following entities or individuals for the purpose of providing information on incident investigations, personal injuries, or the loss or damage of property:

(a) Individuals involved in such incidents;

(b) Persons injured in such incidents;

(c) Owners of property damaged, lost or stolen in such incidents, and/or representatives, administrators of estates, and/or attorneys.

The release of information under these circumstances should only occur when it will not interfere with ongoing investigations or law enforcement proceedings; risk the health or safety of an individual; or reveal the identity of an informant or witness that has received an explicit assurance of confidentiality. Also, Social Security numbers and other sensitive identifying personal information should not be released under these circumstances unless this information belongs to the individual requestor.

(17) To any criminal, civil, or regulatory authority (whether Federal, state, territorial, local, tribal or foreign) for the purpose of providing background search information on individuals for legally authorized purposes, including but not limited to background checks on individuals residing in a home with a minor or individuals seeking employment opportunities requiring background checks.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

Storage:

Electronic records are stored and maintained in a password-protected cloud system that is compliant with the Federal Information Security Modernization Act of 2014. All records are accessed only by authorized personnel who have a need to access the records in the performance of their official duties. Paper records are contained in file folders and stored in locked file cabinets. Records obtained in a paper format and converted into electronic files for submission into the CMS may be temporarily stored or accessed on DOI network computers, email systems, and approved removable hard drives.

RETRIEVABILITY:

Information may be retrieved by first name, middle name, or last name, home and work addresses, personal and official phone numbers, personal and official email addresses, employer information, and associated case or activity number.

SAFEGUARDS:

The records contained in this system are safeguarded in accordance with 43 CFR 2.226 and other applicable security rules and policies. During normal hours of operation, paper records are maintained in locked file cabinets under the control of authorized personnel. Computerized records systems follow the National Institute of Standards and Technology standards as developed to comply with the Privacy Act of 1974, 5 U.S.C. 552a; Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521; Federal Information Security Modernization Act of 2014, 44 U.S.C. 3551–3558; and the Federal Information Processing Standards 199: Standards for Security Categorization of Federal Information and Information Systems. Computer servers in which electronic records are stored are located in secured contractor facilities with physical, technical and administrative levels of security to prevent unauthorized access to the network and information assets. Security controls include encryption, firewalls, audit logs, and network system security monitoring. Cloud hosting will only be provided by approved DOI cloud vendors. A privacy impact assessment was conducted to ensure appropriate controls and safeguards are in place to protect the information within the system.

Access to records in the system is limited to authorized personnel who have a need to access the records in the performance of their official duties. Electronic data is protected through user identification such as usernames, passwords, database permissions and software controls. These security measures establish different access levels for different types of users. Each user's access is restricted to only the functions and data necessary to perform their job responsibilities.

System administrators and authorized users are trained and required to follow established internal security protocols, complete all security, privacy, and records management training, and sign the DOI Rules of Behavior. Contract employees with access to the system must also complete mandatory security and privacy training, sign DOI Rules of Behavior, and are monitored by their Contracting Officer Representative and the agency Security Manager.

RETENTION AND DISPOSAL:

Records in this system are maintained under BSEE Bucket 5—Regulatory Oversight and Stewardship (N1–473–12–5), which has been approved by NARA. Records maintained under Item 5F(2)(a), Major Incident Investigative Records, include final reports that document major incidents requiring investigative panels and other reports selected as significant by BSEE, and have a permanent retention. Electronic records are transferred to NARA fifteen years after cut-off, and hardcopy reports are transferred to NARA twenty-five years after cut-off. Records maintained under Item 5F(2)(b), All Other Incident Investigative and Related Records, include records that do not result in the appointment of a panel or are not selected as significant by BSEE. These records have a temporary disposition and are destroyed twenty-five years after cut-off. Other administrative records are maintained under BSEE Bucket-1, Administrative Records (N1–473–12–001), which has been approved by NARA. Records maintained under Item IG(1), Administrative Function Files/Audits and Investigation Files, have a temporary disposition, and are cut off at the end of the fiscal year when activity is completed and destroyed ten years after cut off. Approved disposition methods for temporary records include shredding or pulping paper records, and erasing or degaussing electronic records in accordance with 384 Departmental Manual 1 and NARA guidelines.

SYSTEM MANAGER AND ADDRESS:

CMS System Administrator, Bureau of Safety and Environmental Enforcement, National Investigations Program, 1849 C Street NW., Mail Stop 5438 MIB, Washington, DC 20240.

NOTIFICATION PROCEDURES:

DOI is proposing to exempt portions of this system from the notification procedures of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2). An individual requesting notification of the existence of records on himself or herself should send a signed, written inquiry to the System Manager previously identified. The request envelope and letter should both be clearly marked "PRIVACY ACT INQUIRY." A request for notification must meet the requirements of 43 CFR 2.235.

RECORDS ACCESS PROCEDURES:

DOI is proposing to exempt portions of this system from the access procedures of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2). An individual requesting records on himself or herself should send a signed, written inquiry to the System Manager previously identified. The request should describe the records sought as specifically as possible. The request envelope and letter should both be clearly marked "PRIVACY ACT REQUEST FOR ACCESS." A request for access must meet the requirements of 43 CFR 2.238.

CONTESTING RECORDS PROCEDURES:

DOI is proposing to exempt portions of this system from the amendment procedures of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2). An individual requesting corrections or the removal of material from his or her records should send a signed, written request to the System Manager previously identified. A request for corrections or removal must meet the requirements of 43 CFR 2.246.

RECORD SOURCE CATEGORIES:

Sources of information in the system include Department, bureau, office and program officials, employees, contractors, and other individuals who are associated with or represent DOI; officials from other Federal, tribal, state and local law enforcement organizations, including DOJ, the Federal Bureau of Investigation, and the Department of Homeland Security; and complainants, informants, suspects, victims, and witnesses.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

This system contains civil and administrative law enforcement investigatory records that are exempt from certain provisions of the Privacy Act, 5 U.S.C. 552a(k)(2). Pursuant to 5 U.S.C. 552a(k)(2) of the Privacy Act, DOI has exempted portions of this system from the following subsections of the Privacy Act: (c)(3), (d), (e)(1),(e)(4) (G), (H) and (I), and (f). In accordance with 5 U.S.C. 553(b), (c) and (e), DOI has promulgated a rule, which was published separately in today's **Federal Register**.

Additionally, the CMS may contain records from numerous sources compiled for investigatory purposes. To the extent that copies of records from other source systems of records are exempt from certain provisions of the Privacy Act, DOI claims the same exemptions for those records that are claimed for the original primary systems of records from which they originated.

[FR Doc. 2016–23706 Filed 9–29–16; 8:45 am]

BILLING CODE 4310–VH–P

DEPARTMENT OF JUSTICE

[OMB Number 1117–NEW]

Agency Information Collection Activities; Proposed eCollection eComments Requested; New Collection: Leadership Engagement Survey

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Department of Justice (DOJ), Drug Enforcement Administration, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until November 29, 2016.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Donna A. Rodriguez, Ph.D., Unit Chief, Research and Analysis Staff, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

1. *Type of Information Collection:* New collection.

2. *The Title of the Form/Collection:* Leadership Engagement Survey (LES).

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* Online survey.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public is Drug Enforcement Administration employees and Task Force Officers. The LES is an initiative mandated by the Acting Administrator, DEA, to assess and improve competencies and proficiency of leadership across the DEA.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that approximately 5,000 respondents will complete the survey within approximately 45 minutes.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated public burden associated with this collection is 3,750 hours. It is estimated that respondents will take 45 minutes to complete the survey. In order to calculate the public burden for the survey, 45 minutes was multiplied by 5,000 and divided by 60 (the number of minutes in an hour) which equals 3,750 total annual burden hours.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., 3E.405B, Washington, DC 20530.

Dated: September 27, 2016.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2016–23704 Filed 9–29–16; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

[OMB Number 1121–0235]

Agency Information Collection Activities; Proposed Collection Comments Requested; Extension, Without Change, of a Currently Approved Collection; Bulletproof Vest Partnership (BVP)

AGENCY: Office of Justice Programs, Department of Justice.

ACTION: 30-day notice.

SUMMARY: The Department of Justice (DOJ), Office of Justice Programs, Bureau of Justice Assistance, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. This collection was previously published in the **Federal Register** at 81 FR 51212, on August 3, 2016, allowing for a 60 day comment period.

DATES: Comments are encouraged and will be accepted for an additional 30 days until October 31, 2016.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact C. Casto at 1–202–353–7193, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, 810 7th Street NW., Washington, DC 20531 or by email at *Chris.Casto@usdoj.gov.* Written comments and/or suggestions can also be sent to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503 or sent to *OIRA_submissions@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and/or

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of This Information Collection

1. *Type of Information Collection:* Extension, without change, of a currently approved collection.

2. *The Title of the Form/Collection:* Bulletproof Vest Partnership Application.

3. *The agency form number: None. Bureau of Justice Assistance, United States Department of Justice.*

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Jurisdictions and law enforcement agencies with armor vest needs.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply: It is estimated that no more than 4,500 respondents will apply each year. Each application takes approximately 1 hour to complete.*

6. *An estimate of the total public burden (in hours) associated with the collection:* 4,500 annual burden hours.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., 3E.405B, Washington, DC 20530.

Dated: September 27, 2016.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2016–23705 Filed 9–29–16; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Program Reporting and Performance Standards System for Indian and Native American Programs Under Title I, Section 166 of the Workforce Innovation and Opportunity Act

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Employment and Training Administration (ETA) sponsored information collection request (ICR) revision titled, "Program Reporting and Performance Standards System for Indian and Native American Programs Under Title I, Section 166 of the Workforce Innovation and Opportunity Act," to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before October 31, 2016.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the *RegInfo.gov* Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201608-1205-003* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–ETA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: This ICR seeks approval under the PRA for revisions to the Program Reporting and Performance Standards System for Indian and Native American Programs Under Title I, Section 166 of the Workforce Innovation and Opportunity Act (WIOA) information collection. The ICR covers Forms ETA–9084, Comprehensive Services Program, and ETA–9085, Supplemental Youth Services Program. It also includes standard data elements for participants, the basis of the current performance standards system for WIOA section 166 grantees. Form ETA–9084 is completed by both tribal and non-profit private sector grantees. Form-ETA 9085 is completed only by tribal grantees. This information collection has been classified as a revision, because the agency is incorporating information collections referenced in the WIOA implementing regulations and to update Form ETA–9085 is to increase the age range for youth to twenty-four, in accordance with the WIOA. WIOA sections 166(e) and (h) authorize this information collection. *See* 29 U.S.C. 3221(e) and (h).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1205–0422. The current approval is scheduled to expire on September 30, 2016; however, the DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. New requirements would only take effect upon OMB approval. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on April 22, 2016 (81 FR 23752).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1205–0422. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Agency: DOL–ETA.

Title of Collection: Program Reporting and Performance Standards System for Indian and Native American Programs Under Title I, Section 166 of the Workforce Innovation and Opportunity Act.

OMB Control Number: 1205–0422.

Affected Public: State, Local, and Tribal Governments; Individuals or Households.

Total Estimated Number of Respondents: 23,602.

Total Estimated Number of Responses: 24,170.

Total Estimated Annual Time Burden: 48,686 hours.

Total Estimated Annual Other Costs Burden: $0.

Dated: September 26, 2016.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2016–23638 Filed 9–29–16; 8:45 am]

BILLING CODE 4510–FR–P

DEPARTMENT OF LABOR

Child Labor, Forced Labor, and Forced or Indentured Child Labor in the Production of Goods in Foreign Countries and Efforts by Certain Foreign Countries To Eliminate the Worst Forms of Child Labor

AGENCY: The Bureau of International Labor Affairs, United States Department of Labor.

ACTION: Notice: Request for information and invitation to comment.

SUMMARY: This notice is a request for information and/or comment on three reports issued by the Bureau of International Labor Affairs (ILAB) regarding child labor and forced labor in certain foreign countries. Relevant information submitted by the public will be used by the Department of Labor (DOL) in preparation of its ongoing reporting under Congressional mandates and Presidential directive. The 2015 Findings on the Worst Forms of Child Labor report (TDA report), published on September 30, 2016, assesses efforts by 137 countries to reduce the worst forms of child labor over the course of 2015 and reports whether countries made significant, moderate, minimal, or no advancement during that year. It also suggests actions foreign countries can take to eliminate the worst forms of child labor through legislation, enforcement, coordination, policies, and social programs. The 2016 edition of the List of Goods Produced by Child Labor or Forced Labor (TVPRA List), published on September 30, 2016, makes available to the public a list of goods from countries that ILAB has reason to believe are produced by child labor or forced labor in violation of international standards. Finally, the List of Products Produced by Forced or Indentured Child Labor (EO List), most recently published on December 1, 2014, provides a list of products, identified by country of origin, that the Department, in consultation and cooperation with the Departments of State (DOS) and Homeland Security (DHS), have a reasonable basis to believe might have been mined, produced or manufactured with forced or indentured child labor. Relevant information submitted by the public will be used by DOL in preparation of the next edition of the TDA report, to be published in 2017; the next edition of the TVPRA List, to be published in 2018; and for possible updates to the EO List as needed.

DATES: Submitters of information are requested to provide their submission to the Office of Child Labor, Forced Labor, and Human Trafficking (OCFT) at the email or physical address below by 5 p.m. December 16, 2016.

To Submit Information: Information should be submitted directly to OCFT, Bureau of International Labor Affairs, U.S. Department of Labor. Comments, identified as "Docket No. DOL–2016–0006", may be submitted by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov.

The portal includes instructions for submitting comments. Parties submitting responses electronically are encouraged not to submit paper copies.

Facsimile (fax): OCFT at 202–693–4830.

Mail, Express Delivery, Hand Delivery, and Messenger Service (1 copy): Chanda Uluca and Rachel Rigby at U.S. Department of Labor, OCFT, Bureau of International Labor Affairs, 200 Constitution Avenue NW., Room S–5317, Washington, DC 20210.

Email: Email submissions should be addressed to both Chanda Uluca (*Uluca.Chanda@dol.gov*) and Rachel Rigby (*Rigby.Rachel@dol.gov*).

FOR FURTHER INFORMATION CONTACT: Chanda Uluca and Rachel Rigby. Please see contact information above.

SUPPLEMENTARY INFORMATION:

I. The Trade and Development Act of 2000 (TDA), Public Law 106–200 (2000), established a new eligibility criterion for receipt of trade benefits under the Generalized System of Preferences (GSP). The TDA amended the GSP reporting requirements of Section 504 of the Trade Act of 1974, 19 U.S.C. 2464, to require that the President's annual report on the status of internationally recognized worker rights include "findings by the Secretary of Labor with respect to the beneficiary country's implementation of its international commitments to eliminate the worst forms of child labor."

DOL fulfills this reporting mandate through annual publication of the U.S. Department of Labor's Findings on the Worst Forms of Child Labor with respect to countries eligible for GSP. The 2015 TDA report and additional background information will be available on the Internet at *https://www.dol.gov/agencies/ilab/resources/reports/child-labor/findings/.*

II. Section 105(b)(1) of the Trafficking Victims Protection Reauthorization Act of 2005 ("TVPRA of 2005"), Public Law 109–164 (2006), directed the Secretary of Labor, acting through ILAB, to "develop and make available to the public a list of goods from countries that the Bureau of International Labor Affairs has reason to believe are produced by forced labor or child labor in violation of international standards" (TVPRA List).

Pursuant to this mandate, in December 2007, DOL published in the **Federal Register** a set of procedural guidelines that ILAB follows in developing the TVPRA List (72 FR 73374). The guidelines set forth the criteria by which information is evaluated; established procedures for public submission of information to be considered by ILAB; and identified the process ILAB follows in maintaining and updating the List after its initial publication.

ILAB published its first TVPRA List on September 30, 2009, and has issued updates in 2010, 2011, 2012, 2013, 2014, and 2016. (In 2014, ILAB began publishing the TVPRA List every other year, pursuant to changes in the law. See 22 U.S.C. 7112(b).) The next TVPRA List will be published in 2018. For a copy of the 2016 TVPRA List, Frequently Asked Questions, and other materials relating to the TVPRA List, see ILAB's TVPRA Web page at *http://www.dol.gov/ilab/reports/child-labor/list-of-goods/*.

III. Executive Order No. 13126 (E.O. 13126) declared that it was "the policy of the United States Government . . . that the executive agencies shall take appropriate actions to enforce the laws prohibiting the manufacture or importation of goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part by forced or indentured child labor." Pursuant to E.O. 13126, and following public notice and comment, the Department of Labor published in the January 18, 2001 **Federal Register**, a final list of products ("EO List"), identified by country of origin, that the Department, in consultation and cooperation with the Departments of State (DOS) and Treasury [relevant responsibilities are now within the Department of Homeland Security (DHS)], had a reasonable basis to believe might have been mined, produced or manufactured with forced or indentured child labor (66 FR 5353). In addition to the List, the Department also published on January 18, 2001, "Procedural Guidelines for Maintenance of the List of Products Requiring Federal Contractor Certification as to Forced or Indentured Child Labor," which provide for maintaining, reviewing, and, as appropriate, revising the EO List (66 FR 5351).

Pursuant to Sections D through G of the Procedural Guidelines, the EO List may be updated through consideration of submissions by individuals or through OCFT's own initiative.

DOL has officially revised the EO List four times, most recently on July 23, 2013, each time after public notice and comment as well as consultation with DOS and DHS.

The current EO List, Procedural Guidelines, and related information can be accessed on the Internet at *http://www.dol.gov/ilab/reports/child-labor/list-of-products/index-country.htm*.

Information Requested and Invitation to Comment: Interested parties are invited to comment and provide information regarding these reports. DOL requests comments or information to maintain and update the TVPRA and EO Lists and to update the findings and suggestions for government action for countries reviewed in the TDA report, as well as to assess each country's individual advancement toward eliminating the worst forms of child labor during the current reporting period compared to previous years. For more information on the types of issues covered in the TDA report, please see Appendix III of the report. Materials submitted should be confined to the specific topics of the TVPRA List, EO List, and TDA report. DOL will generally consider sources with dates up to five years old (*i.e.,* data not older than January 1, 2012). DOL appreciates the extent to which submissions clearly indicate the time period to which they apply. In the interest of transparency in our reporting, classified information will not be accepted. Where applicable, information submitted should indicate its source or sources, and copies of the source material should be provided. If primary sources are utilized, such as research studies, interviews, direct observations, or other sources of quantitative or qualitative data, details on the research or data-gathering methodology should be provided. Please see the TVPRA List, EO List, and TDA report for a complete explanation of relevant terms, definitions, and reporting guidelines employed by DOL.

Carol Pier,

Deputy Undersecretary for International Affairs.

[FR Doc. 2016–23612 Filed 9–29–16; 8:45 am]

BILLING CODE 4510–28–P

DEPARTMENT OF LABOR

Notice of Publication of 2016 Update to the Department of Labor's List of Goods Produced by Child Labor or Forced Labor

AGENCY: Office of the Secretary, Bureau of International Labor Affairs, Department of Labor.

ACTION: Announcement of public availability of updated list of goods.

SUMMARY: This notice announces the publication of an updated list of goods—along with countries of origin—that the Bureau of International Labor Affairs (ILAB) has reason to believe are produced by child labor or forced labor in violation of international standards (the List). ILAB is required to develop and make available to the public the List pursuant to the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2005, as amended.

FOR FURTHER INFORMATION, CONTACT: Director, Office of Child Labor, Forced Labor, and Human Trafficking, Bureau of International Labor Affairs, U.S. Department of Labor, at (202) 693–4843 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The Bureau of International Labor Affairs (ILAB) announces the publication of the seventh edition of the *List of Goods Produced by Child Labor or Forced Labor* (List), pursuant to the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2005, as amended (TVPRA). ILAB published the initial List on September 10, 2009, and has since published six updated editions. The 2016 edition adds three new goods (pepper, potatoes, and silk cocoons) and two new countries (Costa Rica and Sudan) to the List. This edition also features the removal of Jordan from the List.

Section 105(b) of the TVPRA mandates that ILAB develop and publish a list of goods from countries that ILAB "has reason to believe are produced with child labor or forced labor in violation of international standards." 22 U.S.C. 7112(b)(2). ILAB's Office of Child Labor, Forced Labor, and Human Trafficking (OCFT) carries out this mandate. The primary purposes of the List are to raise public awareness about the incidence of child labor and forced labor in the production of goods in the countries listed and to promote efforts to eliminate such practices. A full report, including the updated List and a discussion of the List's methodology, as well as Frequently Asked Questions and a bibliography of sources, are available on the Department of Labor Web site at: *http://www.dol.gov/ilab/reports/child-labor/list-of-goods/*.

Signed at Washington, DC, this 19 day of September 2016.

Carol Pier,

Deputy Undersecretary for International Affairs.

[FR Doc. 2016–23479 Filed 9–29–16; 8:45 am]

BILLING CODE 4510–28–P

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Proposed Collection, Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed reinstatement with change of the "Contingent Worker Supplement (CWS) to the Current Population Survey (CPS)," to be conducted in May 2017.

A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section of this notice on or before November 29, 2016.

ADDRESSES: Send comments to Carol Rowan, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue NE., Washington, DC 20212. Written also may be transmitted by fax to 202–691–5111 (this is not a toll free number).

FOR FURTHER INFORMATION CONTACT: Carol Rowan, BLS Clearance Officer, 202–691–7628 (this is not a toll-free number). (See **ADDRESSES** section.)

SUPPLEMENTARY INFORMATION:

I. Background

The CPS has been the principal source of the official Government statistics on employment and unemployment since 1940 (over 75 years). Collection of labor force data through the CPS is necessary to meet the requirements in Title 29, United States Code, Sections 1 and 2. The 2017 CWS will provide information on the characteristics of workers in contingent jobs—that is, jobs that are structured to last only a limited period of time. The CWS will also provide information about workers in several alternative employment arrangements, including independent contractors, on-call workers, temporary help agency workers, and workers provided by contract companies. With the exception of February 2003, the CWS was fielded every two years from 1995 to 2005; however, since then, there have been no reliable and comparable statistics to show how the number and characteristics of these workers have changed over time. In order to maintain data comparability, the 2017 CWS questionnaire will be largely the same as that used in 2005. However, because new types of work have emerged since the last collection of the CWS, BLS is proposing to add four new questions to the end of the CWS. These new questions will explore whether individuals obtain customers or online tasks through companies that electronically match them, often through mobile apps, and examine whether work obtained through electronic matching platforms is a source of secondary earnings.

II. Current Action

Office of Management and Budget clearance is being sought for the Contingent Worker Supplement (CWS) to the CPS. A reinstatement with change of this previously approved collection for which approval has expired is needed to provide the Nation with timely information about the number and characteristics of workers in contingent or alternative employment arrangements. Because new types of work have emerged since the last fielding of the CWS, BLS is proposing to add four new questions. Specifically, two questions will focus on whether individuals obtain customers or online tasks through mobile apps. Such jobs include people using their own cars to drive customers from one place to another, delivering something, or doing customers' household tasks or errands, as well as online tasks such as data entry, translating text, web or software development, or graphic design. In addition, two questions will examine whether work obtained through electronic matching platforms is a source of secondary earnings.

III. Desired Focus of Comments

The Bureau of Labor Statistics is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

Type of Review: Reinstatement, with change, of a previously approved collection for which approval has expired.

Agency: Bureau of Labor Statistics.

Title: Contingent Worker Supplement to the CPS.

OMB Number: 1220–0153.

Affected Public: Households.

Total Respondents: 47,000.

Frequency: One time.

Total Responses: 47,000.

Average Time per Response: 9 minutes.

Estimated Total Burden Hours: 7050 hours.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they also will become a matter of public record.

Signed at Washington, DC, this 26th day of September, 2016.

Kimberley Hill,

Chief, Division of Management Systems, Bureau of Labor Statistics.

[FR Doc. 2016–23639 Filed 9–29–16; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Affirmative Decisions on Petitions for Modification Granted in Whole or in Part

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Notice.

SUMMARY: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and 30 CFR part 44 govern the application,

processing, and disposition of petitions for modification. This **Federal Register** Notice notifies the public that MSHA has investigated and issued a final decision on certain mine operator petitions to modify a safety standard.

ADDRESSES: Copies of the final decisions are posted on MSHA's Web site at *http://www.msha.gov/READROOM/PETITION.HTM.* The public may inspect the petitions and final decisions during normal business hours in MSHA's Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202. All visitors are required to check in at the receptionist's desk in Suite 4E401.

FOR FURTHER INFORMATION CONTACT: Barbara Barron at 202–693–9447 (Voice), *barron.barbara@dol.gov* (Email), or 202–693–9441 (Telefax). [These are not toll-free numbers].

SUPPLEMENTARY INFORMATION:

I. Introduction

Under section 101 of the Federal Mine Safety and Health Act of 1977, a mine operator may petition and the Secretary of Labor (Secretary) may modify the application of a mandatory safety standard to that mine if the Secretary determines that: (1) An alternative method exists that will guarantee no less protection for the miners affected than that provided by the standard; or (2) the application of the standard will result in a diminution of safety to the affected miners.

MSHA bases the final decision on the petitioner's statements, any comments and information submitted by interested persons, and a field investigation of the conditions at the mine. In some instances, MSHA may approve a petition for modification on the condition that the mine operator complies with other requirements noted in the decision.

II. Granted Petitions for Modification

On the basis of the findings of MSHA's investigation, and as designee of the Secretary, MSHA has granted or partially granted the following petitions for modification:

- *Docket Number:* M–2014–023–C.

FR Notice: 79 FR 45466 (8/5/2014).

Petitioner: ACI Tygart Valley, 1200 Tygart Drive, Grafton, West Virginia 26354.

Mine: Leer Mine #1, MSHA I.D. No. 46–09192, located in Taylor County, West Virginia.

Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

- *Docket Number:* M–2014–029–C.

FR Notice: 79 FR 64625 (10/30/2014).

Petitioner: North American Drillers, LLC, 130 Meadow Ridge Road, Suite 22, Mount Morris, Pennsylvania 15349.

Mines: Tunnel Ridge Mine, MSHA I.D. No. 46–08864, located in Ohio County, West Virginia; Mountain View Mine, MSHA I.D. No. 46–09028, located in Tucker County, West Virginia; Leer Mine, MSHA I.D. No. 46–09192, Taylor County, West Virginia; Monongalia County Mine, MSHA I.D. No. 46–01968, located in Monongalia County, West Virginia; Ohio County Mine, MSHA I.D. No. 46–01436, located in Ohio County, West Virginia; Harrison County Mine, MSHA I.D. No. 46–01318, located in Harrison County, West Virginia; Marshall County Mine, MSHA I.D. No. 46–01437, located in Marshall County, West Virginia; Marion County Mine, MSHA I.D. No. 46–01433, located in Marion County, West Virginia; Powhatan #6 Mine, MSHA I.D. No. 33–01159, located in Belmont County, Ohio; and Federal #2 Mine, MSHA I.D. No. 46–01456, located in Monongalia County, West Virginia.

Regulation Affected: 30 CFR 77.1914(a) (Electrical equipment).

- *Docket Number:* M–2015–003–C.

FR Notice: 80 FR 17502 (4/1/2015).

Petitioner: Rosebud Mining Company, P.O. Box 1025, Northern Cambria, Pennsylvania 15714.

Mine: Coral-Graceton Mine, MSHA I.D. No. 36–09595 and Crooked Creek Mine, MSHA I.D. No. 36–09972, both located in Indiana County, Pennsylvania.

Regulation Affected: 30 CFR 75.503 (Permissible electric face equipment; maintenance) and 18.35(a)(5)(i) (Portable (trailing) cables and cords).

- *Docket Number:* M–2015–023–C.

FR Notice: 80 FR 77024 (12/11/2015).

Petitioner: M-Class Mining, LLC, 11351 N. Thompsonville Road, Macedonia, Illinois 62860.

Mine: MC #1 Mine, MSHA I.D. No. 11–03189, located in Franklin County, Illinois.

Regulation Affected: 30 CFR 75.503 (permissible electric face equipment; maintenance) and 18.35 (Portable (trailing) cables and cords).

- *Docket Number:* M–2015–027–C.

FR Notice: 81 FR 3161 (1/20/2016).

Petitioner: Peabody Midwest Mining, LLC, 115 Grayson Lane, Eldorado, Illinois 62930.

Mine: Wildcat Hills Underground Mine, MSHA I.D. No. 11–03156, located in Saline County, Illinois.

Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

- *Docket Number:* M–2015–028–C.

FR Notice: 81 FR 8999 (2/23/2016).

Petitioner: Peabody Midwest Mining, LLC, 115 Grayson Lane, Eldorado, Illinois 62930.

Mine: Wildcat Hills Underground Mine, MSHA I.D. No. 11–03156, located in Saline County, Illinois.

Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

- *Docket Number:* M–2016–001–C.

FR Notice: 81 FR 8998 (2/23/2016).

Petitioner: Peabody Energy Company, 12968 Illinois State Route 13, Coulterville, Illinois 62237.

Mine: Gateway North Mine, MSHA I.D. No. 11–03235, located in Randolph County, Illinois.

Regulation Affected: 30 CFR 75.503 (permissible electric face equipment; maintenance) and 18.35 (Portable (trailing) cables and cords).

- *Docket Number:* M–2016–005–C.

FR Notice: 81 FR 11843 (3/7/2016).

Petitioner: Clinton M Wynn Mining, 419 Shingara Lane, Sunbury, Pennsylvania 17801.

Mine: Bottom Rock Slope, MSHA I.D. No. 36–10110, located in Northumberland County, Pennsylvania.

Regulation Affected: 30 CFR 75.1200(d) & (i) (Mine map).

- *Docket Number:* M–2016–006–C.

FR Notice: 81 FR 11843 (3/7/2016).

Petitioner: Clinton M Wynn Mining, 419 Shingara Lane, Sunbury, Pennsylvania 17801.

Mine: Bottom Rock Slope, MSHA I.D. No. 36–10110, located in Northumberland County, Pennsylvania.

Regulation Affected: 30 CFR 75.1202 and 75.1202–1(a) (Temporary notations, revisions and requirements).

- *Docket Number:* M–2016–007–C.

FR Notice: 81 FR 11843 (3/7/2016).

Petitioner: Clinton M Wynn Mining, 419 Shingara Lane, Sunbury, Pennsylvania 17801.

Mine: Bottom Rock Slope, MSHA I.D. No. 36–10110, located in Northumberland County, Pennsylvania.

Regulation Affected: 30 CFR 75.1400 (Hoisting equipment; general).

- *Docket Number:* M–2013–003–M.

FR Notice: 78 FR 11232 (2/15/2013).

Petitioner: Badger Mining Corporation, N7815 County Highway P, Taylor, Wisconsin 54659.

Mine: Taylor Plant, MSHA I.D. No. 47–02555, P.O. Box 160, Taylor, Wisconsin 54659, located in Jackson County, Wisconsin.

Regulation Affected: 30 CFR 56.13020 (Use of compressed air).

- *Docket Number:* M–2015–007–M.

FR Notice: 81 FR 4337 (1/26/2016).

Petitioner: Frontier-Kemper Constructors, Inc., 1695 Allen Road, Evansville, Indiana 47710–3394.

Mine: Solvay Chemicals, Inc., P.O. Box 1167, 400 County Road 85, Green

River, Wyoming 82935, MSHA I.D. No. 48–01295, located in Sweetwater County, Wyoming.

Regulation Affected: 30 CFR 57.22606(a) and (c) (Explosive materials and blasting units (III mines)).

Sheila McConnell,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2016–23625 Filed 9–29–16; 8:45 am]

BILLING CODE 4520–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petitions for Modification of Application of Existing Mandatory Safety Standards

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and Title 30 of the Code of Federal Regulations Part 44 govern the application, processing, and disposition of petitions for modification. This notice is a summary of petitions for modification submitted to the Mine Safety and Health Administration (MSHA) by the parties listed below.

DATES: All comments on the petitions must be received by MSHA's Office of Standards, Regulations, and Variances on or before October 31, 2016.

ADDRESSES: You may submit your comments, identified by "docket number" on the subject line, by any of the following methods:

1. *Electronic Mail: zzMSHA-comments@dol.gov.* Include the docket number of the petition in the subject line of the message.
2. *Facsimile:* 202–693–9441.
3. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452, Attention: Sheila McConnell, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk in Suite 4E401. Individuals may inspect copies of the petitions and comments during normal business hours at the address listed above.

MSHA will consider only comments postmarked by the U.S. Postal Service or proof of delivery from another delivery service such as UPS or Federal Express on or before the deadline for comments.

FOR FURTHER INFORMATION CONTACT: Barbara Barron, Office of Standards, Regulations, and Variances at 202–693–9447 (Voice), *barron.barbara@dol.gov* (Email), or 202–693–9441 (Facsimile). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION:

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or
2. That the application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, the regulations at 30 CFR 44.10 and 44.11 establish the requirements and procedures for filing petitions for modification.

II. Petitions for Modification

Docket Number: M–2016–027–C.

Petitioner: Oak Gove Resources, LLC, 8360 Taylors Ferry Road, Hueytown, Alabama 35023.

Mine: Oak Grove Mine, MSHA I.D. No. 01–00851, located in Jefferson County, Alabama.

Regulation Affected: 30 CFR 75.364(b)(2) (Weekly examination).

Modification Request: The petitioner requests a modification of the existing standard to permit an alternative method of compliance for weekly examinations of the four-part overcast bank located in the Main North entries at spad number 16+20, due to deteriorating roof and rib conditions that have made traveling the area unsafe and conditions in the area are impractical and unsafe to rehabilitate. The petitioner proposes to have a certified person take air quantity and quality measurements at monitoring points 71A and 71C at entrance and exist of overcast bank will afford the mines the same protection as the existing standard. The petitioner asserts that the existing standard 30 CFR 75.364(b)(2) undermines the safety of the miners by placing them in an area with deteriorated roof and rib conditions. The petitioner states that the following terms and conditions will be followed:

(1) Monitoring stations 71A and 71C will allow effective evaluation of airflow across overcast used to ventilate old works.

(a) Monitoring station 71A will evaluate air entering overcast bank.

(b) Monitoring station 71C will evaluate air as it leaves overcast bank.

(2) Signs showing safe travel route to each monitoring station will be posed in adjacent entries. Monitoring stations and routes will be kept free of water accumulations.

(3) A certified person will conduct weekly evaluations at each of the monitoring stations. Evaluations will include quantity and quality of air entering or exiting overcast bank. Measurements will be made using MSHA-approved and calibrated hand-held multi gas detectors to check for methane, and oxygen concentrations. Appropriate calibrated anemometers will be used to check airflow and volume.

(4) A diagram of normal air flow will be posted at 71A and 71C monitoring points and maintained legible. Any changes will be reported to the Mine Foreman for immediate investigation.

(5) At each monitoring station, a date board will be provided where date, time, and examiner's initials will be recorded along with measured quantity and quality of air. Results including conditions of accessible controls will be recorded in a book kept on the surface and made available to all interested parties.

(6) All monitoring stations and approaches will at all times be maintained in a safe condition. The roof will be supported by bolts and other means to prevent deterioration in the area of monitoring points.

(7) Monitoring stations locations will be shown on an annually submitted mine ventilation map. Monitoring stations will not be moved to another location without prior approval by the District Manager as part of the ventilation plan for the mine.

(8) For added safety additional roof support will be added under overcasts that belt and track travel through.

(9) Prior to implementation of this modification, all mine personnel will be instructed that except along designated routes no travel into the petitioned area will be permitted and all approaches will be fenced or barricaded with "DO NOT ENTER" warning signs.

(10) The overcast area is not being used for work or travel, and, upon information and belief, no one has performed work, examinations, inspections, or otherwise traveled in the overcast area in many years.

(11) Within 60 days after the Proposed Decision and Order (PDO) becomes final, the petitioner will submit proposed revisions for the approved part 48 training plan to the District

Manager. The revisions will include initial and refresher training regarding compliance with the PDO.

(12) Use of the proposed alternative method described in this petition will prevent miners from being exposed to unnecessary hazards, and will increase the measure of protection to the miners.

The petitioner asserts that application of the existing standard to the particular overcast area will result in a diminution of safety to the miners and that the proposed alternative method will at all times guarantee no less than the same measure of protection to the miners as would be provided by the existing standard.

Sheila McConnell,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2016–23626 Filed 9–29–16; 8:45 am]

BILLING CODE 4520–23–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2010–0008]

Construction Fall Protection Systems Criteria and Practices, and Training Requirements; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning its proposal to extend OMB approval of the information collection requirements contained in the Construction Standards on Fall Protection Systems Criteria and Practices (29 CFR 1926.502), and Training Requirements (29 CFR 1926.503).

DATES: Comments must be submitted (postmarked, sent, or received) by November 29, 2016.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2010–0008, U.S. Department of Labor, Room N–2625, 200 Constitution Avenue NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and the OSHA docket number (Docket No. OSHA–2010–0008) for this Information Collection Request (ICR). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments, see the "Public Participation" heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download from the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue NW., Washington, DC 20210; (202) 693–2044, to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Office of Construction Services, Directorate of Construction, OSHA, U.S. Department of Labor, Room N–3476, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–2020.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accord with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are understandable, and OSHA's estimate of the information collection burden is correct. The Occupational Safety and Health Act of 1970 (the OSH Act) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act, or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657).

The Standards on Construction Fall Protection Systems Criteria and Practices (29 CFR 1926.502) and Training Requirements (29 CFR 1926.503) ensure that employers provide the required fall protection for their workers. Accordingly, these standards have the following paperwork requirements: Paragraphs (c)(4)(ii) and (k) of 29 CFR 1926.502, which specify certification of safety nets and development of fall protection plans, respectively, and paragraph (b) of 29 CFR 1926.503, which requires employers to certify training records. The training certification requirement specified in paragraph (b) of 29 CFR 1926.503 documents the training provided to workers potentially exposed to fall hazards in construction. A competent person must train these workers to recognize fall hazards and in the use of procedures and equipment that minimize these hazards. An employer must verify compliance with this training requirement by preparing and maintaining a written certification record that contains the name or other identifier of the worker receiving the training, the date(s) of the training, and the signature of the competent person who conducted the training, or of the employer.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend its approval of the collection of information requirements contained in the Construction Standards on Fall Protection Systems Criteria and Practices (29 CFR 1926.502) and Training Requirements (29 CFR 1926.503). OSHA is requesting a 31,264 burden hour reduction, from 457,108 hours to 425,844 based on the Agency's determinations that fewer employers are required to comply with the Standard's collection of information requirements and that information exchanged during an OSHA compliance inspection is not covered by the PRA. The Agency will summarize the comments submitted in response to this notice and will include this summary in the request to OMB.

Type of Review: Extension of a currently approved collection.

Title: Construction Fall Protection Systems Criteria and Practices (29 CFR 1926.502) and Training Requirements (29 CFR 1926.503).

OMB Control Number: 1218–0197.

Affected Public: Business or other for-profits; Federal Government; State, Local, or Tribal Government.

Number of Responses: 5,314,317.

Frequency of Record Keeping: On occasion, annually.

Average Time per Response: Time per response ranges from 5 minutes (.08 hour) to certify a safety net to 1 hour to develop a fall protection plan.

Estimated Total Burden Hours: 425,844.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) electronically at *http://www.regulations.gov*, which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for this ICR (Docket No. OSHA–2010–0008). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your full name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov*. Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.*, copyrighted material) is not publicly available to read or download from this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available at the Web site's "User Tips" link. Contact the OSHA Docket Office for information about materials not available from the Web site, and for assistance in using the Internet to locate docket submissions.

V. Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on September 27, 2016.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2016–23667 Filed 9–29–16; 8:45 am]

BILLING CODE 4510–26–P

OFFICE OF MANAGEMENT AND BUDGET

Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity

AGENCY: Executive Office of the President, Office of Management and Budget (OMB).

ACTION: Review and Possible Limited Revision of OMB's Statistical Policy Directive on Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity.

SUMMARY: The Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity were last revised in 1997 (62 FR 58782, Oct. 30, 1997; see *https://www.whitehouse.gov/omb/fedreg_1997standards*). Since these revisions were implemented, much has been learned about how these standards have improved the quality of Federal information collected and presented on race and ethnicity. At the same time, some areas may benefit from further refinement. Accordingly, OMB currently is undertaking a review of particular components of the 1997 standard: The use of separate questions measuring race and ethnicity and question phrasing; the classification of a Middle Eastern and North African group and reporting category; the description of the intended use of minimum reporting categories; and terminology used for race and ethnicity classifications. OMB's current review of the standard is limited to these areas. Specific questions appear under the section, "Issues for Comment."

DATES: Comments on the review and possible limited revisions to OMB's Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity detailed in this notice must be in writing. To ensure consideration of comments, they must be received no later than [30 days from the publication of this notice]. Please be aware of delays in mail processing at Federal facilities due to increased security. Respondents are encouraged to send comments electronically via email, or *http://www.regulations.gov* (discussed in **ADDRESSES** below).

ADDRESSES: Written comments on these issues may be addressed to Katherine K. Wallman, Chief Statistician, Office of Management and Budget, 1800 G St., 9th Floor, Washington, DC 20503. You may also send comments or questions via Email to *Race-ethnicity@omb.eop.gov* or to *http://www.regulations.gov*—a Federal E-Government Web site that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Simply type, "Race-ethnicity" (in quotes) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments.

Comments submitted in response to this notice may be made available to the public through relevant Web sites. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. If you send an email comment, your email address will be automatically captured and included as part of the comment that is placed in the public docket. Please note that responses to this public comment request containing any routine notice about the confidentiality of the communication will be treated as public comments that may be made available to the public notwithstanding the inclusion of the routine notice.

Electronic Availability: This document is available on the Internet on the OMB Web site at: *https://www.whitehouse.gov/sites/default/files/omb/inforeg/directive15/race-ethnicity_directive_2016FRN1.pdf.*

FOR FURTHER INFORMATION CONTACT: Jennifer Park, Senior Statisitician, 1800 G St., 9th Floor, Washington, DC 20503, Email address: *Race-ethnicity@omb.eop.gov, telephone number:* (202) 395–9046.

SUPPLEMENTARY INFORMATION:

Background: Development work on the standards for classification of Federal data on race and ethnicity originated in the activities of the Federal Interagency Committee on Education (FICE), which was originally established by Executive Order 11185 in 1964. The FICE Subcommittee on Minority Education completed a report in April 1973 on higher education for Chicanos, Puerto Ricans, and American Indians, which noted in particular the lack of comparable data on racial and ethnic groups. Accordingly, the report called for the coordinated development of common definitions for racial and ethnic groups, and the Federal collection of racial and ethnic enrollment and other educational data on a compatible and nonduplicative basis.

In June 1974, FICE created an Ad Hoc Committee on Racial and Ethnic Definitions whose 25 members came from Federal agencies with major responsibilities for the collection or use of racial and ethnic data. It took on the task of determining and describing the major groups to be identified by Federal agencies when collecting and reporting racial and ethnic data. The Ad Hoc Committee wanted to ensure that whatever categories the various agencies used could be aggregated, disaggregated, or otherwise combined so that the data developed by one agency could be used in conjunction with the data developed by another agency. In addition, the Ad Hoc Committee recommended that the categories could be subdivided into more detailed ethnic groups to meet users' needs, but that to maintain comparability, such detail data should aggregate into the minimum racial and ethnic categories.

Following testing of proposed categories, and the receipt of comments and incorporation of suggested modifications, OMB on May 12, 1977, promulgated for use by all Federal agencies minimum standard categories for the collection and presentation of data on race and ethnicity. (See 42 FR 1926 May 12, 1977.) (Although OMB required the agencies to use these racial and ethnic categories at a minimum, it should be emphasized that the standard permited collection of additional detail if the more detailed categories could be aggregated into the minimum racial and ethnic categories to allow comparability of data.)

In 1994, OMB published a notice of proposed review and possible revision of the standard. (See *https://www.whitehouse.gov/omb/fedreg_notice_15.*) It requested comments on the adequacy of then current categories. Specifically, it asked for comments on the addition of a "multiracial" category; the addition of an "Other Race" category; use of an open-ended question to solicit information on race and ethnicity; the names of the "Black" category and the "American Indian or Alaska Native" category; including "Native Hawaiians" as a separate reporting category from the "Asian or Pacific Islander" category; adding Hispanic as a racial designation rather than ethnicity; and adding an "Arab or Middle Eastern" category as an ethnicity. OMB established an Interagency Committee for the Review of the Racial and Ethnic Standards, whose members represented the many and diverse Federal needs for racial and ethnic data, including statutory requirements for such data.

In 1997, OMB published the recommendations of the Interagency Committee in its notice of decision. (See *https://www.whitehouse.gov/omb/fedreg_1997standards.*) Drawing from stakeholder input, Interagency Committee statistical analysis, and public comment, the standard was revised in several ways. It required separate measures of race and ethnicity, with the "Hispanic or Latino" ethnicity presented first. Respondents were offered the option of selecting one or more racial designations, with the use of the instructions "Mark one or more" and "Select one or more." "AfricanAmerican" was added to the category of "Black." "Native Hawaiian or Other Pacific Islander" was created as a separate category from "Asian or Pacific Islander." However, agreement could not be reached regarding the composition of an "Arab/Middle Eastern" category, and no classification or category was therefore defined.

Current Review: Since the 1997 revision, the U.S. population has continued to become more racially and ethnically diverse. Additionally, much has been learned about the implementation of these standards since they were issued approximately two decades ago. In accordance with good statistical practice, several Federal agencies have conducted methodological research to better understand how use of the revised standard informs the quality of Federal statistics on race and ethnicity.

In 2014, OMB formed an Interagency Working Group for Research on Race and Ethnicity to exchange research findings, identify implementation issues, and collaborate on a shared research agenda to improve Federal data on race and ethnicity. The Working Group comprises representatives from ten cabinet departments and three other agencies engaged in the collection or use of Federal race and ethnicity data.

Through its systematic review of the implemention of the 1997 revision and stakeholder feedback, the Working Group identified four particular areas where further revisions to the standard might improve the quality of race and ethnicity information collected and presented by Federal agencies. Specifically, these four areas include:

1. The use of separate questions versus a combined question to measure race and ethnicity and question phrasing;
2. the classification of a Middle Eastern and North African group and distinct reporting category;
3. the description of the intended use of minimum reporting categories; and
4. the salience of terminology used for race and ethnicity classifications and other language in the standard.

Issues for Comment: With this Notice, OMB is seeking comments from the public on: (1) The adequacy of the current standard in the areas identified for focused review (see detailed descriptions below); (2) specific suggestions for the identified areas that have been offered; and (3) principles that should govern any proposed revisions to the standards in the identified areas.

Question Format & Nonresponse: Although many respondents report within the race and ethnicity categories specified by the standard, recent censuses, surveys, and experimental tests have shown that its implementation is not well understood and/or is considered inadequate by some respondents. This results in respondents' inability and/or unwillingness to self-identify as the standard intends.

For a growing segment of respondents, this situation arises because of the conceptual complexity that is rooted in the standard's definitional distinction of race from ethnicity. Nearly half of Hispanic or Latino respondents do not identify within any of the standard's race categories (Rios et al. 2014; see *https://www.census.gov/population/www/documentation/twps0102/twps0102.pdf*). With the projected steady growth of the Hispanic or Latino population, the number of people who do not identify with any of the standard's race categories is expected to increase (Compton et al. 2012; see *https://www.census.gov/2010census/pdf/2010_Census_Race_HO_AQE.pdf;* Rios et al. 2014). Additionally, although the reporting of multiple races is permitted according to the current standard, reporting multiple Hispanic origins or a mixed Hispanic/non-Hispanic heritage in the current Hispanic ethnicity question is not permitted. (Please note: The terms 'Hispanic or Latino'' and ''Hispanic'' are used interchangeably in this Notice.)

To explore this issue further, the U.S. Census Bureau conducted the 2010 Census Race and Hispanic Origin Alternative Questionnaire Experiment (AQE). Among its most notable findings was that a combined question design (rather than the current standard of separate questions) yielded a substantially increased use of OMB standard categories among Hispanic or Latino respondents, signaling that a combined question approach may better reflect how Hispanic or Latino respondents view themselves (see *https://www.census.gov/2010census/pdf/2010_Census_Race_HO_AQE.pdf*). Qualitative aspects of this research further supported this interpretation. The Federal Interagency Working Group for Research on Race and Ethnicity continues to examine this proposal. If a combined measure were to be used outside of a limited, methodological experiment, it would be necessary for OMB to revise the current standard.

Middle Eastern or North African: According to the current standard, the aggregate reporting category of ''White'' race includes people having origins in any of the original peoples of Europe, the Middle East, or North Africa. During the periodic review preceding the 1997 revision, OMB's Interagency Committee for the Review of the Racial and Ethnic Standards considered suggestions to require an additional, distinct minimum reporting category for respondents identifying as ''Arabs or Middle Easterners.'' At the conclusion of the review, agreement could not be reached among public stakeholders on the intended measurement concept (*i.e.,* whether the category should be based on language, geography, etc.) nor, accordingly, a definition for this category. The Committee took this public disagreement into consideration and thus did not issue a definition nor an additional, minimum reporting category for this group. Instead, OMB encouraged further research be done to determine the best way to improve data for ''Arabs/Middle Easterners.'' The Federal Interagency Working Group for Research on Race and Ethnicity continues to examine this proposal, with input from multiple stakeholders. If consensus upon a definition for Middle Eastern or North African can be reached, with or without the requirement of an additional, separate, aggregate reporting category, OMB would need to revise the current standard to clarify the classification instructions. This would address potential inconsistencies across data collections where data describing a Middle Eastern or North African group could be reported separately for detailed analyses (for example, where sample size permits), but otherwise could be aggregated into the ''White'' reporting category to facilitate comparability across information collections that would not have large enough samples to permit separate, detailed reporting.

Intent of Minimum Categories: The standard provides a minimum set of racial and ethnic categories for use when Federal agencies are collecting and presenting such information for statistical, administrative, or compliance purposes. However, it does not preclude the collection and presentation of additional detailed categories for statistical, administrative, or compliance purposes, provided that the additional detailed categories can be aggregated into the minimum set to permit comparisons. Specifically, the current standard advises, ''In no case shall the provisions of the standards be construed to limit the collection of data to the categories described above. The collection of greater detail is encouraged . . .''

There are numerous examples of Federal agencies collecting detailed race and ethnicity data in their statistical reporting; these are not limited to decennial censuses or extremely large surveys, such as the American Community Survey (ACS). Nonetheless, OMB has learned that the minimum reporting categories as described in the current standard are often misinterpreted as the only permissible reporting categories. Accordingly, OMB has asked the Federal Interagency Working Group for Research on Race and Ethnicity to examine the language in the current standard in order to improve the understanding of the intended use of minimum categories, that is, to facilitate comparison across information collections, rather than to limit detailed race and ethnic group information collection and presentation.

Terminology: As the diversity of the U.S. continues to increase, it becomes more important for people to understand the racial and ethnic terminology included in Federal data collection systems. The language used to describe race and ethnicity changes over time, and while some terminology continues to resonate with group members, other expressions may fall out of favor or take on other meanings.

For example, the standard currently designates ''Black or African American'' as the ''principal minority race.'' This designation provides an option, in certain circumstances, for presentation of the ''White'' category, the ''Black or African American'' category (as the 'principal minority race') and the ''All Other Races'' category, without the requirement of also presenting other minimum reporting categories. The designation may warrant revision for several reasons. First, certain definitions of ''minority'' as including Hispanic (*i.e.,* HR 4238; see *https://www.congress.gov/bill/114th-congress/house-bill/4238*), and the relative prevalence of the Hispanic or Latino population compared with the Black or African American population, suggest potential revision of the ''principal minority race'' designation, or the use of alternative terms (*e.g.,* ''principal minority race/ethnicity''). Perhaps most broadly, the utility of presenting a category of ''All Other Races,'' given the diversity of experience among other race/ethnicity groups, and the salience of designating a ''principal minority'' for presentation purposes, suggests further review. The Federal Interagency Working Group for Research on Race and Ethnicity is examining such terminology for possible revision to the standard.

Guidance for Review:

Federal Uses of Race and Ethnicity Data: When providing comment regarding proposed areas for possible revision, it may be helpful to keep in mind how the standard is used. The standard not only guides information collected and presented from the decennial census and numerous other statistical collections, but also is used by Federal agencies for civil rights enforcement and for program administrative reporting. These include, among others:

- Enforcing the requirements of the Voting Rights Act;
- reviewing State congressional redistricting plans;
- collecting and presenting population and population characteristics data, labor force data, education data, and vital and health statistics;
- establishing and evaluating Federal affirmative action plans and evaluating affirmative action and discrimination in employment in the private sector;
- monitoring the access of minorities to home mortgage loans under the Home Mortgage Disclosure Act;
- enforcing the Equal Credit Opportunity Act;
- monitoring and enforcing desegregation plans in the public schools;
- assisting minority businesses under the minority business development programs; and
- monitoring and enforcing the Fair Housing Act.

To most effectively promote information quality, the intended uses of data on race and ethnicity should be considered when changes to the standards are contemplated. Additionally, the possible effects of any proposed changes on the quality and utility of the resulting data must be considered.

General Principles for the Review of the Racial and Ethnic Data Categories: When providing comment on particular areas of the current standard, it also may be helpful to consult the principles that framed the 1977 and 1997 revisions. Comments on these principles are welcomed.

1. The racial and ethnic categories set forth in the standard should not be interpreted as being scientific or anthropological in nature.

2. Respect for individual dignity should guide the processes and methods for collecting data on race and ethnicity; respondent self-identification should be facilitated to the greatest extent possible.

3. To the extent practicable, the concepts and terminology should reflect clear and generally understood definitions that can achieve broad public acceptance.

4. The racial and ethnic categories should be comprehensive in coverage and produce compatible, nonduplicated, exchangeable data across Federal agencies.

5. Foremost consideration should be given to data aggregations by race and ethnicity that are useful for statistical analysis, program administration and assessment, and enforcement of existing laws and judicial decisions, bearing in mind that the standards are not intended to be used to establish eligibility for participation in any Federal program.

6. While Federal data needs for racial and ethnic data are of primary importance, consideration should also be given to needs at the State and local government levels, including American Indian tribal and Alaska Native village governments, as well as to general societal needs for these data.

7. The categories should set forth a minimum standard; additional categories should be permitted provided they can be aggregated to the standard categories. The number of standard categories should be kept to a manageable size, as determined by statistical concerns and data needs.

8. A revised set of categories should be operationally feasible in terms of burden placed upon respondents and the cost to agencies and respondents to implement the revisions.

9. Any changes in the categories should be based on sound methodological research and should include evaluations of the impact of any changes not only on the usefulness of the resulting data but also on the comparability of any new categories with the existing ones.

10. Any revision to the categories should provide for a crosswalk at the time of adoption between the old and the new categories so that historical data series can be statistically adjusted and comparisons can be made.

11. Because of the many and varied needs and strong interdependence of Federal agencies for racial and ethnic data, any changes to the existing categories should be the product of an interagency collaborative effort.

OMB recognizes that these principles may in some cases represent competing goals for the standard. Through the review process, it will be necessary to balance statistical issues, needs for data, and social concerns. The application of these principles to guide the review and possible revision of the standard ultimately should result in consistent, publicly accepted data on race and ethnicity that will meet the needs of the government and the public while recognizing the diversity of the population and respecting the individual's dignity.

Howard A. Shelanski,

Administrator, Office of Information and Regulatory Affairs.

[FR Doc. 2016–23672 Filed 9–29–16; 8:45 am]

BILLING CODE 3110–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (16–069)]

NASA Advisory Council; Science Committee; Heliophysics Subcommittee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Heliophysics Subcommittee of the NASA Advisory Council (NAC). This Subcommittee reports to the Science Committee of the NAC. The meeting will be held for the purpose of soliciting, from the scientific community and other persons, scientific and technical information relevant to program planning.

DATES: Tuesday, October 25, 2016, 10:00 a.m.–4:00 p.m., Eastern Time.

FOR FURTHER INFORMATION CONTACT: KarShelia Henderson, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–2355, fax (202) 358–2779, or *khenderson@nasa.gov.*

SUPPLEMENTARY INFORMATION: The meeting will be open to the public telephonically and via WebEx. Any interested person may call the USA toll free conference call number 1–888–625–1623, passcode 5538265, to participate in this meeting by telephone. The WebEx link is *https://nasa.webex.com/;* the meeting number is 999 356 448 and the password is HPS2016!. The agenda for the meeting includes the following topics:

—Living With a Star (LWS) Vision

—LWS Focus Topics for Research Opportunities in Space and Earth Sciences (ROSES) 2017

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

Patricia D. Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2016–23657 Filed 9–29–16; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Social, Behavioral and Economic Sciences; Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name:

Advisory Committee for Social, Behavioral and Economic Sciences (#1171).

Date/Time:

October 27, 2016; 9:00 a.m. to 5:00 p.m.
October 28, 2016; 8:45 a.m. to 12:45 p.m.

Place: National Science Foundation, 4201 Wilson Boulevard, Stafford I, Room 1235, Arlington, VA 22230.

Type of Meeting: Open.

Contact Person: Dr. Deborah Olster, Office of the Assistant Director, Directorate for Social, Behavioral and Economic Sciences, National Science Foundation, 4201 Wilson Boulevard, Room 905, Arlington, Virginia 22230; Telephone: 703–292–8700.

Summary of Minutes: May be obtained from contact person listed above.

Purpose of Meeting: To provide advice and recommendations to the National Science Foundation on major goals and policies pertaining to Social, Behavioral and Economic Sciences Directorate (SBE) programs and activities.

Agenda

Thursday, October 27, 2016

- SBE Directorate and Division Updates
- NSF Strategic Plan
- Update from the National Institutes of Health
- Division of Social and Economic Sciences (SES) Committee of Visitors Report and SES Response
- The National Academies' Division of Behavioral and Social Sciences and Education: Reflections from the Executive Director
- NSF "Big Idea" for Future Investment: Navigating the New Artic
- Report to the National Science Board on the NSF's Merit Review Process Fiscal Year 2015

Friday, October 28, 2016

- Meeting with NSF Leadership
- NSF "Big Idea" for Future Investment: Understanding the Rules of Life: Predicting Phenotype
- Reframing the Social and Behavioral Sciences
- Future Meetings, Assignments and Concluding Remarks

Dated: September 26, 2016.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2016–23644 Filed 9–29–16; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Biological Sciences; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Biological Sciences (#1110).

Date and Time:

October 24, 2016; 8:30 a.m.–5:00 p.m.
October 25, 2016; 8:30 a.m.–11:30 a.m.

Place: National Science Foundation, 4201 Wilson Boulevard, Room 1235, Arlington, VA 22230.

Please contact Rachel Evans at *rlevans@nsf.gov* to obtain a visitor badge. All visitors to the NSF will be required to show photo ID to obtain a badge.

Type of Meeting: Open.

Contact Person: Charles Liarakos, National Science Foundation, 4201 Wilson Boulevard, Room 605, Arlington, VA 22230; Tel No.: (703) 292–8400.

Purpose of Meeting: The Advisory Committee for the Directorate for Biological Sciences (BIO) provides advice, recommendations, and oversight concerning major program emphases, directions, and goals for the research-related activities of the divisions that make up BIO.

Agenda: Agenda items will include a NEON project update, presentations from the Advisory Committee members about leading edge science, a synopsis of the Division of Biological Infrastructure Committee of Visitors' report, and other matters relevant to the Directorate for Biological Sciences.

Dated: September 26, 2016.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2016–23643 Filed 9–29–16; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS) Meeting of the ACRS Subcommittee On T–H Phenomena; Notice of Meeting

The ACRS Subcommittees on T–H Phenomenon will hold a meeting on October 5, 2016, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The meeting will be open to public attendance with the exception of portions that may be closed to protect information that is proprietary pursuant to 5 U.S.C. 552b(c)(4). The agenda for the subject meeting shall be as follows:

Wednesday, October 5, 2016—8:30 a.m. Until 4:30 p.m.

The Subcommittee will review the fidelity of methods and codes for operation at AREVA's Extended Flow Window (plant-specific Monticello). The Subcommittee will hear presentations by and hold discussions with the NRC staff regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Zena Abdullahi (Telephone 301–415–8716 or Email: *Zena.Abdullahi@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 21, 2015, (80 FR 63846).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (Telephone 240–888–9835) to be escorted to the meeting room.

Dated: September 26, 2016.

John Lai,

Acting Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2016–23688 Filed 9–29–16; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2012–22, MC2016–201 and CP2016–290, MC2016–202 and CP2016–291, MC2016–203 and CP2016–292, MC2016–204 and CP2016–293, and MC2016–205 and CP2016–294]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing recent Postal Service filings for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* October 3, 2016 (Comment due date applies to all Docket Nos. listed above)

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's Web site (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.40.

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2012–22; *Filing Title:* Notice of United States Postal Service of Change in Prices Pursuant to Amendment to Parcel Select and Parcel Return Service Contract 3; *Filing Acceptance Date:* September 23, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Curtis E. Kidd; *Comments Due:* October 3, 2016.

2. *Docket No(s).:* MC2016–201 and CP2016–290; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Contract 240 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* September 23, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Erin Mahagan; *Comments Due:* October 3, 2016.

3. *Docket No(s).:* MC2016–202 and CP2016–291; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Contract 241 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* September 23, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Erin Mahagan; *Comments Due:* October 3, 2016.

4. *Docket No(s).:* MC2016–203 and CP2016–292; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Contract 242 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* September 23, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Kenneth R. Moeller; *Comments Due:* October 3, 2016.

5. *Docket No(s).:* MC2016–204 and CP2016–293; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Contract 243 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* September 23, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Kenneth R. Moeller; *Comments Due:* October 3, 2016.

6. *Docket No(s).:* MC2016–205 and CP2016–294; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Express & Priority Mail Contract 35 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* September 23, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Curtis E. Kidd; *Comments Due:* October 3, 2016.

This notice will be published in the **Federal Register**.

Ruth Ann Abrams,

Acting Secretary.

[FR Doc. 2016–23620 Filed 9–29–16; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2014–1, MC2016–206 and CP2016–295]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing recent Postal Service filings for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing,

invites public comment, and takes other administrative steps.

DATES: *Comments are due:* October 4, 2016 (Comment due date applies to all Docket Nos. listed above)

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's Web site (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.40.

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2014–1; *Filing Title:* Notice of United States Postal Service of Amendment to Parcel Select and Parcel Return Service Contract 5, with Portions Filed Under Seal; *Filing Acceptance Date:* September 23, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Natalie R. Ward; *Comments Due:* October 4, 2016.

2. *Docket No(s).:* MC2016–206 and CP2016–295; *Filing Title:* Request of the United States Postal Service to Add First-Class Package Service Contract 64 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* September 26, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Lyudmila Y. Bzhilyanskaya; *Comments Due:* October 4, 2016.

This Notice will be published in the **Federal Register**.

Ruth Ann Abrams,
Acting Secretary.

[FR Doc. 2016–23694 Filed 9–29–16; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Product Change—First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* September 30, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on September 26, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add First-Class Package Service Contract 64 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2016–206, CP2016–295.

Stanley F. Mires,
Attorney, Federal Compliance.

[FR Doc. 2016–23618 Filed 9–29–16; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 32283; 812–14641]

SerenityShares Investments LLC, et al.; Notice of Application

September 26, 2016.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the "Act") for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act. The requested order would permit (a) index-based series of certain open-end management investment companies ("Funds") to issue shares redeemable in large aggregations only ("Creation Units"); (b) secondary market transactions in Fund shares to occur at negotiated market prices rather than at net asset value ("NAV"); (c) certain Funds to pay redemption proceeds, under certain circumstances, more than seven days after the tender of shares for redemption; (d) certain affiliated persons of a Fund to deposit securities into, and receive securities from, the Fund in connection with the purchase and redemption of Creation Units; and (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the Funds ("Funds of Funds") to acquire shares of the Funds.

APPLICANTS: SerenityShares Investments LLC (the "Initial Adviser"), a Delaware limited liability company that will be registered as an investment adviser under the Investment Advisers Act of 1940, ETF Series Solutions (the "Trust"), a Delaware statutory trust registered under the Act as an open-end management investment company with multiple series, and Quasar Distributors, LLC (the "Distributor"), a Delaware limited liability company and broker-dealer registered under the Securities Exchange Act of 1934 ("Exchange Act").

FILING DATES: The application was filed on April 12, 2016, and amended on September 1, 2016.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on October 21, 2016, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090; Applicants: The Initial Adviser, 6615 Hillandale Road, Chevy Chase, MD 20815; the Trust and the Distributor, 615 East Michigan Street, 4th Floor, Milwaukee, Wisconsin 53202.

FOR FURTHER INFORMATION CONTACT: Christine Y. Greenlees, Senior Counsel, at (202) 551–6879, or David J. Marcinkus, Branch Chief, at (202) 551–6821 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Summary of the Application

1. Applicants request an order that would allow Funds to operate as index exchange traded funds ("ETFs").[1] Fund shares will be purchased and redeemed at their NAV in Creation Units only. All orders to purchase Creation Units and all redemption requests will be placed by or through an "Authorized Participant", which will have signed a participant agreement with the Distributor. Shares will be listed and traded individually on a national securities exchange, where share prices will be based on the current bid/offer market. Any order granting the requested relief would be subject to the terms and conditions stated in the application.

2. Each Fund will hold investment positions selected to correspond generally to the performance of an Underlying Index. In the case of Self-Indexing Funds, an affiliated person, as defined in section 2(a)(3) of the Act ("Affiliated Person"), or an affiliated person of an Affiliated Person ("Second-Tier Affiliate"), of the Trust or a Fund, of the Adviser, of any sub-adviser to or promoter of a Fund, or of the Distributor will compile, create, sponsor or maintain the Underlying Index.[2]

3. Shares will be purchased and redeemed in Creation Units and generally on an in-kind basis. Except where the purchase or redemption will include cash under the limited circumstances specified in the application, purchasers will be required to purchase Creation Units by depositing specified instruments ("Deposit Instruments"), and shareholders redeeming their shares will receive specified instruments ("Redemption Instruments"). The Deposit Instruments and the Redemption Instruments will each correspond pro rata to the positions in the Fund's portfolio (including cash positions) except as specified in the application.

4. Because shares will not be individually redeemable, applicants request an exemption from section 5(a)(1) and section 2(a)(32) of the Act that would permit the Funds to register as open-end management investment companies and issue shares that are redeemable in Creation Units only.

5. Applicants also request an exemption from section 22(d) of the Act and rule 22c–1 under the Act as secondary market trading in shares will take place at negotiated prices, not at a current offering price described in a Fund's prospectus, and not at a price based on NAV. Applicants state that (a) secondary market trading in shares does not involve a Fund as a party and will not result in dilution of an investment in shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants represent that share market prices will be disciplined by arbitrage opportunities, which should prevent shares from trading at a material discount or premium from NAV.

6. With respect to Funds that effect creations and redemptions of Creation Units in kind and that are based on certain Underlying Indexes that include foreign securities, applicants request relief from the requirement imposed by section 22(e) in order to allow such Funds to pay redemption proceeds within fifteen calendar days following the tender of Creation Units for redemption. Applicants assert that the requested relief would not be inconsistent with the spirit and intent of section 22(e) to prevent unreasonable, undisclosed or unforeseen delays in the actual payment of redemption proceeds.

7. Applicants request an exemption to permit Funds of Funds to acquire Fund shares beyond the limits of section 12(d)(1)(A) of the Act; and the Funds, and any principal underwriter for the Funds, and/or any broker or dealer registered under the Exchange Act, to sell shares to Funds of Funds beyond the limits of section 12(d)(1)(B) of the Act. The application's terms and conditions are designed to, among other things, help prevent any potential (i) undue influence over a Fund through control or voting power, or in connection with certain services, transactions, and underwritings, (ii) excessive layering of fees, and (iii) overly complex fund structures, which are the concerns underlying the limits in sections 12(d)(1)(A) and (B) of the Act.

8. Applicants request an exemption from sections 17(a)(1) and 17(a)(2) of the Act to permit persons that are Affiliated Persons, or Second Tier Affiliates, of the Funds, solely by virtue of certain ownership interests, to effectuate purchases and redemptions in-kind. The deposit procedures for in-kind purchases of Creation Units and the redemption procedures for in-kind redemptions of Creation Units will be the same for all purchases and redemptions and Deposit Instruments and Redemption Instruments will be valued in the same manner as those investment positions currently held by

---

[1] Applicants request that the order apply to the new series of the Trust and any additional series of the Trust, and any other open-end management investment company or series thereof, that may be created in the future (each, included in the term "Fund"), each of which will operate as an ETF and will track a specified index comprised of domestic or foreign equity and/or fixed income securities (each, an "Underlying Index"). Any Fund will (a) be advised by the Initial Adviser or an entity controlling, controlled by, or under common control with the Initial Adviser (each, an "Adviser") and (b) comply with the terms and conditions of the application.

[2] Each Self-Indexing Fund will post on its Web site the identities and quantities of the investment positions that will form the basis for the Fund's calculation of its NAV at the end of the day. Applicants believe that requiring Self-Indexing Funds to maintain full portfolio transparency will help address, together with other protections, conflicts of interest with respect to such Funds.

the Funds. Applicants also seek relief from the prohibitions on affiliated transactions in section 17(a) to permit a Fund to sell its shares to and redeem its shares from a Fund of Funds, and to engage in the accompanying in-kind transactions with the Fund of Funds.[3] The purchase of Creation Units by a Fund of Funds directly from a Fund will be accomplished in accordance with the policies of the Fund of Funds and will be based on the NAVs of the Funds.

9. Section 6(c) of the Act permits the Commission to exempt any persons or transactions from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that (a) the terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policies of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Brent J. Fields,

Secretary.

[FR Doc. 2016–23611 Filed 9–29–16; 8:45 am]

BILLING CODE 8011–01–P

---

[3] The requested relief would apply to direct sales of shares in Creation Units by a Fund to a Fund of Funds and redemptions of those shares. Applicants, moreover, are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where a Fund could be deemed an Affiliated Person, or a Second-Tier Affiliate, of a Fund of Funds because an Adviser or an entity controlling, controlled by or under common control with an Adviser provides investment advisory services to that Fund of Funds.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–78935; File No. SR–DTC–2016–005]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, Regarding the Implementation of Functionality To Submit a Cover of Protect on Behalf of Another Participant and the Removal of the Option To Cover of Protect Directly With Agent

September 26, 2016.

On July 29, 2016, The Depository Trust Company (“DTC”) filed with the Securities and Exchange Commission (“Commission”) proposed rule change SR–DTC–2016–005 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)[1] and Rule 19b–4 thereunder.[2] The proposed rule change was published for comment in the **Federal Register** on August 15, 2016.[3] The Commission did not receive any comment letters on the proposed rule change. On September 14, 2016, DTC filed Amendment No. 1 to the proposed rule change, as discussed below. The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons and is approving on an accelerated basis the proposed rule change, as modified by Amendment No. 1.

I. Description of the Proposed Rule Change and Notice of Filing Amendment No. 1

The proposed rule change by DTC, as modified by Amendment No. 1, would update its Procedures[4] set forth in the Guide to make changes to certain options within its Participant Subscription Offer Program (“PSOP”)[5] and Participant Tender Offer Program (“PTOP”) functions.[6] Specifically, DTC proposes to add an option called “Cover of Protect on Behalf of Another Participant” (“CPAP”) to both PSOP and PTOP (“PSOP/PTOP”) that would allow a Participant to tender subscription rights (“Rights”) or Securities through DTC to an agent (“Offer Agent”),[7] on behalf of another Participant that needs to tender such Rights or Securities in order to receive the shares and/or consideration from (i) a subscription rights offering (a “Rights Offer”); or (ii) a cash tender offer or exchange offer (collectively, a “Tender/Exchange Offer”) (together with Rights Offer, “Offer”). DTC would also eliminate an option called “Cover of Protect Submitted Directly to Agent” (“CPDA”) from PSOP/PTOP that has allowed a Participant to tender Rights or Securities through DTC to be eligible to receive the shares and/or consideration from an Offer, when such Participant submitted its initial acceptance directly to the Offer Agent outside of DTC. In addition, DTC proposes to make ministerial changes to the text of the Guide, as more fully described below.[8]

A. Proposal

As DTC describes in the Notice, there are times when a Participant that submitted a Protect[9] (the “Protecting Participant”) may need to have another Participant (the “Covering Participant”)

---

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 78520 (August 9, 2016), 81 FR 54170 (August 15, 2016) (SR–DTC–2016–005) (“Notice”).

[4] Capitalized terms not otherwise defined herein have the meaning set forth in the Rules, By-Laws and Organization Certificate of DTC (the “Rules”), *available at http://www.dtcc.com/legal/rules-and-procedures.aspx* and the Reorganizations Service Guide (the “Guide”), *available at http://www.dtcc.com/~/media/Files/Downloads/legal/service-guides/Reorganizations.pdf.*

[5] References in this notice and order to “PSOP” refer to both the PSOP function within the DTC Participant Terminal System (“PTS”) interface and the equivalent “Rights Subscription” function within the Participant Browser System (“PBS”) interface. PSOP is a function that is used by Participants to submit instructions including oversubscriptions, submit protects, submit cover of protects, submit cover of protects on behalf of another Participant, and submit Rights sell instructions on Rights Subscription events. PTS and PBS are user interfaces for DTC’s Settlement and Asset Services functions. PTS is mainframe-based and PBS is web-based with a mainframe back-end. Participants may use either PTS or PBS, as they are functionally equivalent.

[6] References in this notice and order to “PTOP” refer to both the PTOP function within the PTS interface and the equivalent “Voluntary Tenders and Exchanges” function within the PBS interface. PTOP is a function that is used by Participants to submit instructions, submit protects, submit cover of protects, submit cover of protects on behalf of another Participant, and submit withdrawals on various Voluntary Reorganization events.

[7] The Offer Agent is the fiscal agent of the offeror, typically a bank or trust company that is designated to coordinate the process of the Offer.

[8] The description of the proposed rule change herein is based on the statements prepared by DTC in the Notice. Notice, *supra* note 3, 81 FR at 54170–72.

[9] DTC states that an investor or its broker (“Investor”) may want to accept an Offer but will not have the necessary Rights or Securities, as the case may be, before the expiration date of the Offer. If permitted by the terms of the Offer, the Investor may submit to the Offer Agent the notice of guaranteed delivery for such Offer (“Notice of Guaranteed Delivery”) which serves as (i) protection of the Investor’s acceptance of the Offer (the “Protect”), and sets forth the number of shares being subscribed to or the amount of Securities being tendered, and (ii) a guarantee that the Rights or Securities (the “Cover”) will be delivered to the Offer Agent within the period prescribed by the Offer (the “Protect Period”). Notice, *supra* note 3, 81 FR at 54171.

Cover the Protect.[10] Currently, neither PSOP nor PTOP has the specific functionality for a Covering Participant to submit a Cover on behalf of a Protecting Participant.

In order to address directly a Participant's need to submit a Cover of another Participant's Protect, DTC proposes to add the CPAP option to PSOP/PTOP. With this enhancement, the Protecting Participant would submit a Protect through PSOP/PTOP, and the Covering Participant would be able to submit a Cover through PSOP/PTOP by providing the Protecting Participant's Protect ID, Protect Sequence Number, and Protect Participant ID. DTC explains that this enhanced functionality would automate the matching of Covers to corresponding Protects, as well as automatically allocate the applicable credits for Securities and/or payments directly to the Protecting Participant, rather than to the Covering Participant. The CPAP option would eliminate the need for Participants to utilize CPDA for the unintended purpose of Covering another Participant's Protect.[11]

In addition, to further reduce the risks, burden, and costs to DTC associated with the manual processing of the CPDA option in PSOP/PTOP, DTC is proposing to eliminate that option. When a Participant uses CPDA to submit a Cover for another Participant's Protect, DTC must manually process the Cover and use manual exception processing to match the Cover to the corresponding Protect. In addition, DTC must allocate the credits for Securities and/or payment from the Offer to the Covering Participant. Even when a Participant uses CPDA for its intended purpose, which is infrequent, it is a labor intensive process for DTC, as it must manually process the Cover and return the allocation to the Offer Agent within a narrow timeframe. Therefore, as clarified by Amendment No. 1, DTC proposes that, when a Participant submits a Protect directly to the Offer Agent (*i.e.*, not through DTC), such Participant would need to (a) submit the Cover directly to the Offer Agent (*i.e.*, again, not through DTC), or (b) request that DTC process the Cover, but not through PSOP/PTOP.

B. Technical Changes

The proposed rule change would revise the Guide to make ministerial updates to reflect current terminology and practices, as set forth below. The Guide would be updated to:

- Correct the text of the Guide to accurately reflect names of functions accessible through PTS, and to accurately reflect the names of the corresponding functions that are accessible through PBS. Presently, the Guide assigns PTS functions to PBS, and does not provide the names of the corresponding PBS functions.
- Correct the timeframes within which a Participant can submit a Notice of Guaranteed Delivery on the expiration date of a Rights Offer. Generally, a Participant may submit a Notice of Guaranteed Delivery through PSOP/PTOP from 8:00 a.m. to 2:15 p.m., at which time the window closes to allow for settlement of cash activities. However, DTC would re-open the window from 3:30 p.m. to 5:00 p.m. on the expiration date of the Offer to allow Participants extra time to submit a Notice of Guaranteed Delivery before the Offer expires, provided that the Offer Agent agrees to accept deferred subscription payments. The text of the Guide incorrectly reflects an open window from 8:00 a.m. to 5:00 p.m., which is not the practice. The text would be corrected to reflect the correct 8:00 a.m. to 2:15 p.m. and 3:30 p.m. to 5:00 p.m. windows.
- Pursuant to Participant requests, expand the availability of PTOP for a Participant to submit a Cover of Protect, on the dates specified in the notice of an Offer. The current availability is until 4:15 p.m. or 12:00 p.m., depending on the type of Offer, and the proposed rule change, as modified by Amendment No. 1, would revise the text to reflect availability until 5:00 p.m. or 1:00 p.m., as applicable.
- Remove references to the UNIT Swingovers service. Several years ago, the UNIT Swingovers service was discontinued, and instead, voluntary unit separations and recombinations[12] began to be processed under the FAST program.[13]
- Clarify information regarding available reports and methods of submission and receipt.
- Replace reference to 'NASDAQ' with 'FINRA'.
- Replace reference to 'AMEX' with 'NASDAQ'.
- Add the title of the Guide, delete 'Copyright,' and update the 'Important Legal Information' to align with other DTC service guides.
- Correct spelling, grammatical, capitalization, numbering, and typographical errors throughout.
- Update other text, including address, phone numbers, Web site information, and methods of communication.

C. Notice of Filing of Amendment No. 1

In Amendment No.1, DTC clarifies that when a Participant submits a Protect directly to the Offer Agent (*i.e.*, not through DTC), such Participant could still request that DTC process the Cover, but just not through PSOP/PTOP. Therefore, Amendment No. 1 proposes to set forth in the Guide that, once a Participant has accepted an Offer through the Offer Agent via a hard copy Notice of Guaranteed Delivery submitted directly to the Offer Agent, a Participant would need to either (a) submit the Cover directly to the Offer Agent, or (b) request that DTC manually process the Cover, but not through PSOP/PTOP.

Implementation Date

DTC would announce the effective date via Important Notice upon the Commission's approval of the proposed rule change, as modified by Amendment No. 1.

II. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act[14] directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder applicable to such organization. The Commission believes the proposal, as modified by Amendment No. 1, is consistent with Section 17A(b)(3)(F) of the Act,[15] as described in detail below.

Section 17A(b)(3)(F) of the Act[16] requires that the rules of the clearing agency be designed, *inter alia*, to promote the prompt and accurate clearance and settlement of securities transactions. By adding the CPAP option, through which a Participant can properly submit a Cover through PSOP/PTOP on behalf of another Participant, and by removing the CPDA option, the proposed rule change, as modified by Amendment No. 1, will establish a process that will streamline Cover of Protect transactions, allocations, and recordkeeping for Participants. Further, as DTC explains in the Notice, the proposed rule change, as modified by Amendment No. 1, will reduce for DTC the risks, burdens, and costs associated with its current processing of such transactions. Therefore, adding the CPAP option and removing the CPDA option will promote the prompt and accurate clearance and settlement of securities, consistent with the requirements of the Act, in particular Section 17A(b)(3)(F), cited above.

---

[10] Notice, *supra* note 3, 81 FR at 54171.

[11] As DTC explains in the Notice, it is aware that Covering Participants frequently utilize the PSOP/PTOP CPDA option in order to submit a Cover on behalf of another Participant, which is not the intended purpose of the CPDA function. The intended purpose of the CPDA function is to enable a Participant that submitted a Protect directly to an Offer Agent outside of DTC to later submit the corresponding Cover through DTC. Notice, *supra* note 3, 81 FR at 54172.

[12] A unit is a Security comprised of more than one class of Securities, *e.g.*, common stock and warrants (the components). In a voluntary unit separation, the separation and recombination between the security component and the security is done by the Participant and transfer agent using DTC's Deposit and Withdrawal at Custodian system.

[13] Securities Exchange Act Release No. 59199 (January 6, 2009), 74 FR 1266 (January 12, 2009) (SR–DTC–2008–14).

[14] 15 U.S.C. 78s(b)(2)(C).

[15] 15 U.S.C. 78q–1(b)(3)(F).

[16] *Id.*

As the proposed rule change pertains to technical changes to the Procedures, the Commission finds the technical changes also consistent with Section 17A(b)(3)(F) of the Act[17] because technical updates to the Procedures to make them more clear, consistent, and current for Participants that rely on the Procedures support the prompt and accurate clearance and settlement of securities transactions.

III. Solicitation of Comments on Amendment No. 1

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 1 to File Number SR–DTC–2016–005, including whether Amendment No. 1 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–DTC–2016–005 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

All submissions should refer to File Number SR–DTC–2016–005. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of DTC and on DTCC's Web site (*http://dtcc.com/legal/sec-rule-filings.aspx*). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–DTC–2016–005 and should be submitted on or before October 21, 2016.

IV. Accelerated Approval of the Proposed Rule Change, as Modified by Amendment No. 1

The Commission, pursuant to Section 19(b)(2) of the Act,[18] finds good cause to approve the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of Amendment No. 1 in the **Federal Register**. In Amendment No.1, DTC clarifies that when a Participant submits a Protect directly to the Offer Agent, such Participant could still request that DTC process the Cover. As such, Amendment No. 1 proposes to set forth in the Guide that, once a Participant has accepted an Offer through the Offer Agent via a hard copy Notice of Guaranteed Delivery submitted directly to the Offer Agent, a Participant would need to either (a) submit the Cover directly to the Offer Agent, or (b) request that DTC manually process the Cover, but not through PTOP/PSOP.

As discussed more fully above, the Commission finds that the proposed rule change, as modified by Amendment No. 1, will streamline DTC's processing of Cover of Protect transactions and reduce for DTC the risks, burdens, and costs associated with its current processing of such transactions, thereby promoting the prompt and accurate clearance and settlement of securities, consistent with Section 17A(b)(3)(F), cited above. Accordingly, the Commission finds good cause for approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.[19]

V. Conclusion

On the basis of the foregoing, the Commission finds that the proposal, as modified by Amendment No. 1, is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act[20] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that proposed rule change SR–DTC–2016–005, as modified by Amendment No. 1, be, and hereby is, APPROVED on an accelerated basis.[21]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Brent J. Fields,

Secretary.

[FR Doc. 2016–23615 Filed 9–29–16; 8:45 am]

BILLING CODE 8011–01–P

---

[17] *Id.*

[18] 15 U.S.C. 78s(b)(2).

[19] *Id.*

[20] 15 U.S.C. 78q–1.

[21] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–78930; File No. SR–CBOE–2016–070]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Fees Schedule

September 26, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 22, 2016, Chicago Board Options Exchange, Incorporated (the "Exchange" or "CBOE") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

---

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange seeks to amend its fees schedule. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fees Schedule, effective September 26, 2016. Specifically, the Exchange plans to list new options on two FTSE Russell indexes on September 26, 2016. More specifically, the Exchange proposes to establish fees for options that overlie the FTSE Emerging Markets Index ("FTEM"), which are schedule to be listed on September 26, 2016, and options that overlie the FTSE Developed Europe Index ("AWDE"), which are scheduled to be listed in the near future.

By way of background, a specific set of proprietary products are commonly included or excluded from a variety of programs, qualification calculations and transaction fees. In lieu of listing out these products in various sections of the Fees Schedule, the Exchange uses the term "Underlying Symbol List A" to represent these products. Currently, Underlying Symbol List A is defined in Footnote 34 and represents the following proprietary products: OEX, XEO, RUT, RLG, RLV, RUI, FXTM, UKXM, SPX (including SPXw), SPXpm, SRO, VIX, VOLATILITY INDEXES and binary options. The Exchange notes that the reason the products in Underlying Symbol List A are often collectively included or excluded from certain programs, qualification calculations and transactions fees is because the Exchange has expended considerable resources developing and maintaining its proprietary, exclusively-listed products. Similar to the products currently represented by "Underlying Symbol List A," AWDE and FTEM are not listed on any other exchange. As such, the Exchange proposes to exclude or include AWDE and FTEM in the same programs as the other products in Underlying Symbol List A, as well as add AWDE and FTEM to the definition of Underlying Symbol List A in Footnote 34. Specifically, like the other products in Underlying Symbol List A, the Exchange proposes to except AWDE and FTEM from the Liquidity Provider Sliding Scale, the Volume Incentive Program (VIP), the Marketing Fee, the Clearing Trading Permit Holder Fee Cap ("Fee Cap") and exemption from fees for facilitation orders, and the Order Router Subsidy (ORS) and Complex Order Router Subsidy (CORS) Programs. Like all other products in Underlying Symbol List A (with the exception of SROs), the Exchange proposes to apply to AWDE and FTEM the CBOE Proprietary Products Sliding Scale. The Exchange does intend to keep AWDE and FTEM volume in the calculation of qualifying volume for the rebate of Floor Broker Trading Permit fees. The Exchange notes that although AWDE and FTEM are being added to "Underlying Symbol List A", it wishes to include AWDE and FTEM in the calculation of the qualifying volume for the rebate of Floor Broker Trading Permit fees. The Exchange wishes to continue to encourage Floor Brokers to execute open-outcry trades in these classes and believes that including them in the qualifying volume will provide such incentive.

The Exchange next proposes to establish transaction fees for AWDE and FTEM. Particularly, the Exchange proposes to assess the same fees for AWDE and FTEM as apply to UKXM and FXTM options. Transaction fees for AWDE and FTEM options will be as follows (all listed rates are per contract):

Customer	$0.18
Clearing Trading Permit Holder Proprietary	0.25
CBOE Market-Maker/DPM	0.20
Joint Back-Office, Broker-Dealer, Non-Trading Permit Holder Market-Maker, Professional/Voluntary Professional (non-AIM Electronic)	0.65
Joint Back-Office, Broker-Dealer, Non-Trading Permit Holder Market-Maker, Professional/Voluntary Professional (Manual and AIM)	0.25

The Exchange also proposes to apply to AWDE and FTEM, like RUI, RLV, and RLG, and RUT, the Floor Brokerage Fee of $0.04 per contract ($0.02 per contract for crossed orders). The Exchange also proposes to apply to AWDE and FTEM the CFLEX Surcharge Fee of $0.10 per contract for all AWDE and FTEM orders executed electronically on CFLEX, capped at $250 per trade (*i.e.,* first 2,500 contracts per trade). The CFLEX Surcharge Fee assists the Exchange in recouping the cost of developing and maintaining the CFLEX system. The Exchange notes that the CFLEX Surcharge Fee (and $250 cap) also applies to other proprietary index options, including products in Underlying Symbol List A.

The Exchange currently assesses an Index License Surcharge for RUT of $0.45 per contract for all non-customer orders. Because the fees associated with the license for AWDE and FTEM are lower than the license fees for RUT, the Exchange proposes to assess a Surcharge of $0.10 per contract in order to recoup the costs associated with the AWDE and FTEM license.

In order to promote and encourage trading of AWDE and FTEM, the Exchange proposes to waive all transaction fees (including the Floor Brokerage Fee, Index License Surcharge and CFLEX Surcharge Fee) for AWDE and FTEM transactions through December 31, 2016. In order to promote and encourage trading of UKXM, FXTM, RUI, RLV and RLG, the Exchange also proposes to extend the waiver of transaction fees (including the Floor Brokerage Fee, Index License Surcharge and CFLEX Surcharge Fee) for UKXM, FXTM, RUI, RLV and RLG. The Exchange proposes to amend Footnote 40 to the Fees Schedule to make clear that transaction fees for AWDE, FTEM, RUI, RLV, RLG, UKXM and FXTM will be waived through December 31, 2016.

The Exchange is also offering a compensation plan to the Designated

Primary Market-Maker(s) ("DPM(s)") appointed in AWDE and FTEM to offset the initial DPM costs. The Exchange proposes to add AWDE and FTEM to Footnote 43 to the Fees Schedule, which currently provides that DPM(s) appointed for an entire month in either FXTM or UKXM will receive a payment of $7,500 per class per month through December 31, 2016. Because AWDE and FTEM are scheduled to be listed on September 26, 2016, the appointed DPM(s) will not have an appointment in AWDE and FTEM for the entire month of September; thus, the DPM(s) will not receive compensation for September 2016. The DPM(s) appointed for the entire month of October, November, etc. will receive compensation of $7,500 for each entire month the DPM is appointed in AWDE and FTEM through December 31, 2016.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[3] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[4] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[5] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

Particularly, the Exchange believes it is reasonable to charge different fee amounts to different user types in the manner proposed because the proposed fees are consistent with the price differentiation that exists today for other index products, including RUT, RUI, RLV, and RLG. The Exchange also believes that the proposed fee amounts for AWDE and FTEM orders are reasonable because the proposed fee amounts are the same already assessed for similar products (*e.g.*, RUT, RUI, RLV, and RLG), as well as are within the range of amounts assessed for the Exchange's other proprietary products.[6]

The Exchange believes that it is equitable and not unfairly discriminatory to assess lower fees to Customers as compared to other market participants because Customer order flow enhances liquidity on the Exchange for the benefit of all market participants. Specifically, customer liquidity benefits all market participants by providing more trading opportunities, which attracts Market-Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. The fees offered to customers are intended to attract more customer trading volume to the Exchange. Moreover, the options industry has a long history of providing preferential pricing to Customers, and the Exchange's current Fees Schedule currently does so in many places, as do the fees structures of many other exchanges. Finally, all fee amounts listed as applying to Customers will be applied equally to all Customers (meaning that all Customers will be assessed the same amount).

The Exchange believes that it is equitable and not unfairly discriminatory to, assess lower fees to Market-Makers as compared to other market participants other than Customers because Market-Makers, unlike other market participants, take on a number of obligations, including quoting obligations, that other market participants do not have. Further, these lower fees offered to Market-Makers are intended to incent Market-Makers to quote and trade more on the Exchange, thereby providing more trading opportunities for all market participants. Additionally, the proposed fee for Market-Makers will be applied equally to all Market-Makers (meaning that all Market-Makers will be assessed the same amount). This concept also applies to orders from all other origins. It should also be noted that all fee amounts described herein are intended to attract greater order flow to the Exchange in AWDE and FTEM which should therefore serve to benefit all Exchange market participants. Similarly, it is equitable and not unfairly discriminatory to assess lower fees to Clearing Trading Permit Holder Proprietary orders than those of other market participants (except Customers and Market-Makers) because Clearing Trading Permit Holders also have a number of obligations (such as membership with the Options Clearing Corporation), significant regulatory burdens, and financial obligations, that other market participants do not need to take on. The Exchange also notes that the AWDE and FTEM fee amounts for each separate type of market participant will be assessed equally to all such market participants (*i.e.* all Broker-Dealer orders will be assessed the same amount, all Joint Back-Office orders will be assessed the same amount, etc.).

The Exchange believes the proposed AIM transaction fees for Brokers Dealers, Non-Trading Permit Holder Market-Makers, Professionals/Voluntary Professionals, JBOs and Customers are reasonable because the amounts are still lower than assessed for AIM transactions in other proprietary products.[7] The Exchange believes it's equitable and not unfairly discriminatory to assess lower fees for AIM executions as compared to electronic executions because AIM is a price-improvement mechanism, which the Exchange wishes to encourage and support.

Assessing the Floor Brokerage Fee of $0.04 per contract for non-crossed orders and $0.02 per contract for crossed orders to Floor Brokers (and not other market participants) trading AWDE and FTEM orders is equitable and not unfairly discriminatory because only Floor Brokers are statutorily capable of representing orders in the trading crowd, for which they charge a commission. Moreover, this fee is already assessed, in the same amounts, to the other products in Underlying Symbol List A, including UKXM, FXTM, RUT, RUI, RLV, and RLG.

The Exchange believes that assessing an Index License Surcharge Fee of $0.10 per contract to AWDE and FTEM transactions is reasonable because the Surcharge helps recoup some of the costs associated with the license for AWDE and FTEM options. Additionally, the Exchange notes that the Surcharge amount is the same as, and in some cases lower than, the amount assessed as an Index License Surcharge to other index products. The proposed Surcharge is also equitable and not unfairly discriminatory because the amount will be assessed to all market participants to whom the Surcharge applies. Not applying the AWDE and FTEM Index License Surcharge Fee to Customer orders is equitable and not unfairly discriminatory because this is designed to attract Customer AWDE and FTEM orders, which increases liquidity and provides greater trading opportunities to all market participants. Additionally, it is equitable and not unfairly discriminatory to assess a lower License Index Surcharge amount to AWDE and FTEM transactions as compared to RUT transactions because the costs of the license associated with RUT is greater.

---

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78f(b)(4).

[6] *See* CBOE Fees Schedule, Specified Proprietary Index Options Rate Table.

[7] *Id.*

Similarly, the Exchange believes assessing a CFLEX Surcharge Fee of $0.10 per contract for all AWDE and FTEM orders executed electronically on CFLEX and capping it at $250 (*i.e.*, first 2,500 contracts per trade) is reasonable because it is the same amount currently charged to other proprietary index products for the same transactions.[8] The proposed Surcharge is also equitable and not unfairly discriminatory because the amount will be assessed to all market participants to whom the CFLEX Surcharge applies.

Excepting AWDE and FTEM from the Liquidity Provider Sliding Scale, VIP, the Marketing Fee, the Fee Cap, and the exemption from fees for facilitation orders and the ORS and CORS Programs is reasonable because other Underlying Symbol List A products (*i.e.*, other products that are exclusively-listed) are excepted from those same items. This is equitable and not unfairly discriminatory for the same reason; it seems equitable to except AWDE and FTEM from items on the Fees Schedule from which other proprietary products are also excepted.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to waive all transaction fees, including the Floor Brokerage fee, the License Index Surcharge and CFLEX Surcharge Fee because it promotes and encourages trading of these new products and applies to all Trading Permit Holders (“TPHs”).

Applying to AWDE and FTEM to the CBOE Proprietary Products Sliding Scale is reasonable because it also applies to other Underlying Symbol List A products. This is equitable and not unfairly discriminatory for the same reason; it seems equitable to apply to AWDE and FTEM the same items on the Fees Schedule that apply to Underlying Symbol List A options classes (*i.e.*, proprietary options classes that are not listed on other exchanges).

The Exchange believes it's reasonable, equitable and not unfairly discriminatory to continue to include AWDE and FTEM in the calculation of the qualifying volume for the Floor Broker Trading Permit Fees rebate because the Exchange wishes to support and encourage open-outcry trading of AWDE and FTEM, which allows for price improvement and has a number of positive impacts on the market system.

Finally, the Exchange believes that it is equitable and not unfairly discriminatory to compensate DPM(s) that are appointed for an entire month in either AWDE and FTEM. DPM(s) incur costs when receiving an appointment, and in the case of AWDE and FTEM, the Exchange believes it is appropriate to provide compensation to the DPM(s) to offset those costs.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will impose any burden on competition that are not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because, while different fees are assessed to different market participants in some circumstances, these different market participants have different obligations and different circumstances as discussed above. For example, Market-Makers have quoting obligations that other market participants do not have. The Exchange does not believe that the proposed rule change to waive all transaction fees through December 31, 2016 will impose any burden on intramarket competition because it applies to all TPHs and encourages trading in these new products.

The Exchange does not believe that the proposed rule changes will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because AWDE and FTEM will be exclusively listed on CBOE. To the extent that the proposed changes make CBOE a more attractive marketplace for market participants at other exchanges, such market participants are welcome to become CBOE market participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and paragraph (f) of Rule 19b–4[10] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2016–070 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2016–070. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public

---

[8] *See* CBOE Fees Schedule, Index Options Rate Table—All Index Products Excluding Underlying Symbol List A, CFLEX Surcharge Fee and Specified Proprietary Index Options Rate Table—Underlying Symbol List A, CFLEX Surcharge Fee.

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f).

Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2016–070, and should be submitted on or before October 21, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Brent J. Fields,

Secretary.

[FR Doc. 2016–23609 Filed 9–29–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–78931; File No. SR–NSX–2016–11]

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Fee and Rebate Schedule To Create a Liquidity-Adding Volume Threshold To Benefit From the Current Liquidity Taking Fee in Securities Priced $1.00 or Greater

September 26, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 20, 2016, National Stock Exchange, Inc. ("NSX" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change, as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend its Fee and Rebate Schedule (the "Fee Schedule"), issued pursuant to Exchange Rule 16.1, to: (1) Create a monthly, liquidity-adding volume threshold that Equity Trading Permit ("ETP") Holders[3] will be required to meet to continue to pay for [sic] the current liquidity-taking fee in securities priced $1.00 or greater and establish a different, higher liquidity-taking fee for ETP Holders that do not meet the new volume threshold; and (2) make ministerial changes to the Fee Schedule.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nsx.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule, issued pursuant to Rule 16.1, with the goal of maximizing the effectiveness of its business model and continuing to provide ETP Holders a cost-effective execution venue. To further incentivize ETP Holders to post liquidity on the NSX Book,[4] the Exchange is proposing to create a monthly, liquidity-adding volume threshold that an ETP Holder must reach to continue to pay the current liquidity-taking fee for securities priced $1.00 or greater. The Exchange proposes to adopt a different, higher liquidity-taking fee for ETP Holders that do not meet the new liquidity-adding volume threshold.

Currently, the Exchange charges ETP Holders $0.0003 per share executed for liquidity-taking orders in symbols priced at $1.00 or greater. The Exchange proposes to amend its fee schedule to add language in the Transaction Fees and Rebates section of the Fee Schedule and an Explanatory Note 1 which will create two different price structures depending on the amount of liquidity that an ETP Holder adds on the Exchange. Specifically, the Exchange will charge the current "taker" fee of $0.0003 per executed share for any marketable liquidity-removing order in securities priced at $1.00 or greater to any ETP Holder that executes at least 50,000 shares of liquidity-adding volume during a calendar month. An ETP Holder that does not execute at least 50,000 shares of liquidity-adding volume during a calendar month will be charged $0.0030 per executed share for any liquidity-removing order in securities priced at $1.00 or greater. After each calendar month, the Exchange will calculate the number of shares of liquidity-adding volume that each ETP Holder executed and apply the appropriate fee for the ETP Holder's liquidity-taking executions that calendar month.

The Exchange also proposes to make the ministerial change of adjusting the numbering for Explanatory Notes in light of the addition of proposed Explanatory Note 1.

Pursuant to Exchange Rule 16.1(c), the Exchange will "provide ETP Holders with notice of all relevant dues, fees, assessments and charges of the Exchange" through the issuance of an Information Circular and will post the Fee Schedule and the instant rule filing on the Exchange's Web site, *www.nsx.com.*

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b) of the Act,[5] in general and, in particular, Section 6(b)(4) of the Act,[6] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The proposed rule change is also consistent with Section 6(b)(5) of the Act,[7] which requires, among other things, that the rules of a national securities exchange not permit unfair discrimination between customers, issuers, brokers, or dealers, and be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The Exchange submits that the proposed liquidity-adding volume threshold and associated fee are reasonable and equitable, as required by Section 6(b)(4) of the Act. The Exchange believes that the volume thresholds are reasonable because they have been set at achievable levels that will incentivize ETP Holders trading on the Exchange to add a greater amount of liquidity to the Exchange. This will result in greater price discovery and price improvement for ETP Holders and market participants. Further, the proposed "taker" fee of $0.0030 per share for securities priced $1.00 or greater is reasonable because it is within the range of fees that other exchanges charge per executed share for orders removing liquidity in securities priced $1.00 or greater.[8]

---

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Exchange Rule 1.5E(1) defines "ETP" as the Equity Trading Permit issued by the Exchange for effecting approved securities transactions on the Exchange's trading facilities.

[4] Exchange Rule 1.5N(1) defines "NSX Book" as the trading systems' electronic file of orders.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78f(b)(5).

The liquidity-adding volume threshold is equitable because each ETP Holder has the same opportunity to post liquidity on the Exchange totaling 50,000 shares in order to continue to pay the current $0.0003 per share "taker" fee, as opposed to the new, higher taker fee. Thus, the Fee Schedule provides for an equitable program which, the Exchange believes, will operate to encourage increased quoting and trading by ETP Holders on the Exchange. The Exchange notes that in the past it has offered, as a part of its Fee Schedule, a similar minimum, liquidity-adding volume threshold to qualify for a more advantageous "taker" fee.[9]

The Exchange further submits that its proposal that ETP Holders must attain at least 50,000 shares of executed liquidity-adding volume in a calendar month to benefit from the lower "take" fee of $0.0003 satisfies the requirements of Section 6(b)(5) of the Act in that it does not permit unfair discrimination between customers, issuers, brokers, or dealers, is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system. Under the proposed changes to the Fee Schedule, all ETP Holders executing orders on the Exchange will have the same opportunity to qualify for the lower priced fee tier through their trading activity adding liquidity on the Exchange, and such changes are thereby designed to meet the requirements of the Section 6(b)(5) that the rules of the Exchange not permit unfair discrimination among ETP Holders and their customers. The Exchange notes that, at present, approximately a dozen ETP Holders would meet the volume threshold of 50,000 shares of liquidity-adding volume to qualify for the current taker fee of $0.0003 per executed share.

The Exchange submits that the proposal will promote just and equitable principles of trade by providing a reasonable and attainable volume threshold that will potentially attract more displayed volume on the Exchange. Incentivizing ETP Holders to add more liquidity on the Exchange would inure to the benefit of all market participants seeking additional execution opportunities. In this regard, the proposed Fee Schedule will promote just and equitable principles of trade and operate to remove impediments to and perfect the mechanism of a free and open market and a national market system under Section 6(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The proposed changes will enhance rather than burden competition by operating to incentivize increased liquidity and improve execution quality on the Exchange through reasonable and equitably allocated economic incentives.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has taken effect upon filing pursuant to Section 19(b)(3)(A)(ii) of the Act[10] and subparagraph (f)(2) of Rule 19b–4.[11]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NSX–2016–11 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NSX–2016–11. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSX–2016–11 and should be submitted on or before October 21, 2016.

---

[8] *See, e.g.,* Bats BZX Exchange, Inc. ("BZX") Fee Schedule and the Fee Schedule of the Chicago Stock Exchange, Inc. ("CHX"). As of September 2016, both BZX and CHX charge a fee of $0.0030 per executed share for orders removing liquidity in securities priced $1.00 or greater.

[9] The Exchange has utilized a similar program as a part of its Fee Schedule in the past. That program provided that "[e]ach ETP Holder will be charged $0.0030 per share for any marketable order that removes liquidity unless the ETP Holder executes at least 50,000 shares of liquidity-adding volume in Auto-Ex Mode per month." *See* Securities Exchange Act Release No. 67816 (September 10, 2012), 77 FR 56886 (September 14, 2012) SR–NSX–2012–14). The Exchange notes that, when this program was previously in effect, the majority of ETP Holders trading on the Exchange qualified for the lower fee tier.

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

[11] 17 CFR 240.19b–4.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Brent J. Fields,

Secretary.

[FR Doc. 2016–23610 Filed 9–29–16; 8:45 am]

BILLING CODE 8011–01–P

---

[12] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2016–0046]

Charging Standard Administrative Fees for Non-Program Information Requests for Detailed Social Security Earnings

AGENCY: Social Security Administration.

ACTION: Notice of updated schedule of standardized administrative fees.

SUMMARY: On November 8, 2013,[1] we announced in the **Federal Register** a new administrative fee we charge to the public for detailed yearly Social Security earnings information. We charge administrative fees to recover our full costs when we provide information and related services for non-program purposes. We are announcing an update to the previously published fee ($136) for detailed yearly Social Security earnings information.[2]

The updated standard fee schedule is part of our continuing effort to standardize fees for non-program information requests. We reserve the right to review and update the published standard fees as necessary, but no less than every two years, to ensure the agency recovers the full cost of providing non-program services. Standard fees provide consistency and ensure we recover the full cost of supplying information when we receive a request for a purpose not directly related to the administration of a program under the Social Security Act (Act).

DATES: The changes described in this notice are effective for requests we receive on or after October 1, 2016.

FOR FURTHER INFORMATION CONTACT: Kristina Poist, Social Security Administration, Office of Finance, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 597–1977. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet site, Social Security Online, at *http://socialsecurity.gov.*

SUPPLEMENTARY INFORMATION: Section 1106 of the Act and the Privacy Act[3] authorize the Commissioner of Social Security to promulgate regulations regarding agency records and information and to charge fees for providing information and related services. Our regulations and operating instructions identify when we will charge fees for information.[4] Whenever we determine a request for information is for any purpose not directly related to the administration of the Social Security programs, we require the requester to pay the full cost of providing the information.

New Information: Based on the most recent cost analysis, we determined the new standard fee for detailed yearly Social Security Earnings information is $115 for each request. We will certify the detailed earnings information for an additional $33. Note: Certification is usually not necessary. We based this updated standard fee on our most recent cost calculations for supplying this information and the standard fee methodology previously published in the **Federal Register**. A requester can obtain certified and non-certified detailed yearly Social Security earnings information by completing the Form SSA–7050, Request for Social Security Earnings Information. A requester can continue to obtain non-certified, yearly earnings totals (Form SSA–7004, *Request for a Social Security Statement*) through our free online service *my Social Security, http://socialsecurity.gov/myaccount/,* a personal online account for Social Security information and services. Online Social Security Statements display uncertified, yearly earnings, free of charge, and do not show any employer information. Certified yearly Social Security earnings totals cost $33, available by completing Form SSA–7050.

We will continue to evaluate all standard fees at least every two years to ensure we capture the full costs associated with providing information for non-program purposes. We require nonrefundable advance payment of the standard fee by check, money order, or credit card. We do not accept cash. Only one form of payment is acceptable in the full amount of the standard fee. If we revise any of the standard fees, we will publish another notice in the **Federal Register**. For other non-program requests for information not addressed here or within the current schedule of standardized administrative fees, we will continue to charge fees calculated on a case-by-case basis to recover our full cost of supplying the information.

Additional Information

Additional information is available on our Web site at *http://socialsecurity.gov/pgm/business.htm* or by written request to: Social Security Administration, Office of Public Inquiries, Windsor Park Building, 6401 Security Boulevard, Baltimore, MD 21235.

Carolyn W. Colvin,

Acting Commissioner of Social Security.

[FR Doc. 2016–23741 Filed 9–29–16; 8:45 am]

BILLING CODE 4191–02–P

---

[1] 78 FR 67210, November 8, 2013.

[2] 79 FR 66445, November 7, 2014.

[3] 42 U.S.C. 1306 and 5 U.S.C. 552a, respectively.

[4] See 20 CFR 402.170, 402.175; Program Operations Manual System (POMS) GN 03311.005.

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2016–0045]

Charging Standard Administrative Fees for Non-Program Information

AGENCY: Social Security Administration.

ACTION: Notice of updated schedule of standardized administrative fees.

SUMMARY: On August 22, 2012,[1] we announced in the **Federal Register** a schedule of standardized administrative fees we charge to the public. We charge these fees to recover our full costs when we provide information and related services for non-program purposes. We are announcing an update to the previously published schedule of standardized administrative fees.[2]

The updated standard fee schedule is part of our continuing effort to standardize fees for non-program information requests. Standard fees provide consistency and ensure we recover the full cost of supplying information when we receive a request for a purpose not directly related to the administration of a program under the Social Security Act (Act).

DATES: The changes described in this notice are effective for requests we receive on or after October 1, 2016.

FOR FURTHER INFORMATION CONTACT: Kristina Poist, Social Security Administration, Office of Finance, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 597–1977. For information on eligibility or filing for benefits, visit our Internet site, Social Security Online, at *http://socialsecurity.gov,* or call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778.

SUPPLEMENTARY INFORMATION: Section 1106 of the Act and the Privacy Act[3] authorize the Commissioner of Social Security to promulgate regulations regarding agency records and information and to charge fees for providing information and related services. Our regulations and operating instructions identify when we will charge fees for information.[4] Under our regulations, whenever we determine a request for information is for any purpose not directly related to the administration of the Social Security programs, we require the requester to pay the full cost of providing the information.

---

[1] 77 FR 50757, Aug. 22, 2012.

[2] 79 FR 59341, October 1, 2014.

[3] 42 U.S.C. 1306 and 5 U.S.C. 552a, respectively.

New Information: We are required to review and update standardized administrative fees at least every two years. Based on the most recent cost analysis, the following table provides the new schedule of standardized administrative fees per request:

Copying an Electronic Folder	$43
Copying a Paper Folder	72
Regional Office Certification[5]	51
Record Extract	32
Third Party Manual SSN Verification	30
Office of Central Operations Certification[6]	33
W2/W3 Requests	86
Request for Copy of Original Application for Social Security Card (Form SS–5)	21
Request for Computer Extract of Social Security Number Application (Numident)	27

We will continue to evaluate all standard fees at least every two years to ensure we capture the full costs associated with providing information for nonprogram-related purposes. We require nonrefundable advance payment of the standard fee by check, money order, or credit card. We do not accept cash. Only one form of payment is acceptable in the full amount of the standard fee. If we revise any of the standard fees, we will publish another notice in the **Federal Register**. For other non-program requests for information not addressed here or within the current schedule of standardized administrative fees, we will continue to charge fees calculated on a case-by-case basis to recover our full cost of supplying the information. No other changes will apply to the schedule of standardized administrative fees announced in the **Federal Register**[1] on August 22, 2012.

Additional Information

Additional information is available on our Web site at *http://socialsecurity.gov/pgm/business.htm* or by written request to: Social Security Administration, Office of Public Inquiries, Windsor Park Building, 6401 Security Boulevard, Baltimore, MD 21235.

Carolyn W. Colvin,

Acting Commissioner of Social Security.

[FR Doc. 2016–23739 Filed 9–29–16; 8:45 am]

BILLING CODE 4191–02–P

---

[4] See 20 CFR 402.170, 402.175; Program Operations Manual System (POMS) GN 03311.005.

[5] Requests received in a field office, regional office, or headquarters component.

[6] Requests received in the Office of Central Operations.

DEPARTMENT OF STATE

[Public Notice: 9742]

E.O. 13224 Designation of Anas El Abboubi, aka Anas el-Abboubi, aka Anas al-Abboubi, aka Anas Al-Italy, aka Abu Rawaha the Italian, aka Abu the Italian, aka Rawaha al Itali, aka Mc Khalifh, aka McKhalif, aka Mc Khaliph, aka Anas Shakur, aka Anas Abdu Shakur as a Specially Designated Global Terrorist

Acting under the authority of and in accordance with section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, and Executive Order 13284 of January 23, 2003, I hereby determine that the individual known as Anas El Abboubi, also known as Anas el-Abboubi, also known as Anas al-Abboubi, also known as Anas Al-Italy, also known as Abu Rawaha the Italian, also known as Abu the Italian, also known as Rawaha al Italy, also known as Mc Khalifh, also known as McKhalif, also known as Mc Khaliph, also known as Anas Shakur, also known as Anas Abdu Shakur, committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

Consistent with the determination in section 10 of Executive Order 13224 that prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously, I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Dated: September 8, 2016.

John F. Kerry,

Secretary of State.

[FR Doc. 2016–23715 Filed 9–29–16; 8:45 am]

BILLING CODE 4710–AD–P

DEPARTMENT OF STATE

[Public Notice: 9743]

Shipping Coordinating Committee; Notice of Public Meeting

The Shipping Coordinating Committee (SHC) will conduct an open meeting at 9:00 a.m. on November 15, 2016, in Room 7N15–01, of the Douglas A. Munro Coast Guard Headquarters Building at St. Elizabeth's, 2703 Martin Luther King Jr. Avenue SE., Washington, DC 20593. The primary purpose of the meeting is to prepare for the ninety-seventh session of the International Maritime Organization's (IMO) Maritime Safety Committee to be held at the IMO Headquarters, United Kingdom, November 21–25, 2016.

The agenda items to be considered include:

—Adoption of the agenda; report of credentials
—Decisions of other IMO bodies
—Consideration and adoption of amendments to mandatory instruments
—Measures to enhance maritime security
—Goal-based new ship construction standards
—Mandatory instrument and/or provisions addressing safety standards for the carriage of more than 12 industrial personnel on board vessels engaged on international voyages
—Navigation, communications, search and rescue (report of the third session of the Sub-Committee)
—Ship systems and equipment (report of the third session and urgent matters emanating from the third session of the Sub-Committee)
—Implementation of IMO instruments (report of the third session of the Sub-Committee)
—Carriage of cargoes and containers (urgent matters emanating from the third session of the Sub-Committee)
—Implementation of the STCW Convention
—Capacity building for the implementation of new measures
—Formal safety assessment
—Piracy and armed robbery against ships
—Unsafe mixed migration by sea
—Implementation of instruments and related matters

- —Relations with other organizations
- —Application of the Committee's Guidelines
- —Work programme
- —Any other business
- —Consideration of the report of the Committee on its ninety-sixth session

Members of the public may attend this meeting up to the seating capacity of the room. To facilitate the building security process, and to request reasonable accommodation, those who plan to attend should contact the meeting coordinator, LCDR Tiffany Duffy, by email at *tiffany.a.duffy@uscg.mil,* by phone at (202) 372–1376, by fax at (202) 372–8382, or in writing at 2703 Martin Luther King Jr. Ave. SE., Stop 7509, Washington, DC 20593–7509 not later than November 8, 2016. Requests made after November 8, 2016 might not be able to be accommodated. Please note that due to security considerations, two valid, government issued photo identifications must be presented to gain entrance to the Coast Guard Headquarters building. It is recommended that attendees arrive to the Headquarters building not later than 30 minutes ahead of the scheduled meeting for the security screening process.

The Headquarters building is accessible by taxi and public transportation. Parking in the vicinity of the building is extremely limited and not guaranteed. Members of the public may participate in the meeting via teleconference by calling 202–475–4000 or 1–855–475–2447, participant code: 887 809 72. Please contact the meeting coordinator if you plan to participate by phone. Additional information regarding this and other SHC public meetings may be found at: *www.uscg.mil/imo.*

Dated: September 16, 2016.

Jonathan W. Burby,

Executive Secretary, Shipping Coordinating Committee, Department of State.

[FR Doc. 2016–23708 Filed 9–29–16; 8:45 am]

BILLING CODE 4710–09–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 34797 (Sub–No. 1)]

New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway—Construction, Acquisition and Operation Exemption—in Wilmington and Woburn, Mass.

AGENCY: Surface Transportation Board.

ACTION: Notice of intent to prepare an environmental impact statement; notice of availability of the draft scope of study for the environmental impact statement; notice of scoping meeting; and request for comments on draft scope.

SUMMARY: On June 24, 2016, New England Transrail, LLC (NET) filed a petition for exemption with the Surface Transportation Board (Board) pursuant to 49 U.S.C. 10502 and 10901 in Docket No. FD 34797 (Sub–No. 1). NET intends to acquire, construct and operate various rail lines and construct and operate transloading facilities, where goods and materials are transferred from rail to truck, in the towns of Wilmington and Woburn, Massachusetts. NET proposes to acquire 5,727 feet of existing track, to rehabilitate or construct a combined 10,838 feet of track, and to operate as a rail carrier over the total 16,565 feet of track on and adjacent to property currently owned by the Olin Corporation at 51 Eames Street in Wilmington.[1] NET anticipates moving goods and materials (*e.g.* bricks, newspaper, steel, glycols, biofuels, liquid natural gas, vegetable oils, wood chips, sand, and gravel) and transloading them from rail cars directly onto trucks, into holding tanks, or into a warehouse on site for temporary storage.

Because this project has the potential to result in significant environmental impacts, the Board's Office of Environmental Analysis (OEA) has determined that the preparation of an Environmental Impact Statement (EIS) is appropriate pursuant to the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*).[2] The purpose of this Notice of Intent is to inform stakeholders—including members of the public; Tribes; federal, state, and local agencies; environmental groups; potential shippers and other parties—interested in or potentially affected by the proposed project of the decision to prepare an EIS. OEA will hold a public scoping meeting as part of the NEPA process. Oral and written comments submitted during scoping will assist OEA in issuing a Final Scope of Study that defines the range of actions, alternatives, and impacts to be considered in the EIS. The date and location for the public meeting, along with the Draft Scope of Study for review and comment, are provided below.

Background

I. *The Prior Proceedings.* In December 2003, NET filed its original petition for exemption for authority to acquire, construct and operate track to use in conjunction with a reload facility at the Olin site in Docket No. FD 34391. OEA[3] conducted an environmental review and issued an Environmental Assessment (EA) in August 2004 and a Post-EA in December 2004. After issuance of the Post-EA, a number of parties informed the Board that NET had modified its proposed project to include, among other changes, the processing of municipal solid waste (MSW) at the facility without notifying OEA and that therefore, the environmental review was incomplete.

In May 2005, the Board issued a decision dismissing the case without prejudice to NET filing a new petition or application based on its current project plans. The Board concluded that the project had changed significantly from the proposal presented in the petition and that NET had not informed OEA of the changes until after the environmental review had been completed. Because the petition was modified to the point that analysis already performed by the Board became substantially deficient and required extensive revision, the Board found that it was appropriate to terminate the proceeding.[4]

In December 2005, NET filed its petition for exemption in a new docket, Docket No. FD 34797, for acquisition, construction, and operation authority. NET outlined its plans to rehabilitate the existing track on the property and to construct new sections of track to support a facility to handle construction and demolition debris (C&D) and MSW. Following NET's filing, opposing parties argued that some or all of NET's planned activities would not constitute "rail transportation," and in 2006, a coalition of parties asked the Board to address the threshold issue of the extent of this agency's jurisdiction over the proposed project. Additionally, in 2006, the U.S. Environmental Protection Agency (EPA) added the project site to the National Priorities List (NPL) under the Comprehensive Environmental Response, Compensation, and Liability

---

[1] Generally, Board authorization is not required for proposals by existing carriers to acquire or construct rail facilities and "excepted" ancillary track (spur, industrial or side tracks used to support line-haul services). 49 U.S.C. 10906; *Nicholson* v. *ICC,* 711 F.2d 364, 367–8 (D.C. Cir. 1983); *but see Effingham R.R.—Pet. for Declaratory Order—Constr. at Effingham, Ill.,* 2 S.T.B. 606, 609–10 (1997) (Board has licensing authority over proposal by new carrier to construct and operate over § 10906 track that would constitute its entire operation).

[2] *See New Eng. Transrail, LLC—Constr., Acquis., & Operation Exemption—in Wilmington & Woburn, Mass.,* (*2016 Decision*) FD 34797, slip op. at 5 (STB served May 17, 2016).

[3] OEA was formerly known as the Board's Section of Environmental Analysis (SEA).

[4] *See New Eng. Transrail, LLC—Constr., Acquis., & Operation Exemption—in Wilmington & Woburn, Mass.,* FD 34391 (STB served May 3, 2005).

Act (CERCLA or Superfund). EPA suggested that, in order to fully address the proposal's effect on potentially contaminated soil and groundwater, the Board defer issuing even a preliminary analysis under NEPA of the potential environmental impacts of NET's proposal until EPA had completed the relevant portion of its Remedial Investigation and Feasibility Study (RI/FS) of the site.

In July 2007, the Board issued a decision finding that NET would, if authorized, become a rail carrier subject to the Board's jurisdiction and thus would need authority to acquire, construct and operate the track. The Board also addressed the extent to which the handling of C&D and MSW would come within the scope of the Board's jurisdiction, but the issue was not decided because the Board deferred environmental review until EPA had completed the relevant portion of its RI/FS Study at the site.[5] In May 2016, the Board lifted the deferral after EPA submitted a letter stating that the facts no longer supported continuing to defer the Board's environmental review in the case.[6] The Board also directed NET to file an updated petition for exemption in a new sub-docket detailing its current plans for the site.[7]

II. *The Instant Proceeding.* On June 24, 2016, NET filed an updated petition for exemption outlining its current proposal with the Board in Docket No. FD 34797 (Sub–No. 1).[8] As stated above, NET proposes to acquire, construct and operate track and to construct and operate transloading facilities on and adjacent to the Olin site. NET plans to move goods and materials, including bricks, newspaper, steel, glycols, biofuels, liquid natural gas, vegetable oils, wood chips, sand, and gravel and transload them from rail cars directly onto trucks, into holding tanks, or into a warehouse on site for temporary storage. This Notice of Intent initiates the EIS process and scoping for this proceeding.

Date and Location of Public Scoping Meeting: The public scoping meeting will be held at the following location on the date listed:

- October 25, 2016; 5:30–8:00 p.m. at Wilmington Middle School, 25 Carter Lane, Wilmington, MA 01887

The scoping meeting will be held in an open house format for the first half hour followed by a brief presentation by OEA. After the presentation, interested parties will be provided an opportunity for public comment at an open microphone for the balance of the scoping meeting. A court reporter will transcribe the public comments.

The meeting location complies with the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*). Persons that need special accommodations should telephone OEA's toll-free number for this project at 877–573–8930.

OEA invites written public comments on all aspects of the Draft Scope of Study and is providing a 60-day public comment period which begins on September 30, 2016. These written comments may be submitted (1) during the scoping meetings, or (2) by mailing or submitting comments electronically using the filing instructions below. Comments should be submitted by November 29, 2016 to assure full consideration during the scoping process. OEA will issue a Final Scope of Study after the close of the scoping comment period

Summary of the Board's Environmental Review Process: The NEPA process is intended to assist the Board and the public in identifying and assessing the potential environmental consequences of a proposed action before a decision on the proposed action is made. OEA is responsible for ensuring that the Board complies with NEPA and related environmental statutes. The first stage of the EIS process is scoping. Scoping is an open process for determining the range of actions, alternatives and the potential scope of environmental issues to be addressed in the EIS. As part of the scoping process, OEA has developed, and has made available for public comment in this notice, a Draft Scope of Study for the EIS. A scoping meeting will be held in the project area to provide further opportunities for public involvement and input during the scoping process at the time and location set out above. In addition to comments on the Draft Scope of Study, interested parties are encouraged to comment on potential alternatives for the proposed project, including the no-action alternative.

To assist OEA in identifying a range of reasonable and feasible alternatives that could meet the purpose and need for the proposed project, OEA requested detailed information from NET on the alternative sites that were examined as part of project site selection in a letter dated August 29, 2016. NET states in its response, dated September 7, 2016, that it examined alternative sites in Tewksbury, MA, and another in North Billerica, MA. NET determined that the Tewksbury site would be too small for the development of a multi-commodity freight facility. NET also found the North Billerica site unsuitable because of its location away from the center of the region and concerns regarding highway accessibility. OEA invites the public to comment on any potential, reasonable and feasible alternatives that could meet the purpose and need for NET's proposed project.

At the conclusion of the scoping comment period, OEA will issue a Final Scope of Study for the EIS. After issuing the Final Scope of Study, OEA will prepare a Draft EIS for the project. The Draft EIS will address the environmental issues and concerns identified during the scoping process and assess all reasonable and feasible alternatives, including the no-action alternative. The Draft EIS will also contain OEA's preliminary recommendations for environmental mitigation measures. Upon completion, the Draft EIS will be made available for review and comment by the public, government agencies, and other interested parties. OEA will prepare a Final EIS that considers and responds to comments on the Draft EIS. In reaching its decision in this case, the Board will consider the Draft EIS, the Final EIS, all environmental comments received, and OEA's final recommendations regarding environmental mitigation measures.

EPA is participating as a cooperating agency in this EIS based on its special expertise of environmental matters at the site and jurisdiction by law consistent with 40 CFR 1501.6. Throughout the development of the EIS, OEA will coordinate with EPA as the CERCLA process progresses for the project site. In addition, OEA will be consulting with various federal, state and local agencies with specific knowledge of the potential environmental impacts that may be associated with the proposed project. OEA is also initiating government-to-government consultation with potentially affected tribes, including but not limited to: Narragansett Indian Tribe, Mashpee Wampanoag Tribe, and Wampanoag Tribe of Gay Head (Aquinnah).

Filing Environmental Comments: Scoping comments submitted by mail should be addressed to: Danielle Gosselin, Office of Environmental Analysis, Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001, Attention: Docket No. FD 34797 (Sub–No. 1).

Comments may also be submitted electronically via email through the project email address, *NewEnglandTransrailEIS@icf.com*.

---

[5] *See New Eng. Transrail, LLC—Constr., Acquis., & Operation Exemption—in Wilmington & Woburn, Mass.*, FD 34797 (STB served July 10, 2007).

[6] *See* Letter from EPA (Nov. 6, 2015).

[7] *See 2016 Decision.*

[8] NET's current plans do not include operating a municipal solid waste transfer station at the facility.

Please refer to Docket No. FD 34797 (Sub–No. 1) in all correspondence, including emails regarding this project.

Scoping Comments are due by November 29, 2016.

FOR FURTHER INFORMATION CONTACT: Danielle Gosselin by mail at Office of Environmental Analysis, Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001, or call OEA's toll-free number for the project at 877–573–8930. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339. The Web site for the Board is *www.stb.gov*. For further information about the proposed project, the Board's environmental review process, or this EIS, you may also visit the Board-sponsored project Web site at *www.newenglandtransraileis.com*. The project Web site includes a map of the project area including NET's proposed project.

Draft Scope of Study for the EIS

Purpose and Need

According to NET, the principal purpose of the proposed project is to add rail transloading capacity close to the center of the Boston metropolitan area. Further, NET states that the proposed facility would allow for lower rail rates and improved service scheduling for customers.

The proposed project involves a request by NET for a license or approval from the Board. The proposed project is not a federal government-proposed or sponsored project. Thus, the project's purpose and need should be informed by both the applicant's goals and the agency's enabling statute, here, 49 U.S.C. 10901. Section 10901 provides that the Board must approve a construction request unless it finds that the construction is ''inconsistent with the public convenience and necessity.'' Therefore, the statute creates a presumption that rail construction is in the public interest and will be approved.

Proposed Action and Alternatives

NET's proposed project involves the acquisition of 5,727 feet of existing track, the rehabilitation and construction of a combined 10,838 feet of new track, and operation as a rail carrier over the total 16,565 feet of track. Other major elements of the proposed project would include demolishing existing buildings, constructing transloading facilities and warehouses, and moving goods and materials and transloading them from rail cars directly onto trucks, into holding tanks, or into a warehouse on site for temporary storage.

NET estimates that it would operate two round trip trains per day with approximately 30 rail cars. NET also estimates that approximately 400 round trip vehicle trips per day (365 truck trips per day and 35 employee vehicle trips) could be generated at the height of operations. Train operations are expected to occur between 11:00 p.m. and 6:00 a.m., and truck deliveries are expected to occur outside weekday morning and evening commuter peak hours.

The EIS will analyze and compare the potential impacts of (1) acquisition, construction and operation for the proposed project, (2) any reasonable and feasible alternatives that could allow NET to meet its purpose and need, and (3) the no-action alternative (denial of the application).

Environmental Impact Analysis

Proposed Acquisition, Construction and Operation

Analyses in the EIS will address the proposed activities associated with the acquisition, construction and operation of the project and their potential environmental impacts, as appropriate.

Impact Categories

The EIS will analyze potential direct, indirect, and cumulative impacts[9] of NET's proposed acquisition, construction and operation activities, or in the case of the no-action alternative, the absence of these activities.

Impact areas addressed will include an analysis of transportation systems, safety, land use, recreation, biological resources, water resources, including wetlands and other waters of the U.S., geology and soils, air quality and climate, noise and vibration, energy resources, socioeconomics as they relate to physical changes in the environment, cultural and historic resources, aesthetics and environmental justice. Other categories of potential impacts may also be included as a result of comments received during the scoping process or on the Draft EIS. The EIS will include a discussion of each of these categories as they currently exist in the project area and will address the potential direct, indirect, and cumulative impacts of each alternative being studied in detail on each category, as described below:

1. Transportation Systems

The EIS will:

a. Evaluate the potential impacts resulting from the proposed project on the existing transportation network in the project area.

b. Propose mitigation measures to avoid, minimize or eliminate potential project impacts to transportation systems, as appropriate.

2. Safety

The EIS will:

a. Describe existing road/rail grade crossing safety and analyze the potential for an increase in accidents related to the proposed operation, as appropriate.

b. Describe existing rail operations and analyze the potential for increased probability of train accidents, as appropriate.

c. Evaluate the potential for disruption and delays to the movement of emergency vehicles.

d. Propose mitigation measures to avoid, minimize or eliminate potential project impacts to safety, as appropriate.

3. Land Use

The EIS will:

a. Evaluate the potential impacts of each alternative on existing land use patterns within the project area and identify those land uses that would be potentially impacted by the proposed project.

b. Analyze the potential impacts associated with each alternative to land uses identified within the project area.

c. Evaluate consistency with Coastal Zone Management Program, as applicable.

d. Propose mitigation measures to avoid, minimize or eliminate potential impacts to land use, as appropriate.

4. Recreation

The EIS will:

a. Evaluate existing conditions and the potential impacts of the proposed project on recreational areas and opportunities for recreational activities provided in the project area.

b. Propose mitigation measures to avoid, minimize or eliminate potential project impacts on recreational areas and opportunities for recreational activities, as appropriate.

5. Biological Resources

The EIS will:

a. Evaluate the existing biological resources within the project area, including vegetative communities, wildlife, fisheries, wetlands, and federal and state threatened or endangered species, and the potential impacts to these resources resulting from the proposed project.

---

[9] NEPA requires the Board to consider direct, indirect, and cumulative impacts. Direct and indirect impacts are both caused by the action. 40 CFR 1508.8(a)–(b). A cumulative impact is the ''incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person undertakes such other actions.'' 40 CFR 1508.7.

b. Propose mitigation measures to avoid, minimize, eliminate, or compensate for potential impacts to biological resources, as appropriate.

6. Water Resources

The EIS will:

a. Describe the existing surface water and groundwater resources within the project area, including lakes, rivers, streams, ponds, wetlands, and floodplains and analyze the potential impacts on these resources.

b. Describe the permitting requirements with regard to wetlands, river crossings, water quality, floodplains, and erosion control.

c. Propose mitigation measures to avoid, minimize, eliminate, or compensate for potential project impacts to water resources, as appropriate.

d. Describe EPA's CERCLA process as it relates to on and off-site water resources.

7. Geology and Soils

The EIS will:

a. Describe the geology, soils, and seismic conditions found within the project area, including unique or problematic geologic formations or soils, prime farmland, and hydric soils, and analyze the potential impacts on these resources resulting from each alternative.

b. Evaluate any potential measures to avoid or construct through unique or problematic geologic formations or soils.

c. Propose mitigation measures to avoid, minimize or eliminate potential project impacts to geology and soils, as appropriate.

d. Describe EPA's CERCLA process as it relates to geology and soils.

8. Air Quality and Climate

The EIS will:

a. Evaluate the air emissions from the potential operation of the proposed project including potential greenhouse gas emissions, as appropriate.

b. Evaluate the potential air quality impacts resulting from the proposed project construction activities.

c. Evaluate the potential impacts of the proposed project on global climate change and the potential impacts of global climate change on the proposed project.

d. Propose mitigation measures to avoid, minimize or eliminate potential project impacts, as appropriate.

9. Noise and Vibration

The EIS will:

a. Describe the potential noise and vibration impacts during the proposed project construction.

b. Describe the potential noise and vibration impacts of the proposed project operation.

c. Propose mitigation measures to avoid, minimize or eliminate potential project impacts to sensitive noise receptors, as appropriate.

10. Energy Resources

The EIS will:

a. Describe and evaluate the potential impact of the proposed project on the distribution of energy resources in the project area.

b. Propose mitigation measures to avoid, minimize or eliminate potential project impacts to energy resources, as appropriate.

11. Socioeconomics

The EIS will:

a. Analyze the effects of the potential temporary influx of construction workers and creation of permanent rail facilities jobs to the project area.

b. Propose mitigation measures to avoid, minimize or eliminate potential project-related adverse impacts to social and economic resources, as appropriate.

12. Cultural and Historic Resources

The EIS will:

a. Identify historic buildings, structures, sites, objects, or districts eligible for listing on or listed on the National Register of Historic Places (historic properties) within the area of potential effects for each alternative. The cultural resources identified will be categorized into three major groups: Tribal resources, archaeological resources, and built resources.

b. Consult with federally recognized Native American tribes to identify properties with religious and cultural significance to the tribes within the area of potential effects for each alternative (tribal resources), and analyze potential project impacts to them.

c. Identify prehistoric-era and historic-era archaeological resources by using professionals who meet the Secretary of the Interior Professional Qualifications Standards (SOIPQS) in the discipline of archaeology, and analyze potential project impacts to them.

d. Identify built resources by using professionals who meet the SOIPQS in the disciplines of history or architectural history, and analyze potential project impacts to them.

e. Propose measures to avoid, minimize, or mitigate potentially adverse project impacts to tribal resources, built resources, and archaeological resources that are historic properties, as appropriate.

13. Aesthetics

The EIS will:

a. Describe the potential impacts of the proposed project on any areas identified or determined to be of high visual quality.

b. Propose mitigation measures to avoid, minimize or eliminate potential project impacts on aesthetics, as appropriate.

14. Environmental Justice

The EIS will:

a. Evaluate the potential impacts resulting from the proposed project on local and regional minority and low-income populations.

b. Propose mitigation measures to avoid, minimize or eliminate potential project impacts on environmental justice populations, as appropriate.

Decided: September 27, 2016.

By the Board, Victoria Rutson, Director, Office of Environmental Analysis

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2016–23692 Filed 9–29–16; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36062]

Lehigh Railway, LLC—Lease Exemption Containing Interchange Commitment—Norfolk Southern Railway Company

Lehigh Railway, LLC (LRWY), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to continue to lease from Norfolk Southern Railway Company (NSR), and to operate, approximately 56.0 miles of rail line between milepost IS 269.5 at Athens, Pa., and milepost IS 213.5 at Mehoopany, Pa., in Bradford and Wyoming Counties, Pa., including any sidings, sidetracks, yards, or facilities presently owned by NSR that are accessed via the line.

LRWY states that LRWY and NSR have entered into an amended lease agreement[1] (Amended Lease) which served to renew the original lease agreement (Original Lease) that the parties had previously entered into on

---

[1] LRWY filed a confidential, complete version of the Amended Lease with its notice of exemption to be kept confidential by the Board under 49 CFR 1104.14(a) without need for the filing of an accompanying motion for protective order under 49 CFR 1104.14(b).

October 28, 2008.[2] According to LRWY, the Amended Lease extends the term of the Original Lease to December 31, 2023, and includes other changes. As required under 49 CFR 1150.43(h)(1), LRWY has disclosed in its verified notice that the Amended Lease contains an interchange commitment in the form of lease credits. LRWY states that these credits were part of the Original Lease and the terms of the credits in the Amended Lease remain unchanged. LRWY has provided additional information regarding the interchange commitment, as required by 49 CFR 1150.43(h). LRWY notes that it will continue to be the operator of the line.

LRWY certifies that the projected annual revenues as a result of the proposed transaction will not result in LRWY's becoming a Class II or Class I rail carrier and will not exceed $5 million.

The transaction may be consummated on or after October 15, 2016, the effective date of the exemption (30 days after the verified notice of exemption was filed). If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions to stay must be filed by October 7, 2016 (at least seven days prior to the date the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 36062, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on applicant's representative, Kevin M. Sheys, Nossaman LLP, 1666 K Street NW., Suite 500, Washington, DC 20006.

According to LRWY, this action is categorically excluded from environmental review under 49 CFR 1105.6(c).

Board decisions and notices are available on our Web site at *WWW.STB.GOV.*

Decided: September 27, 2016.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2016–23695 Filed 9–29–16; 8:45 am]

BILLING CODE 4915–01–P

---

[2] LRWY was granted authority to lease and operate the rail line in *Lehigh Railway, LLC—Lease & Operation Exemption—Norfolk Southern Railway,* FD 35192 (STB served Nov. 14, 2008).

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in California

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of limitation on claims for judicial review of actions by the California Department of Transportation (Caltrans), pursuant to 23 U.S.C. 327.

SUMMARY: The FHWA, on behalf of Caltrans, is issuing this notice to announce actions taken by Caltrans, that are final within the meaning of 23 U.S.C. 139(*l*)(1). The actions relate to a proposed highway project, located on Interstate 80 between post miles 1.9 to 6.1 and on State Route 65 between post miles R4.8 to R7.3 in the County of Placer, State of California. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA, on behalf of Caltrans, is advising the public of final agency actions subject to 23 U.S.C. 139(*l*)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before February 27, 2017. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: For Caltrans: Adele Pommerenck, Senior Environmental Planner, California Department of Transportation—District 3, 703 B Street, Marysville, California, 95901, during normal business hours from 8:00 a.m. to 5:00 p.m., telephone (530) 741–4215 or email *adele.pommerenck@dot.ca.gov.*

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, the Federal Highway Administration (FHWA) assigned, and the California Department of Transportation (Caltrans) assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Notice is hereby given that the Caltrans, has taken final agency actions subject to 23 U.S.C. 139(*l*)(1) by issuing licenses, permits, and approvals for the following highway project in the State of California: improve the Interstate 80/State Route 65 (I–80/SR 65) interchange in Placer County, California, to reduce future traffic congestion, improve operations and safety, and comply with current Caltrans and local agency design standards. The project limits consist of I–80 from the Douglas Boulevard interchange to the Rocklin Road interchange (post miles 1.9–6.1) and SR 65 from the I–80 separation to the Pleasant Grove Boulevard interchange (post miles R4.8–R7.3) in the cities of Roseville and Rocklin. The total length of the project is 2.5 miles along SR 65 and 4.2 miles along I–80. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Final Environmental Assessment (FEA) for the project, approved on 9/8/16, in the FHWA Finding of No Significant Impact (FONSI) issued on 9/8/16, and in other documents in the FHWA project records. The FEA, FONSI and other project records are available by contacting Caltrans at the addresses provided above. This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. Council on Environmental Quality Regulations
2. National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321 *et seq.*
3. Federal-Aid Highway Act of 1970, 23 U.S.C 109
4. MAP–21, the Moving Ahead for Progress in the 21st Century Act (Pub. L. 112–141)
5. Clean Air Act Amendments of 1990 (CAAA)
6. Clean Water Act of 1977 and 1987
7. Federal Water Pollution Control Act of 1972 (see Clean Water Act of 1977 & 1987)
8. Federal Land Policy and Management Act of 1976 (Paleontological Resources)
9. Noise Control Act of 1972
10. Safe Drinking Water Act of 1944, as amended
11. Endangered Species Act of 1973
12. Executive Order 11990, Protection of Wetlands
13. Executive Order 13112, Invasive Species
14. Executive Order 13186, Migratory Birds
15. Fish and Wildlife Coordination Act of 1934, as amended
16. Migratory Bird Treaty Act
17. Water Bank Act Wetlands Mitigation Banks, ISTEA 1991, Sections 1006–1007
18. Wildflowers, Surface Transportation and Uniform Relocation Act of 1987 Section 130
19. Coastal Zone Management Act of 1972
20. Coastal Zone Management Act Reauthorization Amendments Of 1990
21. Executive Order 11988, Floodplain Management
22. Department of Transportation (DOT) Executive Order 5650.2—

Floodplain Management and Protection (April 23, 1979)
23. Rivers and Harbors Appropriation Act of 1899, Sections 9 and 10
24. Title VI of the Civil Rights Act of 1964, as amended
25. Executive Order 12898, Federal Actions to Address Environmental Justice and Low-Income Populations

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(*l*)(1).

Cesar Perez,

Senior Transportation Engineer, Federal Highway Administration, Sacramento, California.

[FR Doc. 2016–23641 Filed 9–29–16; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement; Hartford County, Connecticut

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement will be prepared for a proposed highway project in Hartford County, Connecticut.

FOR FURTHER INFORMATION CONTACT: Amy D. Jackson-Grove, Division Administrator, Federal Highway Administration, 628–2 Hebron Avenue, Suite 303, Glastonbury, CT 06033, Telephone: (860) 659–6703.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Connecticut Department of Transportation (CTDOT), will prepare an environmental impact statement (EIS) on a proposal for transportation improvements on I–84 between Flatbush Avenue (Interchange 45) and I–91 (Interchange 53) in Hartford, Connecticut. The approximate length of the proposed project area is 2.5 miles. The purpose of the proposed project, as currently defined, is to address structural deficiencies, improve traffic operations and safety, and improve mobility on and along the I–84 corridor within the project limits, while maintaining access for the City of Hartford and adjacent communities. The EIS will study a reasonable range of alternatives to address the proposed project's purpose and need. Alternatives under consideration include (1) No Build Alternative; (2) Elevated Highway Alternative (3) Lowered Highway Alternative and (4) Tunneled Highway Alternative. An Internet Web site has been established to provide information on the proposed project and can be accessed at *http://www.i84hartford.com.*

Public scoping is underway. Agencies, Tribes, and the public are encouraged to submit written comments on the purpose and need, scope of alternatives and impacts. The draft EIS will be available for public and agency review and comment prior to a public hearing. Public notice of the draft EIS and the date and time of the public hearing(s) will be posted on the project Web site and in local the newspapers.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning, and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: September 20, 2016.

Amy Jackson-Grove,

Division Administrator, Glastonbury, Connecticut.

[FR Doc. 2016–23119 Filed 9–29–16; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[FMCSA Docket No. FMCSA–[2016–0216]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA confirms its decision to exempt 46 individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemptions enable these individuals to operate CMVs in interstate commerce.

DATES: The exemptions were effective on September 10, 2016. The exemptions expire on September 10, 2018.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–113, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

I. Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

II. Background

On August 10, 2016, FMCSA published a notice of receipt of Federal diabetes exemption applications from 46 individuals and requested comments from the public (81 FR 52947). The public comment period closed on September 9, 2016, and no comments were received.

FMCSA has evaluated the eligibility of the 46 applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to or greater than the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(3).

Diabetes Mellitus and Driving Experience of the Applicants

The Agency established the current requirement for diabetes in 1970 because several risk studies indicated that drivers with diabetes had a higher rate of crash involvement than the general population. The diabetes rule provides that "A person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control" (49 CFR 391.41(b)(3)).

FMCSA established its diabetes exemption program, based on the Agency's July 2000 study entitled "A Report to Congress on the Feasibility of a Program to Qualify Individuals with Insulin-Treated Diabetes Mellitus to Operate in Interstate Commerce as Directed by the Transportation Act for the 21st Century." The report concluded that a safe and practicable protocol to allow some drivers with ITDM to operate CMVs is feasible. The September 3, 2003 (68 FR 52441), **Federal Register** notice in conjunction with the November 8, 2005 (70 FR 67777), **Federal Register** notice provides the current protocol for allowing such drivers to operate CMVs in interstate commerce.

These 46 applicants have had ITDM over a range of 1 to 42 years. These applicants report no severe hypoglycemic reactions resulting in loss of consciousness or seizure, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning symptoms, in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the past 5 years. In each case, an endocrinologist verified that the driver has demonstrated a willingness to properly monitor and manage his/her diabetes mellitus, received education related to diabetes management, and is on a stable insulin regimen. These drivers report no other disqualifying conditions, including diabetes-related complications. Each meets the vision requirement at 49 CFR 391.41(b)(10).

The qualifications and medical condition of each applicant were stated and discussed in detail in the August 10, 2016, **Federal Register** notice and they will not be repeated in this notice.

III. Discussion of Comments

FMCSA received no comments in this proceeding.

IV. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the diabetes requirement in 49 CFR 391.41(b)(3) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows the applicants to operate CMVs in interstate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered medical reports about the applicants' ITDM and vision, and reviewed the treating endocrinologists' medical opinion related to the ability of the driver to safely operate a CMV while using insulin.

Consequently, FMCSA finds that in each case exempting these applicants from the diabetes requirement in 49 CFR 391.41(b)(3) is likely to achieve a level of safety equal to that existing without the exemption.

V. Conditions and Requirements

The terms and conditions of the exemption will be provided to the applicants in the exemption document and they include the following: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not it is related to an episode of hypoglycemia; (3) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

VI. Conclusion

Based upon its evaluation of the 46 exemption applications, FMCSA exempts the following drivers from the diabetes requirement in 49 CFR 391.41(b)(10), subject to the requirements cited above 49 CFR 391.64(b):

Dale E. Bliss (WI)
Charles W. Bobbitt, III (WA)
Thomas Buckmaster (FL)
Dustin L. Campbell (MD)
Keith A. Cederberg (MN)
Carlos A. Chapa (TX)
David E. Colorado (UT)
Francis J. Crawford (NY)
James W. Creech (IN)
Kirk A. Devitis (NJ)
Melinda L. Echols (WA)
Justin W. Garriott (WY)
David J. Goergen (MN)
Pedro L. Gonzalez (MA)
Jeffrey K. Hagen (WI)
Charles D. Hall (CA)
Daniel O. Hawley (IL)
Eugene R. Huelskamp (OH)
Dennis S. Hughes (TX)
Bonita K. Hunt (NC)
John M. Isley (NC)
John T. Jameson (MO)
Jeffrey A. Kidd (MD)
Craig T. Kite (OH)
Donald E. Knowles (IA)
Kevin E. Lester (VA)
Eric T. Maier (CA)
Javier Melendez (TX)
Brenda L. Mitchell (KY)
Terry L. Neiman (PA)
Peter Z. Pall (FL)
Joaquim Pedro (NY)
Vernon Piper (NY)
Angelo Renieris (NY)
Sean A. Rivera (AZ)
Kevin L. Ross (AK)
James R. Sauceda (NM)
Kevin Stead (NJ)
Jacob P. Trommer (OH)
Nicholas D. Wall (SD)
Tony B. Wetherell (MN)
Mark A. Williams (GA)
Steven M. Wilson (IL)
Don E. Wood, Jr. (TX)
Kirk M. Wright (NE)
Charles P. Zenns (NY)

In accordance with 49 U.S.C. 31136(e) and 31315 each exemption is valid for two years unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315. If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: September 22, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–23652 Filed 9–29–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[FMCSA Docket No. FMCSA–2015–0321]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt 22 individuals from

the requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) that interstate commercial motor vehicle (CMV) drivers have "no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV." The exemptions enable these individuals who have had one or more seizures and are taking anti-seizure medication to operate CMVs in interstate commerce.

DATES: The exemptions were effective on April 11, 2016. The exemptions expire on April 11, 2018.

FOR FURTHER INFORMATION CONTACT: Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. e.t., Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

I. Background

On March 9, 2016, FMCSA published a notice announcing receipt of applications from 31 individuals requesting an exemption from the epilepsy prohibition in 49 CFR 391.41(b)(8) and requested comments from the public (81 FR 12553). The public comment period ended on April 8, 2016, and three comments were received.

FMCSA has evaluated the eligibility of these applicants and determined that granting exemptions to 22 of 31 individuals would achieve a level of safety equivalent to or greater than the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(8). On April 11, 2016 the remaining nine applicants received a letter of final disposition regarding his/her exemption request. Those decision letters fully outlined the basis for the denial. A notice announcing this decision was published on September 9, 2016 (81 FR 62556).

The physical qualification standard for drivers regarding epilepsy found in 49 CFR 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person:

> Has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria [1] to assist medical examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce. [49 CFR part 391, APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section *H. Epilepsy: § 391.41(b)(8),* paragraphs 3, 4, and 5.]

II. Discussion of Comments

FMCSA received three comments in this proceeding. An anonymous commenter and Jake B expressed general support for allowing well controlled individuals with a history of seizures to drive commercially. Deb Carlson of the Minnesota Department of Public Safety expressed support for two applicants included in the notice, Richard Wenner and Dennis Zayic.

III. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the epilepsy/seizure standard in 49 CFR 391.41(b)(8) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows the applicants to operate CMVs in interstate commerce.

In reaching the decision to grant these exemption requests, FMCSA considered the 2007 recommendations of the Agency's Medical Expert Panel (MEP). The January 15, 2013, **Federal Register** notice (78 FR 3069) provides the current MEP recommendations, which is the criteria the Agency uses to grant seizure exemptions.

The Agency's decision regarding these exemption applications is based on an individualized assessment of each applicant's medical information, including the root cause of the respective seizure(s) and medical information about the applicant's seizure history, the length of time that has elapsed since the individual's last seizure, the stability of each individual's treatment regimen and the duration of time on or off of anti-seizure medication. In addition, the Agency reviewed the treating clinician's medical opinion related to the ability of the driver to safely operate a CMV with a history of seizure and each applicant's driving record found in the Commercial Driver's License Information System (CDLIS) for commercial driver's license (CDL) holders, and interstate and intrastate inspections recorded in the Motor Carrier Management Information System (MCMIS). For non-CDL holders, the Agency reviewed the driving records from the State Driver's Licensing Agency (SDLA).

These 22 applicants have been seizure-free over a range of 7 to 35 years while taking anti-seizure medication and maintained a stable medication treatment regimen for the last two years. In each case, the applicant's treating physician verified his or her seizure history and supports the ability to drive commercially. A summary of each applicant's seizure history was discussed in the March 9, 2016, **Federal Register** notice (81 FR 12553).

The Agency acknowledges the potential consequences of a driver experiencing a seizure while operating a CMV. However, the Agency believes the drivers granted this exemption have demonstrated that they are unlikely to have a seizure and their medical condition does not pose a risk to public safety.

Consequently, FMCSA finds that in each case exempting these applicants from the epilepsy/seizure standard in 49 CFR 391.41(b)(8) is likely to achieve a level of safety equal to that existing without the exemption.

IV. Conditions and Requirements

The terms and conditions of the exemption are provided to the applicants in the exemption document and includes the following: (1) Each driver must remain seizure-free and maintain a stable treatment during the two-year exemption period; (2) each driver must submit annual reports from their treating physicians attesting to the stability of treatment and that the driver has remained seizure-free; (3) each driver must undergo an annual medical examination by a certified Medical Examiner, as defined by 49 CFR 390.5; and (4) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy of his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

---

[1] See *http://www.ecfr.gov/cgi-bin/text-idx?SID=e47b48a9ea42dd67d999246e23d97970&mc=true&node=pt49.5.391&rgn=div5#ap49.5.391_171.a* and *https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf.*

V. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VI. Conclusion

Based upon its evaluation of the 22 exemption applications, FMCSA exempts the following drivers from the epilepsy/seizure standard, 49 CFR 391.41(b)(8), subject to the requirements cited above:

Travis Earl Baird (OK)
Robert P. Brackett (ME)
Brian R. Checkley, Jr. (NJ)
James Clark (PA)
Kelly Frederick (LA)
William Gessner (PA)
Jerry L. Henderson (IN)
Clarence D. Jones (VA)
Preston Romayne Kanagy (TN)
James Randall King (CT)
Scott A. Lowe (MA)
Roger Lynn Neal (MO)
Thomas Victor Oconnor (FL)
Scott William Reaves (TX)
Steven Shirley (UT)
Matthew Jack Staley (CO)
Michael A. Sypolt (WV)
Peter M. Thompson (FL)
Mohammad S. Warrad (IA)
Richard James Wenner (MN)
John Charles Wolfe (PA)
Dennis Raymond Zayic (MN)

In accordance with 49 U.S.C. 31315(b)(1), each exemption is valid for two years unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The individual fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: September 23, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–23653 Filed 9–29–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2015–0322]

Denial of Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of denial.

SUMMARY: FMCSA announces its decision to deny applications from 10 individuals who requested an exemption from the Federal Motor Carrier Safety Regulations (FMCSRs) prohibiting persons with a clinical diagnosis of epilepsy or any other condition that is likely to cause a loss of consciousness or any loss of ability to operate a commercial motor vehicle (CMV) from operating CMVs in interstate commerce.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are 8:30 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

II. Background

On May 9, 2016, FMCSA published a notice announcing receipt of applications from 27 individuals requesting an exemption from the prohibition against persons with a clinical diagnosis of epilepsy or any other condition that is likely to cause a loss of consciousness or any loss of ability to operate a CMV in interstate commerce and requested comments from the public (81 FR 28131). The public comment period closed on June 8, 2016, and three comments were received. One commenter supports granting seizure exemptions in general. One commenter expressed concern for the risk of seizure while driving and the Minnesota Department of Public Safety expressed support for three of the applicants and concern about health issues and the driving record of an applicant Shaen Smith. In response to this comment, Mr. Smith has been seizure-free over 18 years and meets the physical qualification standards to drive commercially. His five-year driving record includes no violations or accidents and the Agency has reviewed his ten-year driving history and concludes that he meets the requisite level of safety to drive commercially within the terms and conditions of his exemption.

FMCSA has evaluated the eligibility of these applicants and concluded that granting 10 of the 27 exemptions would not provide a level of safety that would be equivalent to or greater than the level of safety that would be obtained by complying with the regulation 49 CFR 391.41(b)(8). A final notice announcing a decision on the remaining 17 requests will be published at a later date.

III. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the Federal epilepsy standard for a renewable two-year period if it finds "such exemption is likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption."

The Agency's decision regarding these exemption applications is based on an individualized assessment of each applicant's medical information, including the root cause of the respective seizure(s) and medical information about the applicant's seizure history, the length of time that has elapsed since the individual's last seizure, the stability of each individual's treatment regimen and the duration of time on or off of anti-seizure medication. The Agency considered the 2007 recommendations of the Agency's Medical Expert Panel (MEP). The January 15, 2013, **Federal Register** notice (78 FR 3069) provides the current MEP recommendations which is the criteria the Agency uses to make decisions regarding seizure exemptions.

IV. Conclusion

The Agency has determined that these 10 applicants do not satisfy the criteria eligibility or meet the terms and conditions for a Federal exemption and granting these exemptions would not provide a level of safety that would be equivalent to or greater than, the level of safety that would be obtained by complying with the regulation 49 CFR 391.41(b)(8). Therefore, the applicants in this notice have been denied an exemption from the physical qualification standards in 49 CFR 391.41(b)(8).

Each applicant has, prior to this notice, received a letter of final disposition regarding his/her exemption request. Those decision letters fully outlined the basis for the denial and constitutes final action by the Agency. This notice summarizes the Agency's recent denials as required under 49 U.S.C. 31315(b)(4) by publishing names periodically and reasons for denial. The following 10 applicants do not meet the minimum time requirement for being seizure-free, either on or off of anti-seizure medication:

William E. Beaver
Paul V. Carlson
Tommy Joe Cox
William Garvin
Jeremiah Gonzales
Roderick Haslip
Doug William Outfleet
David J. Parris
Shawn E. Sands
Robert B. Skinner

Issued on: September 22, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–23651 Filed 9–29–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2016–0221]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA).

ACTION: Notice of applications for exemptions; request for comments.

SUMMARY: FMCSA announces receipt of applications from 39 individuals for exemption from the prohibition against persons with insulin-treated diabetes mellitus (ITDM) operating commercial motor vehicles (CMVs) in interstate commerce. If granted, the exemptions would enable these individuals with ITDM to operate CMVs in interstate commerce.

DATES: Comments must be received on or before October 31, 2016.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2016–0221 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket numbers for this notice. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below for further information.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–113, Washington, DC 20590–0001. Office hours are 8:30 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

I. Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for a 2-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption." The statute also allows the Agency to renew exemptions at the end of the 2-year period. The 39 individuals listed in this notice have recently requested such an exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by statute.

II. Qualifications of Applicants

Thomas A. Alcon

Mr. Alcon, 32, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Alcon understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Alcon meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from New Mexico.

John K. Bottkol

Mr. Bottkol, 51, has had ITDM since 2014. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Bottkol understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Bottkol meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Florida.

Donald J. Brinkman

Mr. Brinkman, 61, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Brinkman understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Brinkman meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Colorado.

John D. Cline

Mr. Cline, 59, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Cline understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Cline meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Arizona.

Paul H. Coleman, Jr.

Mr. Coleman, 50, has had ITDM since 2008. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Coleman understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Coleman meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

John D. Colpitts

Mr. Colpitts, 35, has had ITDM since 1984. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Colpitts understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Colpitts meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds an operator's license from North Carolina.

Salvatore A. Corrao

Mr. Corrao, 65, has had ITDM since 2015. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Corrao understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Corrao meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2016 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Massachusetts.

Patrick R. Dawson

Mr. Dawson, 52, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Dawson understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Dawson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2016 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from New York.

Kevin A. Dietz

Mr. Dietz, 39, has had ITDM since 1997. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Dietz understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Dietz meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Illinois.

Steven M. Dunham

Mr. Dunham, 58, has had ITDM since 2010. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Dunham understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Dunham meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy.

He holds an operator's license from New Hampshire.

James H. Elliott

Mr. Elliott, 46, has had ITDM since 1980. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Elliott understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Elliott meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2016 and certified that he has stable nonproliferative diabetic retinopathy. He holds an operator's license from Ohio.

Frank A.W. Emrath

Mr. Emrath, 61, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Emrath understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Emrath meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Wisconsin.

Kirk M. Faria

Mr. Faria, 24, has had ITDM since 1993. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Faria understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Faria meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds an operator's license from Massachusetts.

Richard L. Farris

Mr. Farris, 60, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Farris understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Farris meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Washington.

Alex J. Gerena-Santiago

Mr. Gerena-Santiago, 39, has had ITDM since 2008. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Gerena-Santiago understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Gerena-Santiago meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Pennsylvania.

Matthew D. Homan

Mr. Homan, 38, has had ITDM since 2011. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Homan understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Homan meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2016 and certified that he has stable nonproliferative diabetic retinopathy. He holds an operator's license from Michigan.

Donna J. Jones

Ms. Jones, 59, has had ITDM since 2016. Her endocrinologist examined her in 2016 and certified that she has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. Her endocrinologist certifies that Ms. Jones understands diabetes management and monitoring has stable control of her diabetes using insulin, and is able to drive a CMV safely. Ms. Jones meets the requirements of the vision standard at 49 CFR 391.41(b)(10). Her optometrist examined her in 2016 and certified that she does not have diabetic retinopathy. She holds a Class B CDL from Illinois.

Jamison G. Land

Mr. Land, 37, has had ITDM since 2015. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Land understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Land meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Virginia.

Richard H. Leger

Mr. Leger, 43, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Leger understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Leger meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Louisiana.

Solomon J. Mayfield

Mr. Mayfield, 45, has had ITDM since 2012. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Mayfield understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Mayfield meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds an operator's license from Georgia.

Calvin W. McDaniel

Mr. McDaniel, 62, has had ITDM since 2015. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. McDaniel understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. McDaniel meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a CDL from Michigan.

Clay A. McDaniel

Mr. McDaniel, 21, has had ITDM since 1997. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. McDaniel understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. McDaniel meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds an operator's license from Missouri.

Steven D. Mellott

Mr. Mellott, 68, has had ITDM since 2011. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Mellott understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Mellott meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2016 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Ohio.

Sean R.T. Murray

Mr. Murray, 43, has had ITDM since 2014. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Murray understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Murray meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds an operator's license from Minnesota.

Chris A. Perez

Mr. Perez, 33, has had ITDM since 1991. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Perez understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Perez meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds an operator's license from Illinois.

Luther S. Pickell

Mr. Pickell, 74, has had ITDM since 2008. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Pickell understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Pickell meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds an operator's license from Kansas.

Michael K. Piirto

Mr. Piirto, 49, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Piirto understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Piirto meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Indiana.

William A. Pope, Jr.

Mr. Pope, 45, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Pope understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Pope meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

Jeffrey E. Prevost

Mr. Prevost, 61, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Prevost understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Prevost meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Maine.

Eric W. Ransom

Mr. Ransom, 53, has had ITDM since 2014. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Ransom understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Ransom meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Wyoming.

Phillip A. Rentschler

Mr. Rentschler, 59, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Rentschler understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Rentschler meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Indiana.

Steven L. Saddler

Mr. Saddler, 54, has had ITDM since 2009. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Saddler understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Saddler meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds an operator's license from Florida.

Allan C. Smith

Mr. Smith, 57, has had ITDM since 2014. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Smith understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Smith meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Iowa.

Craig A. Squib

Mr. Squib, 54, has had ITDM since 1989. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Squib understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Squib meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

Timothy B. Suck

Mr. Suck, 49, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Suck understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Suck meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a CDL from Michigan.

Tyrel J. Turner

Mr. Turner, 31, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Turner understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Turner meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy.

He holds an operator's license from Idaho.

Daniel R. Violette

Mr. Violette, 60, has had ITDM since 2015. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Violette understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Violette meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Oregon.

Robert C. Williams

Mr. Williams, 43, has had ITDM since 1989. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Williams understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Williams meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds an operator's license from Oregon.

David W. Wiltrout

Mr. Wiltrout, 64, has had ITDM since 2013. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Wiltrout understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Wiltrout meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds an operator's license from Pennsylvania.

III. Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated in the date section of the notice.

FMCSA notes that section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users requires the Secretary to revise its diabetes exemption program established on September 3, 2003 (68 FR 52441).[1] The revision must provide for individual assessment of drivers with diabetes mellitus, and be consistent with the criteria described in section 4018 of the Transportation Equity Act for the 21st Century (49 U.S.C. 31305).

Section 4129 requires: (1) Elimination of the requirement for 3 years of experience operating CMVs while being treated with insulin; and (2) establishment of a specified minimum period of insulin use to demonstrate stable control of diabetes before being allowed to operate a CMV.

In response to section 4129, FMCSA made immediate revisions to the diabetes exemption program established by the September 3, 2003 notice. FMCSA discontinued use of the 3-year driving experience and fulfilled the requirements of section 4129 while continuing to ensure that operation of CMVs by drivers with ITDM will achieve the requisite level of safety required of all exemptions granted under 49 U.S.C. 31136(e).

Section 4129(d) also directed FMCSA to ensure that drivers of CMVs with ITDM are not held to a higher standard than other drivers, with the exception of limited operating, monitoring and medical requirements that are deemed medically necessary.

The FMCSA concluded that all of the operating, monitoring and medical requirements set out in the September 3, 2003 notice, except as modified, were in compliance with section 4129(d). Therefore, all of the requirements set out in the September 3, 2003 notice, except as modified by the notice in the **Federal Register** on November 8, 2005 (70 FR 67777), remain in effect.

IV. Submitting Comments

You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–2016–0221 and click the search button. When the new screen appears, click on the blue "Comment Now!" button on the right hand side of the page. On the new page, enter information required including the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period. FMCSA may issue a final determination at any time after the close of the comment period.

V. Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–2016–0221 and click "Search." Next, click "Open Docket Folder" and you will find all documents and comments related to this notice.

Issued on: September 22, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–23656 Filed 9–29–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2011–0027, Notice No. 9]

Northeast Corridor Safety Committee; Notice of Meeting

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Announcement of Northeast Corridor Safety Committee (NECSC) meeting.

---

[1] Section 4129(a) refers to the 2003 notice as a "final rule." However, the 2003 notice did not issue a "final rule" but did establish the procedures and standards for issuing exemptions for drivers with ITDM.

SUMMARY: FRA announces the seventh meeting of the NECSC, a Federal Advisory Committee mandated by Section 212 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA). The NECSC is made up of stakeholders operating on the Northeast Corridor, and the purpose of the NECSC is to provide annual recommendations to the Secretary of Transportation. The NECSC meeting topics will include presentations on system safety, the Tier III passenger equipment rulemaking, Amtrak 160 mph waiver requests, split rail derails on track leading to the Northeast Corridor, drug and alcohol issues, and a general discussion of safety issues. This agenda is subject to change.

DATES: The NECSC meeting is scheduled to commence at 9:30 a.m. on Tuesday, October 18, 2016, and will adjourn by 4:30 p.m.

ADDRESSES: The NECSC meeting will be held at the National Housing Center located at 1201 15th Street NW., Washington, DC 20005. The meeting is open to the public on a first-come, first-served basis, and is accessible to individuals with disabilities. Sign and oral interpretation can be made available if requested 10 calendar days before the meeting.

FOR FURTHER INFORMATION CONTACT: Mr. Kenton Kilgore, NECSC Administrative Officer/Coordinator, FRA, 1200 New Jersey Avenue SE., Mailstop 25, Washington, DC 20590, (202) 493–6286; or Mr. Larry Woolverton, Executive Officer for Safety Analysis, FRA, 1200 New Jersey Avenue SE., Mailstop 25, Washington, DC 20590, (202) 493–6212.

SUPPLEMENTARY INFORMATION: The NECSC is mandated by a statutory provision in Section 212 of the PRIIA (codified at 49 U.S.C. 24905(f)). The NECSC is chartered by the Secretary of Transportation and is an official Federal Advisory Committee established in accordance with the provisions of the Federal Advisory Committee Act, as amended, 5 U.S.C. Title 5—Appendix.

Issued in Washington, DC, on September 26, 2016.

Robert C. Lauby,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2016–23630 Filed 9–29–16; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Sanctions Actions Pursuant to Executive Order 13224

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (OFAC) is removing the name of two entities, whose property and interests in property were blocked pursuant to Executive Order 13224, from the list of Specially Designated Nationals and Blocked Persons (SDN List).

DATES: OFAC's actions described in this notice were effective on August 16, 2016.

FOR FURTHER INFORMATION CONTACT: Associate Director for Global Targeting, tel.: 202–622–2420, Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490, Assistant Director for Licensing, tel.: 202–622–2480, Office of Foreign Assets Control, or Chief Counsel (Foreign Assets Control), tel.: 202–622–2410, Office of the General Counsel, Department of the Treasury (not toll free numbers).

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available from OFAC's Web site (*www.treas.gov/ofac*).

Notice of OFAC Actions

The following entities are removed from the SDN List, effective as of August 16, 2016.

Entities

1. INTERNATIONAL ISLAMIC RELIEF ORGANIZATION INDONESIA BRANCH OFFICE (a.k.a. AL IGATHA AL-ISLAMIYA; a.k.a. EGASSA; a.k.a. HAYAT AL-AGHATHA AL-ISLAMIA AL-ALAMIYA; a.k.a. HAYAT AL-IGATHA; a.k.a. HAYAT AL-'IGATHA; a.k.a. IGASA; a.k.a. IGASE; a.k.a. IGASSA; a.k.a. IGATHA; a.k.a. IGHATHA; a.k.a. IIRO; a.k.a. INTERNATIONAL ISLAMIC AID ORGANIZATION; a.k.a. INTERNATIONAL ISLAMIC RELIEF AGENCY; a.k.a. INTERNATIONAL RELIEF ORGANIZATION; a.k.a. ISLAMIC RELIEF ORGANIZATION; a.k.a. ISLAMIC SALVATION COMMITTEE; a.k.a. ISLAMIC WORLD RELIEF; a.k.a. THE HUMAN RELIEF COMMITTEE OF THE MUSLIM WORLD LEAGUE; a.k.a. WORLD ISLAMIC RELIEF ORGANIZATION), Jalan Raya Cipinang Jaya No. 90, East Jakarta, Java 13410, Indonesia; P.O. Box 3654, Jakarta, Java 54021, Indonesia [SDGT].

2. INTERNATIONAL ISLAMIC RELIEF ORGANIZATION PHILIPPINES BRANCH OFFICE (a.k.a. AL IGATHA AL-ISLAMIYA; a.k.a. EGASSA; a.k.a. HAYAT AL-AGHATHA AL-ISLAMIA AL-ALAMIYA; a.k.a. HAYAT AL-IGATHA; a.k.a. HAYAT AL-'IGATHA; a.k.a. IGASA; a.k.a. IGASE; a.k.a. IGASSA; a.k.a. IGATHA; a.k.a. IGHATHA; a.k.a. IIRO; a.k.a. INTERNATIONAL ISLAMIC AID ORGANIZATION; a.k.a. INTERNATIONAL ISLAMIC RELIEF AGENCY; a.k.a. INTERNATIONAL RELIEF ORGANIZATION; a.k.a. ISLAMIC RELIEF ORGANIZATION; a.k.a. ISLAMIC SALVATION COMMITTEE; a.k.a. ISLAMIC WORLD RELIEF; a.k.a. THE HUMAN RELIEF COMMITTEE OF THE MUSLIM WORLD LEAGUE; a.k.a. WORLD ISLAMIC RELIEF ORGANIZATION), Zamboanga City, Philippines; Tawi Tawi, Philippines; Marawi City, Philippines; Basilan, Philippines; Cotabato City, Philippines; 201 Heart Tower Building, 108 Valero Street, Salcedo Village, Makati City, Metropolitan Manila, Philippines [SDGT].

Dated: September 27, 2016.

John E. Smith,

Acting Director, Office of Foreign Assets Control.

[FR Doc. 2016–23702 Filed 9–29–16; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Sanctions Actions Pursuant to Executive Order 13224

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (OFAC) is removing the name of one individual, whose property and interests in property was blocked pursuant to Executive Order 13224, from the list of Specially Designated Nationals and Blocked Persons (SDN List).

DATES: OFAC's actions described in this notice were effective on July 27, 2016.

FOR FURTHER INFORMATION CONTACT: Associate Director for Global Targeting, tel.: 202–622–2420, Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490, Assistant Director for Licensing, tel.: 202–622–2480, Office of Foreign Assets Control, or Chief Counsel (Foreign Assets Control), tel.: 202–622–2410, Office of the General Counsel, Department of the Treasury (not toll free numbers).

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available from OFAC's Web site (*www.treas.gov/ofac*).

Notice of OFAC Actions

The following individual was removed from the SDN List, effective as of July 27, 2016.

Individual

1. ABDULRAHIM, Abdulbasit (a.k.a. ABDELRAHIM, Abdelbasit; a.k.a. ABDUL RAHIM, Abdul Basit Fadil; a.k.a. ADBULRAHIM MAHOUD, Abdulbasit Fadil; a.k.a. AL ZAWY, Abdel Bassit Fadil; a.k.a. AL-ZAWI, 'Abd Al-Basit Fadhil; a.k.a. AL-ZWAY, 'Abd Al-Basit Fadil; a.k.a. MANSOUR, Abdallah; a.k.a. MANSOUR, Abdullah; a.k.a. MANSUR, 'Abdallah; a.k.a. "ABOU BASSIR"; a.k.a. "ABU BASIR"), undetermined; DOB 02 Jul 1968; POB GDABIA, LIBYA; alt. POB Ajdabiyah, Libya; nationality United Kingdom (individual) [SDGT].

Dated: September 27, 2016.

John E. Smith,

Acting Director, Office of Foreign Assets Control.

[FR Doc. 2016–23701 Filed 9–29–16; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Obligations of States and Political Subdivisions Statutory Elections

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning, obligations of states and political subdivisions.

DATES: Written comments should be received on or before November 29, 2016 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Kerry Dennis, at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet at *Kerry.Dennis@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Obligations of States and Political Subdivisions.

OMB Number: 1545–1730.

Regulation Project Number: TD 8941.

Abstract: Section 421(f)(4) of the Internal Revenue Code of 1986 permits a person engaged in the local furnishing of electric energy or gas that uses facilities financed with exempt facility bonds under section 142(a)(8), and that expands its service area in a manner inconsistent with the requirements of sections 142(a)(8) and 142(f) to make an election to ensure that those bonds will continue to be treated as tax-exempt bonds. The final regulations (1.142(f)–1) set forth the required time and manner of making this statutory election.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, and state, local or tribal governments.

Estimated Number of Respondents: 15.

Estimated Time per Respondent: 1 hour.

Estimate Total Annual Burden Hours: 15.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: September 21, 2016.

Tuawana Pinkston,

IRS Reports Clearance Officer.

[FR Doc. 2016–23595 Filed 9–29–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 1363

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently, the IRS is soliciting comments concerning Form 1363, Export Exemption Certificate.

DATES: Written comments should be received on or before November 29, 2016 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Kerry Dennis, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet, at *Kerry.Dennis@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Export Exemption Certificate.

OMB Number: 1545–0685.

Form Number: Form 1363.

Abstract: Internal Revenue Code section 427(b)(2) exempts exported property from the excise tax on transportation of property. Regulation § 49.4271–1(d)(2) authorizes the filing of Form 1363 by the shipper to request tax exemption for a shipment or a series of shipments. The information on the form is used by the IRS to verify shipments of property made tax-free.

Current Actions: There are no changes being made to this form at this time.

Type of Review: Extension of a Revision of a currently approved collection.

Affected Public: Business or other for-profit organizations and individuals or households.

Estimated Number of Respondents: 100,000.

Estimated Time per Respondent: 4 hours, 15 minutes.

Estimated Total Annual Burden Hours: 425,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: September 19, 2016.

Tuawana Pinkston,

IRS Reports Clearance Officer.

[FR Doc. 2016–23592 Filed 9–29–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8703

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8703, Annual Certification of a Residential Rental Project.

DATES: Written comments should be received on or before November 29, 2016 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Kerry Dennis, at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet at *Kerry.Dennis@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Annual Certification of a Residential Rental Project.

OMB Number: 1545–1038.

Form Number: 8703.

Abstract: Form 8703 is used by the operator of a residential rental project to provide annual information that the IRS will use to determine whether a project continues to be a qualified residential rental project under Internal Revenue Code section 142(d). If so, and certain other requirements are met, bonds issued in connection with the project are considered ''exempt facility bonds'' and the interest paid on them is not taxable to the recipient.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 6,000.

Estimated Time per Respondent: 12 hours, 47 minutes.

Estimated Total Annual Burden Hours: 76,620.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: September 16, 2016.

Tuawana Pinkston,

IRS Reports Clearance Officer.

[FR Doc. 2016–23590 Filed 9–29–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection: Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning, Adjustments Following Sales of Partnership Interests.

DATES: Written comments should be received on or before November 29, 2016 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of regulations should be directed to Kerry Dennis, at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet at *Kerry.Dennis@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Adjustments Following Sales of Partnership Interests.

OMB Number: 1545–1588.

Regulation Project Number: TD 8847.

Abstract: Partnerships, with a section 754 election in effect, are required to adjust the basis of partnership property following certain transfers of partnership interests. This regulation relates to the optional adjustments to the basis of partnership property following certain transfers of partnership interests under section 743, the calculation of gain or loss under section 751(a) following the sale or exchange of a partnership interest, the allocation of basis adjustments among partnership assets under section 755, the allocation of a partner's basis in its partnership interest to properties distributed to the partner by the partnership under section 732(c), and the computation of a partner's proportionate share of the adjusted basis of depreciable property (or depreciable real property) under section 1017.

Current Actions: There are no changes being made to the regulation at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents/Recordkeepers: 226,000.

Estimated Time per Respondent/Recordkeeper: 4 hrs.

Estimated Total Annual Burden Hours: 904,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: September 19, 2016.

Tuawana Pinkston,

IRS Reports Clearance Officer.

[FR Doc. 2016–23588 Filed 9–29–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Gasohol; Compressed Natural Gas and Gasoline Excise Tax

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently, the IRS is soliciting comments concerning gasohol; compressed natural gas and gasoline excise tax.

DATES: Written comments should be received on or before November 29, 2016 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to Allan Hopkins at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet at *Kerry.Dennis@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Gasohol; Compressed Natural Gas; and Gasoline Excise Tax.

OMB Number: 1545–1270. Regulation Project Number: PS–66–93 (TD 8609) and PS–120–90 (8241).

Abstract: PS–66–93: This regulation relates to gasohol blending and the tax on compressed natural gas (CNG). The sections relating to gasohol blending affect certain blenders, enterers, refiners, and throughputters. The sections relating to CMG affect persons that sell or buy CNG for use as a fuel in a motor vehicle or motorboat. PS–120–90: This regulation relates to the federal excise tax on gasoline. It affects refiners, importers, and distributors of gasoline and provides guidance relating to taxable transactions, persons liable for tax, gasoline blendstocks, and gasohol.

Current Actions: There are no changes being made to this regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, Not-for-profit institutions, Farms and State, Local or Tribal Governments.

Estimated Number of Respondents: 3,410.

Estimated Time per Respondent: 7 minutes.

Estimated Total Annual Burden Hours: 366.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: September 21, 2016.

Tuawana Pinkston,

IRS Reports Clearance Officer.

[FR Doc. 2016–23589 Filed 9–29–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

September 27, 2016.

The Department of the Treasury will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the date of publication of this notice.

DATES: Comments should be received on or before October 31, 2016 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimates, or any other aspect of the information collection, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 8117, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained by emailing *PRA@treasury.gov,* calling (202) 622–1295, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Internal Revenue Service (IRS)

OMB Control Number: 1545–0889.

Type of Review: Extension of a currently approved collection.

Title: Disclosure Statement (Form 8275), and Regulation Disclosure Statement (Form 8275–R).

Form: Forms 8275, 8275–R.

Abstract: Taxpayers and tax return preparers use Form 8275 to disclose items or positions that are not otherwise adequately disclosed on a tax return to avoid certain penalties.

Affected Public: Businesses or other for-profits.

Estimated Total Annual Burden Hours: 3,716,664.

OMB Control Number: 1545–2032.

Type of Review: Extension of a currently approved collection.

Title: Application to Participate in the Income Verification Express Service (IVES) Program.

Form: Form 13803.

Abstract: The form is used to submit the required information necessary to complete the e-services enrollment process for IVES users and to identify delegates receiving transcripts on behalf of the principal account user.

Affected Public: Businesses or other for-profits.

Estimated Total Annual Burden Hours: 100.

OMB Control Number: 1545–2075.

Type of Review: Extension of a currently approved collection.

Title: Form 13614–NR—Nonresident Alien Intake and Interview Sheet.

Form: Form 13614.

Abstract: The completed form is used by screeners, preparers, or others involved in the tax return preparation process to more accurately complete tax returns of international students and scholars. These persons need assistance having their returns prepared so they can fully comply with the law.

Affected Public: Individuals or households.

Estimated Total Annual Burden Hours: 141,260.

OMB Control Number: 1545–2158.

Type of Review: Extension of a currently approved collection.

Title: Notice 2010–54: Production Tax Credit for Refined Coal.

Abstract: This notice sets forth interim guidance pending the issuance of regulations relating to the tax credit under § 45 of the Internal Revenue Code (Code) for refined coal.

Affected Public: Businesses or other for-profits.

Estimated Total Annual Burden Hours: 1,500.

Brenda Simms,

Treasury PRA Clearance Officer.

[FR Doc. 2016–23713 Filed 9–29–16; 8:45 am]

BILLING CODE 4830–01–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
1985

FEDERAL REGISTER

Vol. 81 Friday,
No. 190 September 30, 2016

Part II

Department of Health and Human Services

Administration for Children and Families

45 CFR Part 98
Child Care and Development Fund (CCDF) Program; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 98

RIN 0970–AC67

Child Care and Development Fund (CCDF) Program

AGENCY: Office of Child Care (OCC), Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: This final rule makes regulatory changes to the Child Care and Development Fund (CCDF) based on the Child Care and Development Block Grant Act of 2014. These changes strengthen requirements to protect the health and safety of children in child care; help parents make informed consumer choices and access information to support child development; provide equal access to stable, high-quality child care for low-income children; and enhance the quality of child care and the early childhood workforce.

DATES: *Effective:* November 29, 2016.

Compliance date: States and Territories are expected to be in full compliance by the end of the Fiscal Year (FY) 2016—2018 CCDF Plan period. ACF will determine compliance with provisions in this final rule through review and approval of the FY 2019—2021 CCDF Plans that become effective October 1, 2018 and through the use of federal monitoring of progress in accordance with section 98.90 prior to that date.

For Tribal Lead Agencies, ACF will determine compliance through review and approval of the FY 2020—2022 Tribal CCDF Plans that become effective October 1, 2019. See further discussion of effective and compliance dates in the background section of this rule.

FOR FURTHER INFORMATION CONTACT: Andrew Williams, Office of Child Care at 202–401–4795 (not a toll-free call). Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1–800–877–8339 between 8 a.m. and 7 p.m. Eastern Time.

SUPPLEMENTARY INFORMATION:

Contents

I. Executive Summary
II. Background
  a. Child Care and Development Fund
  b. Statutory Authority
  c. Effective Dates
III. Development of the Regulation
IV. General Comments and Cross-Cutting Issues
V. Section by Section Discussion of Comments and Regulatory Provisions
  Subpart A—Goals, Purposes and Definitions
  Subpart B—General Application Procedures
  Subpart C—Eligibility for Services
  Subpart D—Program Operations (Child Care Services) Parental Rights and Responsibilities
  Subpart E—Program Operations (Child Care Services) Lead Agency and Provider Requirements
  Subpart F—Use of Child Care and Development Funds
  Subpart G—Financial Management
  Subpart H—Program Reporting Requirements
  Subpart I—Indian Tribes
  Subpart J—Monitoring, Non-Compliance, and Complaints
  Subpart K—Error Rate Reporting
VI. Regulatory Process Matters
  a. Regulatory Flexibility Act
  b. Executive Orders 12866 and 13563
  c. Regulatory Impact Analysis
  d. Unfunded Mandates Reform Act of 1995
  e. Executive Order 13045 on Protection of Children
  f. Executive Order 13175 on Consultation with Indian Tribes
  g. Paperwork Reduction Act of 1995
  h. Congressional Review
  i. Executive Order 13132
  j. Treasury and General Government Appropriations Act of 1999

I. Executive Summary

Overview. On November 19, 2014, President Barack Obama signed the Child Care and Development Block Grant (CCDBG) Act of 2014 (Pub. L. 113–186) into law following its passage in the 113th Congress. The CCDBG Act, as amended (42 U.S.C. 9858 *et seq.*, and hereinafter referred to as the "Act"), along with Section 418 of the Social Security Act (42 U.S.C. 618) authorizes the Child Care and Development Fund (CCDF), which is the primary Federal funding source devoted to providing low-income families who are working or participating in education or training activities with help paying for child care and improving the quality of child care for all children.

The bipartisan CCDBG Act of 2014 made sweeping statutory changes that require significant reforms to State and Territory CCDF programs to raise the health, safety, and quality of child care and provide more stable child care assistance to families. It expanded the purposes of CCDF for the first time since 1996, ushering in a new era for child care in this country. Since 1996, a significant body of research has demonstrated the importance of early childhood development and how stable, high-quality early experiences can positively influence that development and contribute to children's futures. In particular, low-income children stand to benefit the most from a high-quality early childhood experience. Research has also shown the important role of child care financial assistance in helping parents afford reliable child care in order to obtain and maintain stable employment or pursue education. The reauthorized Act recognizes CCDF as an integral program to promote both the healthy development of children and parents' pathways to economic stability.

In Fiscal Year (FY) 2014, CCDF provided child care assistance to 1.4 million children from nearly 1 million low-income working families in an average month. The Congressional reauthorization of CCDBG made clear that the prior law was inadequate to protect the health and safety of children in care and that more needs to be done to increase the quality of CCDF-funded child care. It also recognized the central importance of access to subsidy continuity in supporting parents' ability to achieve financial stability and children's ability to develop nurturing relationships with their caregivers, which creates the foundation for a high-quality early learning experience.

Purpose of this regulatory action. The majority of CCDF regulations at 45 CFR parts 98 and 99 were last revised in 1998 (with the exception of some more recent updates related to State match and error reporting). This regulatory action is needed to update the regulations to accord with the reauthorized Act and to reflect what has been learned since 1998 about child care quality and child development.

Legal authority. This final rule is being issued under the authority granted to the Secretary of Health and Human Services by the CCDBG Act of 1990, as amended, (42 U.S.C. 9858 *et seq.*) and Section 418 of the Social Security Act (42 U.S.C. 618).

Major provisions of the final rule. The final rule addresses the CCDBG Act of 2014, which includes provisions to: (1) Protect the health and safety of children in child care; (2) help parents make informed consumer choices and access information to support child development; (3) provide equal access to stable, high-quality child care for low-income children; and (4) enhance the quality of child care and the early childhood workforce.

Protect Health and Safety of Children in Child Care

This rule provides details on the health and safety standards established in the CCDBG Act of 2014, including health and safety training, comprehensive background checks, and monitoring. The Act requires States to monitor providers receiving CCDF funds (including those that are license-exempt), at least annually, to determine whether health and safety practices and standards are being followed in the child care setting, including a pre-licensure visit for licensed providers. Regular monitoring of child care settings is necessary to ensure compliance with appropriate standards that protect the health and safety of children. However, this rule allows Lead Agencies to develop alternative monitoring requirements for CCDF-funded care provided in the child's home and exempts relative caregivers from the monitoring and training requirements at the option of Lead Agencies. This flexibility allows Lead Agencies to address the unique characteristics of these care arrangements.

In this final rule, we address the Act's background check requirements by requiring all child care staff members (including prospective staff members) of all licensed, regulated, or registered child care providers and all child care providers eligible to deliver CCDF services to have a comprehensive background check, unless they are related to all children in their care. We extend the background check requirement to all adults residing in family child care homes. All parents, regardless of whether they receive CCDF assistance, deserve this basic protection of knowing that those individuals who have access to their children do not have prior records of behavior that could endanger their children.

The Act requires Lead Agencies to establish standards and training in 10 topic areas related to health and safety that are fundamental for any child care setting, such as first aid, CPR, and safe sleep practices. We added recognizing and reporting child abuse and neglect to this list. The Act also requires Lead Agencies to maintain records of substantiated parental complaints about child care. The final rule requires Lead Agencies to designate a hotline or similar reporting process for parental complaints. Child care providers are required to report serious injuries or deaths that occur in child care settings in order to inform regulatory or other policy changes to improve health and safety.

Help Parents Make Informed Consumer Choices and Access Information To Support Child Development

The Act expanded requirements for the content of consumer education available to parents receiving CCDF assistance, the public, and where applicable, child care providers. By adding providers, Congress recognized the positive role trusted caregivers can play in communicating and partnering with parents on a daily basis regarding their children's development and available resources in the community. Effective consumer education strategies are important to inform parental choice of child care and to engage parents in the development of their children in child care settings—a new purpose of the CCDF added by the CCDBG Act of 2014. States and territories have the opportunity to consider how information can be best provided to low-income parents through their interactions with CCDF, partner agencies, and child care providers, as well as through electronic means such as a Web site. Parents face great challenges in finding reliable information and making informed consumer choices about child care for their children.

The Act requires Lead Agencies to make available via a consumer-friendly and easily accessible Web site, information on policies and procedures regarding: (1) Licensing of child care providers; (2) conducting background checks and the offenses that keep a provider from being allowed to care for children; and (3) monitoring of child care providers. This is done through a single Web site that is easy for families to navigate and provides widest possible access to individuals who speak languages other than English and persons with disabilities. This Web site must give parents receiving CCDF information about the quality of their chosen providers. The final rule also requires Lead Agencies to provide CCDF parents with a consumer statement in hard copy or electronically (such as referral to the consumer education Web site) with specific information about the child care provider they select.

The Act requires Lead Agencies to make results of monitoring available in a consumer-friendly and easily accessible manner. We require posting a minimum of three years of results. If full reports are not in plain language, Lead Agencies must post a plain language summary for each report in addition to the full monitoring and inspection report. Parents should not have to parse through administrative code or understand advanced legal terms to determine whether safety violations have occurred in a child care setting.

Congress added a number of content areas that will support parents in their role as their child's first and most important teacher. In keeping with a new purpose of the CCDF program at Section 658A(b)(3) of the Act to promote involvement by parents and family members in the development of their children in child care settings, Section 658C(2)((E)(i) of the Act requires Lead Agencies to make available information related to best practices in child development and State policies regarding child social and emotional development, including any State policies relevant to preventing expulsion of children under age five from child care settings.

The reauthorized Act also requires Lead Agencies to provide information that can help parents identify other financial benefits and services that may support their pathway to economic stability. Families eligible for child care assistance are often eligible for other supports, and the Act specifies that Lead Agencies provide families with information on several public benefit programs, including Temporary Assistance for Needy Families (TANF), Supplemental Nutrition Assistance Program (SNAP), Medicaid, and the Children's Health Insurance Program (CHIP). In addition, the Act requires Lead Agencies to provide information on the programs and services that are part of Individuals with Disabilities Education Act (IDEA), such as early intervention and special education services, and that parents are given information on how to obtain a developmental screening for their child. Low-income parents deserve to have easy access to the full range of information, programs, and services that can support them in their parenting efforts. To ensure equal access for persons with limited English proficiency and for persons with disabilities, the final rule requires Lead Agencies to provide child care program information in multiple languages and alternative formats.

Provide Equal Access to High-Quality Child Care for Low-Income Children

Congress established requirements to provide more stable child care financial assistance to families, including extending children's eligibility for child care to a minimum of 12 months, regardless of increases in parents' earnings (as long as income remains at or below the Federal eligibility limit) and temporary changes in participation in work, training, or education. This will enable parents to maintain employment or complete education programs, and supports both family financial stability and the relationship between children and their caregivers. Under the reauthorized Act, Lead Agencies that choose to end assistance prior to 12 months, due to a non-temporary change in a parent's work, training, or education participation, must continue assistance for a minimum of 3 months to allow parents to engage in job search, resume work, or attend an education or training program, as soon as possible.

This final rule establishes a set of policies intended to stabilize families' access to child care assistance and, in turn, help stabilize their employment or education and their child's care arrangement. These policies also have the potential to stabilize the revenue of child care providers who receive CCDF funds, as they experience more predictable, reliable, and timely payments for services. This rule reduces reporting requirements for families and prevents them from unduly losing their assistance. Parents often find it difficult to navigate administrative processes and paperwork required to maintain their eligibility, and state policies can be inflexible to changes in a family's circumstances. These provisions also make it easier for Lead Agencies to align CCDF policies with other programs serving low-income children. For example, more than half of children receiving CCDF-funded child care are in families with incomes under the federal poverty line, and therefore qualify for Head Start. Children once found eligible for Head Start may remain in the program until they age out, which promotes stability for families and for the Head Start program. The provisions here promote stability of child care programs and allow for greater alignment between child care services and Head Start for families in poverty who rely on child care subsidy to participate in work or education/job training.

Families may be determined to be ineligible within the minimum 12-month eligibility period if their income exceeds 85 percent of state median income (SMI) (taking into account irregular fluctuations in income) or, at Lead Agency option, the family experiences a non-temporary cessation in job, training, or education. We clarify that additional State-imposed eligibility criteria apply only at the time of initial eligibility determination and redetermination and provide examples of changes in parents' scheduling and conditions of employment that meet the statutory intent of stabilizing assistance for families through changes in circumstance. Lead Agencies that set their income eligibility threshold below 85 percent of SMI must allow parents who otherwise qualify for CCDF assistance to continue receiving assistance, at subsequent redeterminations, until their income exceeds a second tier of eligibility set at a level sufficient for the family to reasonably afford quality child care without assistance, based on the typical household budget of a low-income families. This approach promotes continuity of care for children while allowing for wage growth for families to move on a path toward economic stability.

All too often, getting and keeping CCDF assistance is overly burdensome for parents, resulting in short durations of assistance and churning on and off CCDF as parents lose assistance and then later return. This instability disrupts parental employment and education, harms children, and runs counter to nearly all of CCDF's purposes. This full set of provisions that facilitates easier and sustained access to assistance is necessary to strengthen CCDF as a two-generation program that supports work, training, and education, as well as access to high-quality child care.

Congress reaffirmed the core principle that families receiving CCDF-funded child care should have equal access to child care that is comparable to that of non-CCDF families. The Act requires Lead Agencies to set provider payment rates based on a valid market rate survey or alternative methodology. To allow for equal access, the final rule requires Lead Agencies to set base payment rates *at least* at a level sufficient to cover the costs to providers of the health, safety, quality, and staffing requirements included in the Act and the final rule. The Act also requires Lead Agencies to take into account the cost of higher quality when setting rates. We reaffirm our long-standing position that setting payment rates at the 75th percentile of a recent market rate survey remains an important benchmark for gauging equal access. Below market payment rates limit access to high-quality care for children receiving CCDF-funded care and violate the equal access provision that is central to CCDF. Higher provider payment rates are necessary to ensure that providers receiving CCDF funds have the means to provide high-quality care for our country's low-income children.

The final rule provides details on the statutory requirements for Lead Agencies to pay providers in a timely manner based on generally-accepted payment practices for non-CCDF providers and that Lead Agencies delink provider payments from children's absences to the extent practicable. We establish a new Federal benchmark for affordable family co-payments of seven percent of family income and allow Lead Agencies more flexibility to waive co-payments for vulnerable families. Under this rule, Lead Agencies may increase family co-payments only at redetermination or during a period of graduated phase-out when families' incomes have increased above the Lead Agency's initial income eligibility threshold. In addition, if a Lead Agency allows providers to charge amounts more than the required family co-payments, the Lead Agency must provide a rationale for this practice, including how charging such additional amounts will not negatively impact a family's ability to receive care they might otherwise receive taking into consideration a family's co-payment and the provider's payment rate.

This final rule requires Lead Agencies to take into consideration children's development and learning and promote continuity of care when authorizing child care services; offer increased flexibility for determining eligibility of vulnerable children; and clarify that Lead Agencies are not required to restrict a child's care to the hours of a parent's work or education. These changes are important to make the program more child-focused and ensure that the most vulnerable children have access to and benefit from high-quality care. These provisions may be implemented broadly in ways that best support the goals of Lead Agencies.

Enhance the Quality of Child Care and the Early Childhood Workforce

The final rule provides detail on the statutory requirement to increase spending on initiatives that improve the quality of care. The Act increases the share of CCDF funds directed towards quality improvement activities, authorizes a new set-aside for infant-toddler care, and drives investments towards increasing the supply of high-quality care for infants and toddlers, children with special needs, children experiencing homelessness, and other vulnerable populations including children in need of nontraditional hour care and children in poor communities. The Act requires States and Territories to submit an annual report on quality activities, including measures created by the Lead Agency to evaluate progress on quality improvement. This final rule requires Lead Agencies to report data on their progress on those measures. The Act also increases quality through more robust program standards, including training and professional development standards for caregivers, teachers, and directors to help those working with children promote their social, emotional, physical, and cognitive development.

The final rule clarifies the Act's training requirements by requiring that child care caregivers, teachers, and directors of CCDF providers receive training prior to caring for children, or during an orientation period not to exceed three months, and on an annual basis. In order for the health and safety requirements to be implemented, and because these are areas that the Lead Agency will monitor, this final rule requires that the pre-service or orientation training include the ten basic health and safety topics identified in the Act, as well as recognizing and reporting child abuse and neglect (in order to comply with child abuse reporting requirements) and training in child development for eligible children from birth to 13 years of age.

Lead Agencies must provide for a progression of professional development that may include postsecondary education. The final rule identifies six key components of a professional development State framework, and we encourage, to the extent practicable, that ongoing training yields continuing education units or is credit-bearing. These components advance expert recommendations to improve the knowledge and competencies of those who care for young children, which is central to children's learning experiences and the quality of child care.

In addition, the Act includes a number of provisions to improve access to high-quality child care for children experiencing homelessness. The Act requires Lead Agencies to establish a grace period that allows children experiencing homelessness (and children in foster care) to receive CCDF services while allowing their families (including foster families) a reasonable time to comply with immunization and other health and safety requirements. The final rule requires Lead Agencies to help families by coordinating with licensing agencies and other relevant State and local agencies to provide referrals and support to help families experiencing homelessness comply with immunization and health and safety requirements. This final rule also requires Lead Agencies to use the definition of homeless applicable to school programs from the McKinney-Vento Act to align with other Federal early childhood programs (42 U.S.C. 11434a).

This final rule indicates the extent to which CCDF provisions apply to tribes, since this was not specified in the Act itself. Starting in early 2015, OCC began a series of formal consultations with Tribal leaders to determine how the provisions in the reauthorized Act should apply to Tribes and Tribal organizations. We heard from many Tribal leaders and CCDF Administrators asking for flexibility to implement child care programs that meet the individual needs of their communities. The final rule is intended to preserve Tribal Lead Agency flexibility, in a manner consistent with the CCDF dual goals of promoting families' financial stability and fostering healthy child development. We differentiate and exempt some Tribal grantees from a progressive series of CCDF provisions based on three categories of CCDF grant allocations: Large, medium and small. We are also allowing Tribes flexibility to consider any Indian child in the Tribe's service area to be eligible to receive CCDF funds, regardless of the family's income or work, education, or training status, if a Tribe's median income is below a threshold established by the Secretary. However, the Tribe's provision of services still must be directed to those with the highest need.

Costs, benefits and transfer impacts. Changes made by the CCDBG Act of 2014 and this final rule have the most direct benefit for the 1.4 million children and their parents who use CCDF assistance to pay for child care. Many of the Act's changes will also positively impact children who do not directly participate in CCDF. Many children who receive no direct assistance from CCDF will benefit from more rigorous health and safety standards, provider inspections, criminal background checks for child care staff, and accessible consumer information and education for their parents and providers. The attention to quality goes beyond health and safety. Caregivers, teachers, and directors of CCDF providers will be supported in their ongoing professional development. Under the Act, States and Territories must direct an increasingly greater share of their CCDF grant towards activities that improve the quality of child care, including a new share dedicated to improving the quality of infant and toddler care. Low-income parents who receive CCDF assistance will benefit from more stable financial assistance as they work toward economic stability and their children will benefit from relationships that are more continuous with their caregivers. Providers will benefit from improved provider payment rates (by certificate or grant or contract), as well as payment practices that support their financial stability. These include timely payments so that providers can sustain their operations and quality and paying providers for a reasonable number of absent days. The positive impacts of the reauthorized Act and this rule will benefit children, families, providers, and employers now and into the future.

The cost of implementing changes made by the Act and this rule vary depending on a State's specific situation. There are a significant number of States, Territories, and Tribes that have already implemented many of these policies. ACF conducted a regulatory impact analysis to estimate costs and benefits of provisions in this final rule, including the new statutory requirements, taking into account current State practices. We evaluated major areas of policy change, including monitoring and inspections (including a hotline for parental complaints), background checks, training and professional development, consumer education (including the Web site and consumer statement), quality spending, minimum 12-month eligibility and related provisions, increased subsidies, and supply building.

Based on our analysis, annualized costs associated with these provisions, averaged over a ten year window, are $235.2 million and the annualized amount of transfers is approximately $839.1 million (both estimated using a 3 percent discount rate), which amounts to a total annualized impact of $1.16 billion. Of that amount, approximately $1.15 billion is directly attributable to the CCDBG Act of 2014, with an annualized cost of only $4 million (or 0.3% of the total estimated impact) directly attributable to discretionary provisions of this regulation. While this analysis does not attempt to fully quantify the many benefits of the reauthorization and this rule, we do conduct a breakeven analysis to compare requirements clarified through this regulation against a potential reduction in child fatalities and injuries. Further detail and explanation can be found in the regulatory impact analysis.

II. Background

a. Child Care and Development Fund. Nearly 13 million young children, under age 5, regularly rely on child care to support their healthy development and school success. (Census Bureau, Who's Minding the Kids? Child Care Arrangements, Spring 2011). Additionally, more than 10 million children participate in a range of school-age programs, before- and after-school and during summers and school breaks. (Afterschool Alliance, America After 3PM: Afterschool Programs in Demand, 2014). CCDF is the primary Federal funding source devoted to providing low-income families with access to child care and before- and after-school care and improving the quality of care and, thus, is an integral part of the nation's child care and early education system. Each year, more than $5 billion in Federal CCDF funding is allocated to State, Territory and Tribal grantees. Combined with State funds and transfers from the Temporary Assistance for Needy Families (TANF) program, States and Territories spend nearly $9 billion annually to support child care services to low-income families and to improve the quality of child care. More than $1 billion of this spending is directed towards supporting child care quality improvement activities designed to create better learning environments and more effective caregivers and teachers in child care centers and family child care homes across the country.

CCDF was created 20 years ago, upon the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) in 1996 (Pub. L. 104–193), in which Congress replaced the former Aid to Families with Dependent Children with the framework of TANF block grants, and established a new structure of consolidated funding for child care. This funding, provided under section 418 of the Social Security Act (42 U.S.C. 618), combined with funding from the Child Care and Development Block Grant (CCDBG) Act of 1990 (42 U.S.C. 9858 *et seq.*), was designated by HHS as the Child Care and Development Fund (CCDF).

The CCDBG Act of 2014 was the first reauthorization of CCDBG since 1996. The reauthorized Act affirms the importance of CCDF as a two-generation program that supports parents' financial success and children's healthy development. Since PRWORA, the focus of CCDF has shifted from one largely dedicated to the goal of enabling low-income parents to work to one that includes a focus on promoting positive child development as we have learned a great deal about the value of high-quality child care for young children. While low-income parents continue to need access to child care in order to work and gain economic independence, policymakers and the public now recognize that the quality of child care arrangements is also critically important.

Sixteen years ago, HHS (in collaboration with other federal agencies and private partners) funded the National Academies of Sciences to evaluate and integrate the research on early childhood development and the role of early experiences. (National Research Council and Institute of Medicine, From Neurons to Neighborhoods: The Science of Early Childhood Development, Board on Children, Youth, and Families, Commission on Behavioral and Social Sciences and Education, 2000.) An overarching conclusion was that early experiences matter for healthy child development. Nurturing and stimulating care given in the early years of life builds optimal brain architecture that allows children to maximize their enormous potential for learning. On the other hand, hardship in the early years of life can lead to later problems. Interventions in the first years of life are capable of helping to shift the odds for those at risk of poor outcomes toward more positive outcomes. A multi-site study conducted by the Frank Porter Graham Child Development Institute found that, ". . . children who experienced higher quality care are more likely to have more advanced language, academic, and social skills," and, ". . . children who have traditionally been at risk of not doing well in school are affected more by the quality of child care experiences than other children." (E. Peisner-Feinberg, M. Burchinal, et al., The Children of the Cost, Quality, and Outcomes Study Go to School: Executive Summary, University of North Carolina at Chapel Hill, Frank Porter Graham Child Development Center, 1999).

Evidence continues to mount regarding the influence that children's earliest experiences have on their later success and the role child care can play in shaping those experiences. The most recent findings from the National Institute of Child Health and Human Development (NICHD) showed that the quality of child care children received in their preschool years had small but statistically significant associations with their academic success and behavior into adolescence. (NICHD, Study of Early Child Care and Youth Development, 2010). Recent follow-up studies to the well-known Abecedarian Project, which began in 1972 and has followed participants from early childhood through young adulthood, found that adults who had participated in a high-quality early childhood education program experienced better educational, employment, and health outcomes. Abecedarian Project participants had significantly more years of education than their control group peers, were four times more likely to earn college degrees, and had lower risk of cardiovascular and metabolic diseases in their mid-30s. (Campbell, Pungello, Burchinal, et al., Adult Outcomes as a Function of an Early Childhood Educational Program: An Abecedarian Project Follow-Up, Frank Porter Graham Child Development Institute, Developmental Psychology, 2012 and Campbell, Conti, Heckman et al, Early Childhood Investments Substantially Boost Adult Health, Science 28 March 2014, Vol. 343).

Research also confirms that consistent time spent in afterschool activities during the elementary school years is linked to narrowing the gap in math achievement, greater gains in academic and behavioral outcomes, and reduced school absences. (Auger, Pierce, and Vandell, Participation in Out-of-School Settings and Student Academic and Behavioral Outcomes, presented at the Society for Research in Child Development Biennial Meeting, 2013). An analysis of over 70 after-school program evaluations found that evidence-based programs designed to promote personal and social skills were successful in improving children's behavior and school performance. (Durlak, Weissberg, and Pachan, The Impact of Afterschool Programs that Seek to Promote Personal and Social Skills in Children and Adolescents, American Journal of Community Psychology, 2010). After-school programs also promote youth safety and family stability by providing supervised settings during hours when children are not in school. Parents with school-aged children in unsupervised arrangements face greater stress that can impact the family's well-being and successful participation in the workforce. (Barnett and Gareis, Parental After-School Stress and Psychological Well-Being, Journal of Marriage and the Family, 2006).

CCDF often operates in conjunction with other programs including Head Start, Early Head Start, State pre-kindergarten, and before-and after-school programs. States and Territories have flexibility to use CCDF to provide children enrolled in these programs full-day, full-year care, which is essential to supporting low-income working parents. CCDF also funds quality improvements for settings beyond those that serve children receiving subsidies. CCDF has helped lay the groundwork for development of State early learning systems. Lead Agencies have used CCDF funds to make investments in professional development systems to ensure a well-qualified and effective early care and education workforce. Lead Agencies have provided scholarships for child care teachers and worked closely with higher education, especially community colleges, to increase the number of teachers with training or a degree in early childhood or youth development. Lead Agencies have used CCDF funds to build quality rating and improvement systems (QRIS) to provide consumer education information to parents, help providers raise quality, and create a more systemic approach to child care quality improvement efforts and accountability. These investments have likely also generated benefits for children enrolled in unsubsidized child care programs.

Child care is a core early learning and care program and plays an important role within a broad spectrum of early childhood programs supporting young children. The Administration has consistently sought to support State, Territory and Tribal efforts to improve the coordination and alignment of early childhood programs through multiple efforts, including the Race to the Top-Early Learning Challenge and the Early Head Start-Child Care Partnerships. Most recently, ACF published Caring for our Children Basics (*www.acf.hhs.gov/sites/default/files/ecd/caring_for_our_children_basics.pdf*), a set of recommendations intended to create a common framework to align basic health and safety efforts across all early childhood settings. This final rule builds on the alignment and coordination work that has been advanced by the Administration. For example, Lead Agencies are required to collaborate with multiple entities, including State Advisory Councils on Early Childhood Education and Care, authorized by the Head Start Act, or similar coordinating bodies. In addition, minimum 12-month eligibility periods will make it easier to align child care assistance with eligibility periods for other programs, such as Early Head Start, Head Start, and State prekindergarten. Policies that stabilize access to child care assistance for families and bring financial stability to child care providers will play an important role in supporting the success of Early Head Start-Child Care Partnerships.

According to a recent report by the President's Council of Economic Advisors, investments in early childhood development will reap economic benefits now and in the future. Immediate benefits include increased parental earnings and employment. Future benefits come when children who experience high-quality early learning opportunities are prepared for success in school and go on to earn higher wages as adults. (Council of Economic Advisors, Executive Office of the President of the United States, The Economics of Early Childhood Investments, 2014). Decades of research show that the experiences babies and toddlers have in their earliest years shape the architecture of the brain and have long-term impacts on human development. At the same time, increasing the employability and stability of parents reduces the impact of poverty on children and sustains our nation's workforce and economy. Studies have shown that access to reliable child care contributes to increased employment and earnings for parents. (National Research Council and Institute of Medicine, From Neurons to Neighborhoods: The Science of Early Childhood Development, Board on Children, Youth, and Families, Commission on Behavioral and Social Sciences and Education, 2000 and Council of Economic Advisors, The Economics of Early Childhood Investments). In short, high-quality child care is a linchpin to the creation of an educational system that successfully supports the country's workforce development, economic security, and global competitiveness. Successful implementation of the CCDBG Act of 2014 will ensure that child care is not only safe, but also supports children's healthy development and their future academic achievement and success.

b. Statutory authority. This final rule is being issued under the authority granted to the Secretary of Health and Human Services by the CCDBG Act of 1990, as amended (42 U.S.C. 9858 *et seq.*) and Section 418 of the Social Security Act (42 U.S.C. 618).

c. Effective dates. This final rule will become effective 60 days from the date of its publication, except for provisions with a later effective date as defined in the Act (discussed further below). Compliance with provisions in the Act will be determined through ACF review and approval of CCDF Plans, including State Plan amendments, as well as using Federal monitoring, including on-site monitoring visits as necessary. Lead Agencies must comply with the provisions of the Act, as revised by the CCDBG Act of 2014. Compliance with key statutorily required implementation dates outlined in Program Instruction CCDF–ACF–PI–2015–02 (*http://www.acf.hhs.gov/programs/occ/resource/pi-2015-02*), dated January 9, 2015, remain in effect. In some cases, the CCDBG Act of 2014 specifies a particular date when a provision is effective. Where the Act does not specify a date, the new requirements became effective upon the date of enactment of the Act, and ACF guidance established September 30, 2016 as the deadline for States and Territories to implement the new statutory requirement(s). As discussed below, Tribes and Tribal organizations have different implementation and compliance timelines.

CCDF Final Rule Implementation Timeline

State and Territory Lead Agencies (FY 2019-2021 CCDF Plans)

July 2018	October 1, 2018
Plan Submission	Plan Effective Date

Tribal Lead Agencies (FY 2020-2022 CCDF Plans)

July 2019	October 1, 2019
Plan Submission	Plan Effective Date

We recognize that States and Territories prepared their FY 2016–2018 CCDF Plans, which were due in March 2016, prior to the issuance of this final rule. States and Territories were to comply with the Act based on their reasonable interpretation of the requirements in the revised Act. With the issuance of this final rule, any State or Territory that does not fully meet the requirements of the Act, as interpreted by these regulations, will need to revise its policies and procedures to come into compliance. Plan amendments for substantial changes must be submitted within 60 days of the effective date of the change, and ACF will track compliance. The Act and this final rule also provide guidance on the process that allows the Secretary to consider whether to approve requests for temporary extensions from States and Territories through waivers. If a State or Territory receives an extension via waiver, ACF still expects full compliance with the Act, as interpreted by this final rule, by the end of the current triennial Plan period (FY 2016–2018). ACF will use federal monitoring in accordance with section 98.90.

Tribal Lead Agencies will submit new 3-year Plans for FY 2020–2022, with an effective date of October 1, 2019, and ACF will use those Plans to determine compliance with the Act, as interpreted by this rule. Tribes may also submit requests, for HHS to consider, seeking temporary extensions via waivers. Tribes that have consolidated CCDF with other employment, training and related programs under Public Law (Pub. L. 102–477), are not required to submit separate CCDF Plans, but will be required to submit amendments to their Public Law 102–477 Plans, along with associated documentation, in accordance with this timeframe to demonstrate compliance with the Act, as interpreted by this final rule.

This final rule is being published well in advance of the October 1, 2018 deadline for States and Territories (and October 1, 2019 deadline for Tribes) to ensure there is enough time to demonstrate compliance with all the statutory interpretations in this final rule. As a result, there is sufficient time for all States, Territories, and Tribes to demonstrate compliance with this rule's interpretations no later than these deadlines. We are not inclined to approve any requests for temporary extensions/waivers due to legislative or transitional purposes in order to comply with this rule's interpretations because the compliance deadlines already provide adequate time.

III. Development of Regulation

After enactment of the CCDBG Act of 2014, the Office of Child Care (OCC) and the Office of the Deputy Assistant Secretary for Early Childhood Development in ACF conducted outreach to engage with a variety of stakeholders to understand better the implications of its provisions. OCC created a CCDF reauthorization page on its Web site to provide public information and an email address to receive questions. OCC received approximately 650 questions and comments through this email address. OCC leadership and staff participated in more than 21 listening sessions with approximately 675 people representing diverse national, State, and local stakeholders regarding the Act, held webinars, and gave presentations at national conferences. Participants included State human services agencies, child care caregivers and providers, parents with children in child care, child care resource and referral agencies, national and State advocacy groups, national stakeholders including faith-based communities, after-school and school-age caregivers and providers, child care researchers, State and local early childhood organizations, provider associations, labor unions, and Head Start grantees. In addition, OCC held five meetings with State and Territory CCDF administrators and a series of consultations with Tribal leaders to describe the Act and to gather input from Federal grantees with responsibility for operating the CCDF program.

ACF published a notice of proposed rulemaking (NPRM) in the **Federal Register** on December 24, 2015, (80 FR 80466) proposing revisions to CCDF regulations consistent with the reauthorized Act and research on child safety, health, and child development in child care and school-age child care. We provided a 60-day comment period during which interested parties could submit comments in writing by mail or electronically.

ACF received 150 comments on the proposed rule (public comments on the proposed rule are available for review on *www.regulations.gov*), including comments from State human services and education agencies, national advocacy groups, State and local early childhood organizations, child care resource and referral agencies, faith-based organizations, provider associations, Tribes and Tribal organizations, labor unions, child care providers, parents, individual members of the public, and a joint letter by two members of the U.S. Congress. We were pleased to receive comments from 41 State and local governments, 1 Territory, and 15 Tribes and Tribal organizations. A number of stakeholders coordinated comments and policy recommendations so that their comments were signed by multiple entities, and there were some membership organizations whose comments were by signed by their individual members. Public comments informed the development of content for this final rule.

Use of terms. Terminology used to refer to child care settings and the individuals who provide care for children varies throughout the early childhood and afterschool fields. In this rule, the terms caregiver, teacher, and director refer to individuals. The term provider refers to the entity providing child care services. This may be a child care program, such as a child care center, or an individual in the case of family child care or in-home care. Complete descriptions of these terms are included in Subpart A of this rule.

Overview of changes made by CCDBG Act of 2014. The changes included in this final rule provide detail on major provisions of the CCDBG Act of 2014 to: (1) Protect the health and safety of children in child care; (2) help parents make informed consumer choices and access information to support child development; (3) provide equal access to stable, high-quality child care for low-income children; and (4) enhance the quality of child care and the early childhood workforce.

First, Congress established minimum health and safety standards including mandatory criminal background checks, at least annual monitoring of providers, and health and safety training. Children in CCDF-funded child care will now be cared for by caregivers who have had basic training in health and safety practices and child development. Parents will know that individuals who care for their children do not have prior criminal records that indicate potential endangerment of their children. Health and safety is a necessary foundation for quality child care that supports early learning and development. Research shows that licensing and regulatory requirements for child care affect the quality of care and child development. (Adams, G., Tout, K., Zaslow, M., Early care and education for children in low-income families: Patterns of use, quality, and potential policy implications, Urban Institute, 2007).

Second, Congress increased consumer education requirements for States and Territories and made clear that parents need transparent information about health and safety practices, monitoring results, and the quality of child care providers. Parents will now be able to easily view on a Web site the standards a child care provider meets and their record of compliance. Most States and Territories administering the CCDF program have already begun building a quality rating and improvement system (QRIS), which make strategic investments to provide pathways for providers to reach higher quality standards. Our rule builds on the reauthorization and Lead Agency efforts to inform parents about the quality of providers by requiring that the consumer education Web site include provider-specific quality information, if available, such as from a QRIS, and that Lead Agencies provide parents receiving CCDF with information about the quality of their chosen provider.

Third, low-income parents need access to stable, high-quality child care for their children, and the Act affirms that they should have equal access to settings that are comparable to those accessible to non-CCDF families. This final rule details the Act's continuity of care provisions, such as extending eligibility for child care for a minimum of 12 months regardless of a parent's temporary change in employment or participation in education or training. Continuity of services contributes to improved job stability and is important to a family's financial health. Family economic stability is undermined by policies that result in unnecessary disruptions to receipt of a subsidy due to administrative barriers or other processes that make it difficult for parents to maintain their eligibility and thus fully benefit from the support it offers. Continuity also is of vital importance to the healthy development of young children, particularly the most vulnerable. Disruptions in services can stunt or delay socio-emotional and cognitive development, and make it harder for children to develop trusting relationships with their caregivers. Safe, stable environments allow young children the opportunity to develop the relationships and trust necessary to comfortably explore and learn from their surroundings. Research has demonstrated a relationship between child care stability and social competence, behavior outcomes, cognitive outcomes, language development, school adjustment, and overall child well-being. (Adams, Rohacek, and Danziger, Child Care Instability, The Urban Institute, 2010.) This area includes a number of changes, including requirements for limiting administrative burdens on parents and enabling families to retain their child care assistance as their income increases in order to move towards economic success.

The final rule also addresses the Act's equal access provisions by requiring that base payment rates be established at least at a level that enables child care providers to meet the health, safety, quality, and staffing requirements in the final rule, ensuring that co-payments are affordable for families, and establishing provider payment practices that support access to high-quality child care.

Finally, this final rule addresses increased quality set-asides in the reauthorized Act, which enhance the quality of child care and the early childhood workforce. States and Territories will report on their investments in quality activities, which will now be a greater share of CCDF spending. They will also expand quality investments in infant-toddler care. High-quality care for children under age 3 is the most expensive and hardest care to find during the most formative years. (National Survey of Early Care and Education, 2015, *www.acf.hhs.gov/sites/default/files/opre/es_price_of_care_toopre_041715_2.pdf*) The Act requires States and Territories to have training and professional development standards in effect for CCDF caregivers, and we build on this requirement by outlining the components of a professional development framework. Research shows the fundamental importance of the caregiver in a high-quality early learning setting, and this rule helps ensure that early childhood professionals have access to the knowledge and skills they need to best support young children and their development.

In developing this rule, we were mindful of CCDF's purpose to allow Lead Agencies maximum flexibility in developing child care policies and programs. In some areas, the final rule adds flexibility to allow Lead Agencies to tailor policies that better meet the needs of the low-income families they serve. For example, the rule provides more flexibility for Lead Agencies to determine when it is appropriate to waive a family's co-pay requirement. In many areas, the rule adds new requirements as dictated by the updated Act or because they advance the revised purposes of the CCDF program.

Changes in the Act, and in this final rule, affect the State, Territorial, and Tribal agencies that administer the CCDF program. The Act requires changes across many areas: Child care licensing, subsidy, quality, workforce, and program integrity and requires coordination across State agencies. Achieving the full visions of reauthorization will be challenging, but this effort is necessary to improve child care in this country for the benefit of our children. ACF has and will continue to consult with State, Territorial, and Tribal agencies and provide technical assistance throughout implementation.

This final rule generally maintains the structure and organization of the current CCDF regulations. The preamble in this final rule discusses the changes to current regulations and contains certain clarifications based on ACF's experience in implementing the prior final rules. Where language of previous regulations remains unchanged, the preamble explanation and interpretation of that language published with all prior final rules also is retained, unless specifically modified in the preamble to this rule. (See 57 FR 34352, Aug. 4, 1992; 63 FR 39936, Jul. 24, 1998; 72 FR 27972, May 18, 2007; 72 FR 50889, Sep. 5, 2007).

IV. General Comments and Cross-Cutting Issues

This final rule includes substantive changes in multiple areas spanning nearly every subpart of CCDF regulations. We received comments on a large majority of the proposed changes, and made significant revisions in this final rule in response to comments. For example, we deleted a proposal that would have required Lead Agencies to make some use of grants and contracts, revised the provision providing a graduated phase-out for certain families, and made a number of adjustments to equal access provisions. We discuss specific comments in the section-by-section analysis later in this final rule.

In general, public response to the proposed rule was positive. There was widespread support for the recognition of the dual purposes of the CCDF program—to support both parental pathways to economic security and stability and children's development. As noted by a joint set of comments by State child care administrators, "[we] share a common interest in increasing access to opportunities for high-quality early care and education for children and recognize the important developmental growth that occurs in early years." However, many of the commenters had concerns about costs and said more funding is needed to implement the changes. Developing this final rule required balancing both positive and negative comments, and we tried to be thoughtful about looking at the whole by considering the added-value of different provisions. Below we summarize these general comments as well other crosscutting issues raised by commenters.

General Comments

We received a few comments arguing that we lacked authority under the Act to establish some of the final rule's requirements. In developing this final rule, ACF was careful to stay within the authority provided by the reauthorized Act and cognizant of areas where our authority was limited and further changes would require Congressional action. We reviewed previously-existing regulations and identified areas under the CCDBG Act of 2014 where we could incorporate the tremendous amount of recent research on early brain development and best policies and practices to improve access to and the quality of child care being implemented.

Many commenters were concerned about the financial tensions between the objectives of the CCDF program—to provide access to child care for as many low-income families as possible so they can work and build financial stability, and to make sure children are in safe, quality child care settings. Many of these same commenters had concerns about costs and said more funding is needed to implement the statutory and regulatory changes. A letter submitted by 80 national and State organizations cautioned: "We note that CCDBG has been severely underfunded in recent years, resulting in large numbers of eligible children unserved and low provider payment rates, among other consequences. Achieving the goals of the Act to improve the health, safety, and quality of child care and the stability of child care assistance will require additional resources. Congress made a down payment on funding in the recent FY 2016 omnibus budget; however, additional investments will be necessary to ensure the success of the reauthorized Act and to address the gaps that already exist in the system." Several States and local governments voiced concern about the costs to implement the Act and the rule. They raised concerns about sufficiency of funding to meet requirements within the given period, and that insufficient funding could necessitate serving fewer eligible children.

We recognize that the CCDBG Act of 2014 makes many changes, and that States, Territories, and Tribes are budgeting with a limited amount of funding. Lead Agencies are faced with making difficult tradeoffs about where to direct scarce resources. Over time, some States have struggled to maintain the number of children and families served with child care subsidies, and caseloads declined to an all-time low in 2014. Additionally, the average CCDF subsidy per child is extremely low, approximately $4,800 annually in FY 2014. In inflation adjusted terms, the value of the child care subsidy (per child) has decreased in real dollars by about 20 percent since 2003, while the caseload has declined somewhat over that same period. This is a reflection of the tradeoffs that some States have had to consider due to limited federal and state funding under tight budget constraints, resulting in the erosion of the value of the subsidy and its ability to help families obtain high-quality care. On the other hand, there are States that have made different choices, such as providing an adequate subsidy value as they focused on serving children in settings where training and regulation is in place and oversight is sufficient.

This final rule attempts to bring a basic level of safety to all children whose care is supported with taxpayer funds. We will continue to pursue the goal of preserving and expanding access to quality child care for the many families who are currently unable to access a subsidy due to lack of funding. However, we see this final rule as a critical opportunity to ensure that the subsidized care families' access is of sufficient quality. The Act supports this goal of ensuring quality of care by requiring that providers serving CCDF children have background checks, receive basic training in health and safety, and are monitored on a regular basis. Like Lead Agencies, we have considered these difficult tradeoffs, but we believe that the final rule strikes the appropriate balance of both supporting quality and access and not ensuring one at the expense of the other. We will continue to pursue increased federal funding to increase access to high-quality, affordable child care. We believe that the policies in this final rule appropriately balance a reasonable cost burden while still achieving the goals (and resulting benefits) outlined in the Act and the rule.

We seriously considered concerns about cost, and recognize that the Act and final rule contain provisions that will require some State, Territory, and Tribal Lead Agencies to re-direct CCDF funds to implement specific provisions. Yet, the vast majority of the costs associated with this rule and outlined in the regulatory impact analysis are required by the law itself, and we support these critical investments as our guiding principle has been, and remains, that we cannot in good conscience continue to use any federal taxpayer dollars to support sub-standard child care for our nation's most vulnerable and disadvantaged children. The CCDBG Act of 2014 clearly spells out that its purpose is to improve the health, safety and quality of child care and to increase access to high-quality child care. Many Lead Agencies have already implemented some or most of the provisions in this final rule. In addition, each year, more than $5 billion in federal CCDF funding is allocated to State, Territory and Tribal grantees. The activities to implement requirements in this final rule are allowable costs in the CCDF program. Changes made by this final rule represent a commitment to shoring up quality and accountability in the CCDF program now, to provide a stronger foundation for future growth and investment.

Several States commented on wanting more flexibility to meet some the requirements. Our approach was to look at the provisions of this final rule in their entirety and identify areas where more flexibility is appropriate. While many Lead Agencies have made great strides to fashion the program in a way that emphasizes child development and increasing access to high-quality care, implementation of the CCDF program across the country varies greatly. The previous lack of substantive federal requirements in areas such as health and safety, consumer education, and eligibility policy means there is no uniform national standard that families can count on. All families receiving CCDF assistance, regardless of where they live, should have basic assurances about the safety and quality of services they receive.

This final rule provides more flexibility in areas that were not addressed by the reauthorized Act. For example, it allows Lead Agencies to establish their own criteria for waiving copays, gives flexibility to waive income and work requirements for vulnerable children, and provides the option for alternative monitoring strategies for in-home providers. In addition, there were several areas where we declined to impose a federal standard, even while some commenters asked us to go further. We also eliminated or revised a number of proposals from the NPRM in response to comments.

In addition, we took into consideration a number of comments that asked for more flexibility for Tribes. We continue to balance flexibility for Tribes to address the unique needs of their communities with the need to ensure accountability and quality child care for all children. In response to comments received from Tribes, we have made changes to how this final rule applies to them, including clarifying implementation periods and adding in flexibility around the background check requirements. This final rule addresses all comments from Tribes and tribal organizations in the preamble discussion for Subpart I.

Finally, we received comments from some States and Tribes on the effective date of the final rule, indicating that time is needed to take administrative or legislative action, or to otherwise fully implement the provisions. While States should have already been proceeding with implementation of reauthorization requirements based on their reasonable interpretation of the reauthorized Act, we recognize that some States may need time to make adjustments to their policies and procedures based on this final rule. Therefore, we have provided delayed compliance dates, discussed in more detail earlier in this preamble, to allow States, Territories and Tribes time to fully implement this rule.

V. Section-by-Section Discussion of Comments and Regulatory Provisions

We received comments about changes we proposed to specific subparts of the regulation. Below, we identify each subpart, summarize the comments, and respond to them accordingly.

Subpart A—Goals, Purposes, and Definitions

§ 98.1 Purposes

The CCDBG Act of 2014 amended and expanded the Act's previous "goals" and renamed them "purposes". The final rule makes changes to regulatory language at 45 CFR 98.1 to describe the revised purposes of the CCDF program, according to the updated Act.

Comment: We received multiple comments from national and State organizations and child care worker organizations asking us to explicitly highlight compensation as an integral strategy to retaining a high-quality early childhood workforce in this section and in several other sections of the regulation.

Response: We agree and § 98.1(b)(8) of the final rule provides that, in providing a progression of professional development and promoting retention of quality early childhood caregivers, teachers, and directors, an important strategy is financial incentives and compensation improvements to align with § 98.44. We note that several States are working to improve compensation to support caregivers, teachers, and directors, generally linked to attaining higher professional credentials and education and as a strategy to retain educators who have these credentials and degrees in early childhood programs. Turnover remains a significant issue in child care, and investments in professional development and training should be coupled with improvements in compensation so that children benefit from teachers with those higher levels of knowledge and skill.

§ 98.2 Definitions

The final rule makes technical changes to definitions at § 98.2 and adds six new definitions. Below we discuss any comments we received to these proposals.

First, the final rule makes technical changes by deleting the definition for group home child care provider. Some States, Territories, and Tribes do not consider group homes to be a separate category of care when administering their CCDF programs or related efforts, such as child care licensing. According to the National Association for Regulatory Administration, at least 13 States do not license group homes as a separate category. Some States and Territories use alternative terminology (*e.g.*, large family child care homes), while others treat all family child care homes similarly regardless of size. Due to this variation, we are deleting the separate definition for group home child care provider, which requires a number of technical changes to the definitions section. We did not receive comments on this section.

Under this final rule, the categories of care are defined to include center based child care, family child care, and in-home care (*i.e.*, an individual caring for a child in the child's home).

This final rule also makes conforming changes to the definitions for categories of care, eligible child care provider, and family child care provider.

The final rule amends the definition for eligible child care provider at § 98.2 to delete a group home child care provider. The revised definition defines an eligible child care provider as a center-based child care provider, a family child care provider, an in-home child care provider, or other provider of child care services for compensation. Group home child care is considered a family child care provider for CCDF purposes.

The final rule also amends the definition for family child care provider at § 98.2 to include larger family homes or group homes. The new definition revises family child care provider to include one or more individuals who provide child care services. The remainder of the definition stays the same, specifying that services are for fewer than 24 hours per day per child, in a private residence other than the child's residence, unless care in excess of 24 hours is due to the nature of the parent(s)' work.

Lead Agencies may continue to provide CCDF services for children in large family child care homes or group homes, and this is allowable and recognized by the revised definition of family child care provider, which now includes care in private residences provided by more than one individual. This change eliminates group homes as a separately defined category of care for purposes of administering the CCDF—thereby allowing States, Territories, and Tribes to more easily align their practices with Federal requirements. The rule does not require that States and Territories eliminate group homes from their categories of care or change the way they categorize providers for the purposes of analyzing or setting provider payment rates.

The final rule makes one additional change to a pre-existing definition as called for by new statutory language. We are amending the definition of Lead Agency so that it may refer to a State, Territorial or Tribal entity, or a joint interagency office, designated or established under §§ 98.10 and 98.16(a) as indicated at Section 658P(9) of the Act. While the NPRM proposed amending the definition of eligible child, we decided a revision is unnecessary and have reverted to the pre-existing definition that references eligibility requirements at § 98.20.

Finally, the final rule adds five new terms to the definitions due to statutory changes and to include terms commonly used in the child care profession.

Caregiver

The definition of caregiver in the Act and prior regulations remains unchanged.

Comment: One child care worker organization raised concerns that the term "caregiver" is outdated, and requested deletion of the term.

Response: The final rule does not delete or alter the definition of "caregiver" that is included in the Act. The final rule, however, adds definitions for "teacher" and "director" to recognize the roles in child care and early childhood education as a professional field. The definitions for these terms are based on a white paper recommending revisions to the U.S. Department of Labor's Standard Occupational Classification. (Proposed Revisions to the Definitions for the Early Childhood Workforce in the Standard Occupational Classification. White Paper Commissioned by the Administration for Children and Families, U.S. Department of Health and Human Services, prepared by the Workgroup on the Early Childhood Workforce and Professional

Development under contract through the Child Care and Early Education Policy and Research Analysis, 2005–2018. June 18, 2014, *www.acf.hhs.gov/sites/default/files/occ/soc_acf_submittal.pdf*).

Teacher

The final rule defines teacher as 'a lead teacher, teacher, teacher assistant or teacher aide who is employed by a child care provider for compensation on a regular basis, or a family child care provider, and whose responsibilities and activities are to organize, guide and implement activities in a group or individual basis, or to assist a teacher or lead teacher in such activities, to further the cognitive, social, emotional, and physical development of children from birth to kindergarten entry and children in school-age child care.' We recognize that the responsibilities and qualifications for lead teachers, teachers, and teacher assistants are different as set by child care licensing, State early childhood professional development systems, and State teacher licensure policies and have added these definitions for simplification in relation to requirements in the Act and this rule. We strongly encourage States and Territories to recognize differentiated roles and qualifications in their requirements and systems.

Director

The final rule defines director as 'a person who has primary responsibility for the daily operations management for a child care provider, which includes a family child care provider, and which may serve children from birth to kindergarten entry and/or school-age children.'

Comment: Several comments from national and State organizations and child care worker organizations expressed support for the new definitions for teacher and director and asked for a reorganization of certain words in the proposed definition to ensure that they include family child care providers.

Response: We agree with the comments, and the final rule makes the requested changes.

Child With a Disability

We define child with a disability as: A child with a disability as defined in section 602 of the Individuals with Disabilities Education Act (20 U.S.C. 1401); a child who is eligible for early intervention services under part C of the Individuals with Disabilities Education Act (20 U.S.C. 1431 *et seq.*); a child who is less than 13 years of age and who is eligible for services under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); and a child with a disability, as defined by the State. This definition is identical to the definition found at Section 658P(3) of the Act.

Comment: We received comments from national organizations for individuals with disabilities on the definition of "child with a disability" asking to delete the "or" and an open-ended ability of the State to define the term.

Response: The final rule's definition is identical to the definition set forth in the Act, which allows States, Territories, and Tribes to include other developmental delays and disabilities if they choose. Consistent with the statute, we are changing "or" (which was proposed in the NPRM) to "and" to indicate that a child meeting at least one of any of the four parts of the definition (*i.e.,* section 602 of IDEA, part C of IDEA, section 504 of the Rehabilitation Act, or definition of State, Territory or Tribe) would be considered a child with a disability.

English Learner

The final rule reiterates Section 658P(5)'s definition of English learner as an individual who is limited English proficient, as defined in section 9101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801) or section 637 of the Head Start Act (42 U.S.C. 9832).

Child Experiencing Homelessness

The final rule's definition of a child experiencing homelessness is adopted from section 725 of Subtitle VII–B of the McKinney-Vento Act (42 U.S.C. 11434a). While a definition of child experiencing homelessness was not included in the reauthorized CCDBG Act, we understand the intent of Congress was to apply the McKinney-Vento definition here based on a letter sent to HHS Secretary Sylvia Burwell in February 2015 from Senate and House members.

Comment: Several comments expressed support for using the definition in the McKinney-Vento Act, section VII–B. One commenter sought to augment the definition to refer to several other federal laws that can be used to support children experiencing homelessness.

Response: Using the McKinney-Vento Act's definition, without modification here, will lead to better consistency in identifying children and in information collection. This definition is also used by Head Start and education programs.

Subpart B—General Application Procedures

Lead Agencies have considerable latitude in administering and implementing their child care programs. Subpart B of the regulations describes some of the basic responsibilities of a Lead Agency as defined in the Act. A Lead Agency serves as the single point of contact for all child care issues, determines the basic use of CCDF funds and priorities for spending CCDF funds, and promulgates the rules governing overall administration and oversight.

§ 98.10 Lead Agency Responsibilities

This final rule amends the language at § 98.10 in accordance with new statutory language at Section 658D(a) of the Act that a Lead Agency may be a collaborative agency or a joint interagency office, as designated or established by the Governor of the State (or by the appropriate Tribal leader or applicant). Paragraphs (a) through (e) remain unchanged. Paragraph (f) requires that, at the option of an Indian Tribe or Tribal organization in the State, a Lead Agency should consult, collaborate and coordinate in the development of the State Plan with Tribes or Tribal organizations in the State in a timely manner pursuant to § 98.14. Because States also provide CCDF assistance to Indian children, States benefit by coordination with Tribes and we encourage States to be proactive in reaching out to the appropriate Tribal officials for collaboration. The final rule adds "consult" to recognize the need for formal, structured consultation with Tribal governments, including Tribal leadership, and the fact that many States and Tribes have consultation policies and procedures in place. We received one comment on this section.

Comment: One State and a Tribal organization wrote that they support the requirement to consult, collaborate, and coordinate in the development of the State Plan with Indian Tribes or Tribal organizations.

Response: The final rule keeps this language.

§ 98.11 Administration Under Contracts and Agreements

Written agreements. Section 98.11 previously required Lead Agencies that administer or implement the CCDF program indirectly through other local agencies or organizations to have written agreements with such agencies that specify mutual roles and responsibilities. However, it did not address the content of such agreements. This final rule amends regulatory language at § 98.11(a)(3) to specify that, while the content of the written agreements may vary based on the role the agency is asked to assume or the type of project undertaken, agreements must, at a minimum, include tasks to be performed, a schedule for completing tasks, a budget that itemizes categorical expenditures consistent with CCDF requirements at § 98.65(h), and indicators or measures to assess performance. Many Lead Agencies administer the CCDF program through the use of sub-recipients that have taken on significant programmatic responsibilities, including providing services on behalf of the Lead Agency. For example, some Lead Agencies operate primarily through a county-based system, while others devolve decision-making and administration to local workforce boards, school readiness coalitions or community-based organizations such as child care resource and referral agencies. Through working with grantees to improve program integrity, ACF has learned that the quality and specificity of written agreements vary widely, which hampers accountability and efficient administration of the program. These changes represent minimum, common-sense standards for the basic elements of those agreements, while allowing latitude in determining specific content. The Lead Agency is ultimately responsible for ensuring that all CCDF-funded activities meet the requirements and standards of the program, and thus has an important role to play to ensure written agreements with sub-recipients appropriately support program integrity and financial accountability.

We are cognizant that some States and Territories lack strong requirements to ensure there is transparency in cases where a sub-recipient contracts with a network of family child care providers to serve children receiving CCDF. This rule places a strong emphasis on implementation of provider-friendly payment practices, including a payment agreement or authorization of services for all payments received by child care providers. When a local entity contracts with a family child care network for services, we agree that there should be a clear understanding from the outset regarding payment rates for providers, any fees the provider may be subject to, and payment policies.

Finally, § 98.11(b)(5) adds a reference to the HHS regulations requiring Lead Agencies to oversee the expenditure of funds by sub-recipients and contractors, in accordance with 75 CFR 351 to 353. The final rule changes the term "subgrantee" in the proposed rule to "subrecipients" in this final rule as a technical correction. These regulations implement the Office of Management and Budget's Uniform Administrative Requirements for Federal awards (see ACF, Uniform Administrative Requirements, Cost Principles, and Audit Requirements, Program Instruction: CCDF–ACF–PI–2015–01, January 2015.)

Section 658D(b)(1)(A) of the Act provides Lead Agencies with broad authority to administer the program through other governmental or non-governmental agencies. In addition, CCDF Lead Agencies must comply with requirements for monitoring and management of sub-recipients, including government-wide grant requirements issued by the Office of Management and Budget (OMB) at 2 CFR 200.330 to 200.322 and adopted by HHS at 45 CFR 75.351 to 75.353, which address reporting, auditing and other requirements related to sub-recipients. This final rule adds language at § 98.11 to improve the quality and specificity of written agreements to promote program integrity and efficient administration at all levels. We received three comments on this section.

Comment: One child care worker organization commented that these requirements should apply in all instances where CCDF funds are sub-granted or passed through to an entity, including arrangements between intermediary entities and individual child care providers.

Response: This provision applies only to written agreements between lead Agencies and first-level sub-recipients (and not to agreements between first-level sub-recipients and lower-level sub-recipients). The regulation states that the agreement must specify the mutual roles and responsibilities of the Lead Agency and the other agencies—indicating that the Lead Agency is a party to the agreement. This language is intended to be broad as sub-entities may fulfill any number of different roles or projects, including implementing quality improvement activities, determining eligibility for families, or providing consumer education on behalf of the Lead Agency. We strongly encourage lower-level agreements to have similar provisions, but prefer to leave this as an area of flexibility to give State and local agencies discretion over the details, given the wide-range of conditions and circumstances involved. Also, we note that regulations at 98.67(c)(2) require Lead Agencies to have in place fiscal control and accountability procedures that permit the tracing of funds to a level of expenditure adequate to establish that such funds have not been used in violation of the CCDF rules. Therefore, Lead Agencies that devolve program administration to first, second, and third-level entities necessarily must be concerned with the integrity and transparency of all written agreements involving CCDF funds.

The comment also urged ACF to compile and disseminate best practices for written agreements between entities that administer CCDF monies and providers and that the State or local agency develop a model written agreement for networks. This is an area where ACF anticipates providing more technical assistance to assist States in developing model written agreements focused on cases where a sub-recipient contracts with a network of family child care providers to serve children receiving CCDF.

Comment: We received a comment from one State that some of the items for written agreements do not seem applicable to the administration of child care subsidies. For example, including a schedule for completing tasks does not seem applicable since the tasks of administering child care subsidies are ongoing and do not have end dates. States may have existing methods of ensuring compliance with administration requirements for the program, and should be offered flexibility in how tasks and expenditures are overseen and monitored. Conversely, we received a comment from a child care worker organization in support of requiring a written agreement between a Lead Agency and another agency that must include, at minimum, tasks to be performed, a schedule for completing tasks, a budget which itemizes categorical expenditures consistent with CCDF requirements at 98.65(h), and indicators or measures to assess performance.

Response: We have maintained the language in this section. Lead Agencies can adopt the required elements, as appropriate, to fit the circumstances. For example, in the schedule for tasks, they can indicate the tasks that are ongoing.

§ 98.14 Plan Process

Coordination. Section 658E(c)(2)(O) of the Act added language to previously-existing requirements for coordination of programs that benefit Indian children requiring Lead Agencies to also coordinate the provision of programs that serve infants and toddlers with disabilities, children experiencing homelessness, and children in foster care. We include all children with disabilities, not just infants and toddlers, in the regulatory language, given the critical importance of serving that population of children.

Lead Agencies also are required to consult and coordinate services with agencies responsible for public health, public education, employment services/workforce development, and TANF. The CCDBG Act of 2014 added a requirement for the Lead Agency to develop the Plan in coordination with State Advisory Councils on Early Childhood Education and Care, which are authorized by the Head Start Act (42 U.S.C. 9831 *et seq.*) at Section 658E(c)(2)(R).

In this final rule, we amend § 98.14(a)(1) to add the State Advisory Council on Early Childhood Education and Care or similar coordinating body, as well as additional new entities with which Lead Agencies are required to coordinate the provision of child care services. We have added parenthetical language to paragraph (a)(1)(iii) to specify that coordination with public education should also include agencies responsible for pre-kindergarten programs, if applicable, and early intervention and preschool educational services provided under Parts B and C of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. 1400). Other coordinating entities include agencies responsible for child care licensing; Head Start collaboration; Statewide after-school network or other coordinating entity for out-of-school time care; emergency management and response; the Child and Adult Care Food Program (CACFP); Medicaid and the State children's health insurance program; mental health services agencies; services for children experiencing homelessness, including State Coordinators for the Education of Children and Youth Experiencing Homelessness; and, to the extent practicable, local liaisons designated by local educational agencies (LEAs) in the State as required by the McKinney-Vento Act (42 U.S.C. 11432) and the Department of Housing and Urban Development's Continuum of Care and Emergency Solutions Grantees. In the final rule, we added other relevant nutrition programs in addition to CACFP.

Over time, the CCDF program has become an essential support in local communities to provide access to early care and education in before- and after-school settings and to improve the quality of care. Many Lead Agencies already work collaboratively to develop a coordinated system of planning that includes a governance structure composed of representatives from the public and private sector, parents, schools, community-based organizations, child care, Head Start and Early Head Start, child welfare, family support, public health, and disability services. Local coordinating councils or advisory boards also often provide input and direction on CCDF-funded programs.

This type of coordination frequently is facilitated through entities such as State Advisory Councils on Early Childhood Education and Care. In both Head Start and CCDF, collaboration efforts extend to linking with other key services for young children and their families, such as medical, dental and mental health care; nutrition; services to children with disabilities; child support; refugee resettlement; adult education and postsecondary education; family literacy and English language acquisition; and employment training. These comprehensive services are crucial in helping families progress towards economic stability and in helping parents provide a better future for their young children.

Implementation of the requirements of the CCDBG Act of 2014 will require leadership and coordination between Lead Agencies and other child- and family-serving agencies, services, and supports at the State and local levels, including those identified above. For example, in many States, child care licensing is administered in a different agency than CCDF. In those States, implementation of the inspection and monitoring requirements included in the Act necessitates coordination across agencies.

Comment: One State noted that it has multiple agencies that serve children experiencing homelessness and asked for a change in the language.

Response: We recognize that there are many agencies that have responsibilities for serving children experiencing homelessness. The examples of agencies in this provision are not meant to be an exhaustive list. Each Lead Agency will need to identify the appropriate agencies that are responsible for providing services to children experiencing homelessness to comply with the coordination requirement.

Comment: We received multiple comments from national and State organizations supportive of the list of coordinating partners. We received a few comments suggesting additional coordinating partners to be named in this final rule, including child care resource and referral agencies, specific types of mental health providers, child care provider organizations, and child care providers who are faith-based or use a distinctive early childhood education approach.

Response: New paragraph 98.14(a)(1)(xiv) includes child care resource and referral agencies, as recommended by commenters. Recognizing that functions typically performed by resource and referral agencies in some instances may be performed by other types of entities, we expanded the regulatory language to also include child care consumer education organizations and providers of early childhood education and professional development. Lead Agencies have the flexibility, and are encouraged, to engage with a wide variety of cross-sector partners when developing the CCDF Plan. Some of the coordinating partners suggested by commenters, such as providers using distinctive approaches to teaching, and faith-based organizations are already assumed to be included in pre-existing regulations at § 98.14(a)(1), which requires coordination with child care and early childhood development programs.

Combined funding. Section 98.14(a)(3) reiterates the statutory requirement that any Lead Agency that combines funding for CCDF services with any other early childhood programs shall provide a description in the CCDF Plan of how the Lead Agency will combine and use the funding according to Section 658E(c)(2)(O) of the Act. Lead Agencies have the option of combining funding for CCDF child care services with programs operating at the Federal, State, and local levels for children in preschool programs, Tribal early childhood programs, and other early childhood programs, including those serving infants and toddlers with disabilities, children experiencing homelessness, and children in foster care. Combining funds could include blending, layering, or pooling multiple funding streams in an effort to expand and/or enhance services for children and families. For example, Lead Agencies may use multiple funding sources to offer grants or contracts to programs to deliver high-quality child care services; a Lead Agency may allow county or local governments to use coordinated funding streams; or policies may be in place that allow local programs to layer funding sources to provide full-day, full-year child care that meets Early Head Start, Head Start or State/Territory pre-kindergarten standards in addition to child care licensing requirements. As per the OMB Circular A–133 Compliance Supplement 2015, *https://www.whitehouse.gov/omb/circulars/a133_compliance_supplement_2015*, CCDF funds may be used in collaborative efforts with Head

Start programs to provide comprehensive child care and development services for children who are eligible for both programs. In fact, the coordination and collaboration between Head Start and CCDF is strongly encouraged by sections 640(g)(1)(D) and (E), 640(h), 641(d)(2)(H)(v), and 642(e)(3) of the Head Start Act in the provision of full working day, full calendar year of early care and learning and comprehensive services.

In order to implement such collaborative programs, which share, for example, space, equipment or materials, grantees may blend several funding streams so that services are provided seamlessly for the child and family. The same strategy applies to State-funded preschool programs where, working with CCDF funds, eligible children can benefit from a full-day and full-year program. Lead Agencies can layer Early Head Start and CCDF funds for the same child as long as there is no duplication in payments for the exact same part of the service. This is an option that some Lead Agencies are already implementing. Early Head Start-Child Care Partnerships grants, which allow Early Head Start programs to collaborate with local child care centers and family child care providers serving infants and toddlers from low-income families, offer a new important opportunity to implement this strategy to expand access to high-quality child care for infants and toddlers. We do note that, when CCDF funds are combined with other funds, § 98.67 continues to require Lead Agencies to have in place fiscal control and accounting procedures sufficient to prepare required reports and trace funds to a level of expenditure adequate to establish that such funds have been used on allowable activities.

Public-private partnerships. This final rule adds paragraph (a)(4) to § 98.14 in accordance with Section 658E(c)(2)(P) of the Act, which requires Lead Agencies to demonstrate in their Plan how they encourage public-private partnerships to leverage existing child care and early education service delivery systems and to increase the supply and quality of child care services for children under age 13, such as by implementing voluntary shared services alliance models (*i.e.,* cooperative agreements among providers to pool resources to pay for shared fixed costs and operation). Public-private partnerships may include partnerships among State/Territory and public agencies, Tribal organizations, private entities, faith based organizations and/or community-based organizations.

Public availability of Plans. The final rule adds language at § 98.14(c)(3) that requires the Lead Agency to post the content of the Plan that it proposes to submit to the Secretary on a Web site as part of the public hearing process. A new § 98.14(d) requires Lead Agencies to make their CCDF Plan and any Plan amendments publicly available. Ideally, Plans and Plan amendments are available on the Lead Agency Web site or other appropriate State/Territory Web sites (such as the consumer education Web site required at § 98.33(a)) to ensure that there is transparency for the public, and particularly for parents seeking assistance, about how the child care program operates. This is especially important for Plan amendments, given that Lead Agencies often make substantive changes to program rules or administration during the Plan period (now three years) through submission of Plan amendments (subject to ACF approval), but were not previously required to proactively make those amendments available to the public.

Comment: We received comments from disabilities organizations to insert "early intervention" to describe Part C and "preschool" before "Part B" for clarity.

Response: We agree with a comment recommending a technical fix to language at § 98.14(a)(1)(iii). The Act includes Part C and B of the Individuals with Disabilities Education Act (IDEA) for coordination. Part C provides early intervention services and Part B provides preschool as well as elementary and secondary educational services. The final rule adds "early intervention and preschool" to describe the educational services under IDEA.

Comment: We received several comments from provider and child care worker organizations supporting the requirement that Lead Agencies make draft and final Plans and Plan amendments publicly available. We received one comment that Lead Agencies should make the Plan available in the language of the community and another comment asking for a timeframe for States and Territories to make these items public.

Response: In paragraphs (c)(3) and (d) of this section, the final rule adds language that the Plan and any amendments to the Plan, as well as approved requests for temporary relief as discussed at § 98.19, must be made available on a Web site. The final rule does not require that the Plan be made available in multiple languages. However, we strongly encourage States to be mindful of the needs of families with limited English proficiency and to work with families and community groups to give them a voice in program planning and policymaking, for example, by organizing outreach meetings with interpreters, recruiting multilingual eligibility staff, and translating provider-focused documents to ensure a diverse group of providers. CCDF Plans are long, technical documents and there could be significant costs associated with translating them into multiple languages. The CCDF Plan asks States to indicate whether they provide information or services in other non-English languages and most States indicate that they have procedures in place to translate program materials and provide technical assistance to providers. Lead Agencies may decide it is more cost effective to prioritize translating provider contracts, consumer education information, or other key documents that are integral to service delivery than to translate the Plan itself, if resources are limited. We also urge States to publish these items as soon as possible, within a timeframe determined by the Lead Agency, for the greatest transparency to families, providers, and the public.

§ 98.15 Assurances and Certifications

Section 658E(c) of the Act requires Lead Agencies to provide assurances and certifications in its Plan. The final rule adds new assurances based on new statutory language.

The final rule provides that Lead Agencies are required to provide an assurance that training and professional development requirements comply with § 98.44 and are applicable to caregivers, teachers, and directors working for child care providers receiving CCDF funds. They are also required to provide assurance that, to the extent practicable, enrollment and eligibility policies support the fixed costs of providing child care services by delinking provider payment rates from an eligible child's occasional absences in accordance with § 98.45(l). Both of these requirements are discussed in detail in later sections of this rule.

Section 98.15(a)(9) of this final rule adopts the statutory requirement at Section 658E(c)(2)(G) of the Act for Lead Agencies to provide an assurance that they will maintain or implement early learning and developmental guidelines that are developmentally appropriate for all children from birth to kindergarten entry, describing what children should know and be able to do, and covering the essential domains of early childhood development (cognition, including language arts and mathematics; social, emotional and physical development; and approaches toward learning) for use statewide by child care providers and caregivers. Guidelines should be research-based and developmentally, culturally, and linguistically appropriate, building in a forward developmental progression, and aligned with entry to kindergarten. Guidelines should be implemented in consultation with the State educational agency and the State Advisory Council on Early Childhood Education and Care or similar coordinating body, and in consultation with child development and content experts.

Paragraph (a)(10) of § 98.15 requires Lead Agencies to provide an assurance that funds received to carry out this subchapter will not be used to develop or implement an assessment for children that will be the primary or sole basis for deeming a child care provider ineligible to participate in a program carried out under this subchapter; will be used as the primary or sole basis to provide a reward or sanction for an individual provider; will be used as the primary or sole method for assessing program effectiveness; or will be used to deny children eligibility to participate in the program carried out under this subchapter. The Consolidated and Further Continuing Appropriations Act, 2015, Public Law 113–235, made a correction to the CCDBG Act, adding that the assessments will not be the "primary or" sole basis for a child care provider being determined to be ineligible to participate in CCDF. The statute lays out the acceptable ways of using child assessments, including to support learning or improve a classroom environment; target professional development; determine the need for health, mental health, disability, developmental delay, or family support services; obtain information for the quality improvement process at the State/Territory level; or conduct a program evaluation for the purposes of providing program improvement and parent information. We received one comment on this section, which was supportive.

Finally, § 98.15(a)(11) requires, to the extent practicable and appropriate, an assurance that any code or software for child care information systems or information technology that a Lead Agency, or other agency, expends CCDF funds to develop must be made available to other public agencies for their use in administering child care or related programs upon request. This provision is intended to prevent CCDF funds from being spent multiple times on the same, or similar, technology in order to provide accountability for public dollars.

Section 98.15(b) requires Lead Agencies to include certifications in its CCDF Plan. We are adding new requirements, as proposed in the NPRM, to reflect the following new statutory requirements:

- To develop the CCDF plan in consultation with the State Advisory Council on Early Childhood Education and Care (or similar coordinating body);
- to collect and disseminate to parents of eligible children, the general public, and, where applicable, child care providers, consumer education information that will promote informed child care choices and information on developmental screenings, as required by § 98.33;
- to make public the result of monitoring and inspections reports, as well as the number of deaths, serious injuries, and instances of substantiated child abuse that occurred in child care settings as required by § 98.33(a);
- to require caregivers, teachers, and directors of child care providers to comply with the State's, Territory's or Tribe's procedures for reporting child abuse and neglect as required by section 106(b)(2)(B)(i) of the Child Abuse Prevention and Treatment Act (42 U.S.C. 5106a(b)(2)(B)(i)), if applicable, or other child abuse reporting procedures and laws in the service area, as required by § 98.41(e);
- to have in effect monitoring policies and practices pursuant to § 98.42; and
- to ensure payment practices of child care providers receiving CCDF funds reflect generally-accepted payment practices of child care providers that serve children who do not receive CCDF assistance, pursuant to § 98.45(l).

These requirements are discussed later in this final rule. The final rule also removes "or area served by Tribal Lead Agency" from § 98.15(b)(6), as re-designated, because the rule includes distinct requirements for Tribes to enforce health and safety standards for child care providers. Section 98.15(b)(12), as re-designated, updates the reference to § 98.43, which is now § 98.45. All other paragraphs in this section remain unchanged.

The final rule adds a new paragraph (b)(13) requiring Lead Agencies to certify in the CCDF Plan that they have in place policies to govern the use and disclosure of confidential and personally-identifiable information about children and families receiving CCDF-funded assistance and child care providers receiving CCDF funds. Previously, there were no Federal requirements in statute or regulation governing confidentiality in CCDF, although there are Federal requirements governing information that the CCDF agency may have in its files, such as child abuse and neglect information. The Federal Privacy Act is the primary source of Federal requirements related to client confidentiality (5 U.S.C. 552a note); however, the Privacy Act generally applies to Federal agencies, and is not applicable to State and local government agencies, with some exceptions, such as computer matching issues and requirements related to the disclosure and protection of Social Security numbers. (ACF has previously issued guidance: Clarifying policy regarding limits on the use of Social Security Numbers under the CCDF and the Privacy Act of 1974, Program Instruction: ACYF–PI–CC–00–04, 2000, which remains in effect as of the effective date of this rule.)

This final rule requires that Lead Agencies have policies in place to govern the use and disclosure of confidential and personally identifiable information (PII) about children and families receiving CCDF-funded assistance and child care providers, which should include their staff, receiving CCDF funds. We offer Lead Agencies discretion to determine the specifics of such privacy policies because we recognize many Lead Agencies already have policies in place, and it is not our intention to make them revise such policies, provided the State's policy complies with existing Federal confidentiality requirements. Further, many Lead Agencies are working on data sharing across Federal and State programs and it is not our intention to make these efforts more challenging by introducing a new set of confidentiality requirements. This regulatory addition is not intended to preclude the sharing of individual, case-level data among Federal and State programs that can improve the delivery of services. The ACF Confidentiality Toolkit may be a useful resource for States in addressing privacy and security in the context of information sharing (*https://www.acf.hhs.gov/sites/default/files/assets/acf_confidentiality_toolkit_final_08_12_2014.pdf*).

It is important that personal information not be used for purposes outside of the administration or enforcement of CCDF, or other Federal, State or local programs, and that when information is shared with outside entities (such as academic institutions for the purpose of research) there are safeguards in place to ensure for the non-disclosure of Personally-Identifiable Information, which is information that can be used to link to, or identify, a specific individual. It is at the Lead Agency's discretion whether they choose to comply with this provision by writing and implementing CCDF-specific confidentiality rules or by ensuring that CCDF data is subject to existing Federal or State confidentiality rules. Further, nothing in this provision should preclude a Lead Agency from making publicly available provider-specific information on the level of quality of a provider or the results of monitoring or inspections as described in § 98.33.

Comment: We received comments from private and faith-based providers on § 98.15(a)(9) requesting language to name certain pedagogical approaches and other distinctive approaches to teaching in multiple sections, including Lead Agency certification and assurances regarding the State's early learning guidelines.

Response: We decline to add this language because the request speaks to teaching practices rather than content of what children should learn and be able to do. Further, the Act prohibits the Secretary from requiring any specific curricula, teaching philosophy, or pedagogical approach. We encourage Lead Agencies to coordinate on the Plan development and its implementation with the full range of providers, including those who use distinctive curricula or teaching practices that are grounded in research of child development and learning.

Comment: Two States and a local government raised concerns that the provision in § 98.15(a)(11)—making available code or software for child care information systems or technology developed with CCDF funds be made available upon request by other agencies—could negatively affect their ability to procure vendors for information systems. The commenters suggested that the provision raised the risk of violating licensing agreements and intellectual property law and asked for clarification whether this provision applies to technology partially funded by CCDF. One comment asked for clarifying statements whether the regulation applies to systems partially funded by CCDF; whether the systems must be shared inter-state or intra-state; and that the child, program, and contractor data itself would be protected under applicable State and federal laws.

Response: We have modified the language in this provision to provide that the assurance for sharing upon request will be made "to the extent practicable and appropriate." We also added language to clarify that the CCDF-funded code and software should be shared upon request with other public agencies, "including public agencies in other States". We considered the regulation for the Medicaid Program's Mechanized Claims Processing and information Retrieval Systems (90/10) (*www.federalregister.gov/articles/2015/12/04/2015-30591/medicai-program-mechanized-claims-processing-and-information-retrieval-systems-90100* and the Office of Child Support Enforcement's Information Memoranda: Use of Enterprise Software in Automated Human Services Information Systems-Use of Enterprise Level Commercial-Off-the-Shelf (COTS) Software in Automated Human Services Information Systems (*www.acf.hhs.gov/programs/css/resource/use-of-enterprise-software-in-automated-human-services-information*).

As a general practice, the reuse and availability of IT code and software allows States to leverage software development funding more effectively. Subsidy child care data systems are being developed using CCDF funding. Thus, this provision applies to code and software developed fully or partially with CCDF funds. As to sharing with other public agencies within the State and across State borders, we expect the widest reuse of IT artifacts as possible. Lastly, data would be protected under applicable federal and State laws. The majority of information system definitions typically include several layers, such as users, business rules, hardware, software, and data. There is specific mention of code and software in the provision, which does not include data.

§ 98.16 Plan Provisions

Submission and approval of the CCDF Plan is the primary mechanism by which ACF works with Lead Agencies to ensure program implementation meets Federal regulatory requirements. All provisions that are required to be included in the CCDF Plan are outlined in § 98.16. Many of the additions to this section correspond to changes throughout the regulations, which we provide explanation and responses to comment for later in this rule. For provisions that do not cross-reference other sections of the rule, we respond to comments here. Paragraph (a) of § 98.16 continues to require that the Plan specify the Lead Agency.

General comments. We received supportive comments from national and State organizations on the following subsections: Emergency and disaster planning (aa); outreach to English language learner children and children with disabilities and providers who are English language learners (dd); supporting providers in successful family engagement (gg); and responding to complaints to the national hotline (hh).

Comment: We received comments from a child care worker organization requesting the addition of "higher compensation" as a strategy in several subsections of § 98.16.

Response: The final rule includes compensation improvements in the goals and purposes section and in the professional development and training sections. We agree that in raising standards, Lead Agencies should consider multiple strategies for raising compensation commensurate with caregivers, teachers, and directors attaining higher level credentials and education to retain highly knowledgeable and skilled educators and leaders. We also encourage Lead Agencies to consider strategies throughout the Plan that can bolster compensation, such as setting reimbursement rates, building the supply of quality child care, and using the quality set-aside dollars specifically to improve compensation in a field that remains undercompensated even when earning higher education and credentials comparable to their counterparts in the public education system.

Written agreements. A new § 98.16(b), which was proposed in the NPRM, corresponds with changes at § 98.11(a)(3) discussed earlier, related to administration of the program through written agreements with other entities. In the CCDF Plan, the change requires the Lead Agency to include a description of processes it will use to monitor administrative and implementation responsibilities undertaken by agencies other than the Lead Agency including descriptions of written agreements, monitoring, and auditing procedures, and indicators or measures to assess performance. This is consistent with the desire to strengthen program integrity within the context of current Lead Agency practices that devolve significant authority for administering the program to sub-recipients. Prior paragraphs (b) through (f) are re-designated as paragraphs (c) through (g). All paragraphs remain unchanged with the exception of paragraph (e), as re-designated, which has been revised by adding "and the provision of services" to clarify that the Plan's description of coordination and consultation processes should address the provision of services in addition to the development of the Plan. We address comments in discussion of § 98.11.

Continuity of care. A new § 98.16(h) corresponds with statutory changes in subpart C discussed later to describe and demonstrate that eligibility determination and redetermination processes promote continuity of care for children and stability for families receiving CCDF services, including a minimum 12-month eligibility redetermination period in accordance with § 98.21(a); a graduated phase out for families whose income exceeds the Lead Agency's threshold to initially qualify for CCDF assistance, but does not exceed 85 percent of State median income, pursuant to § 98.21(b); processes that take into account irregular fluctuation in earnings, pursuant to § 98.21(c); procedures and policies to ensure that parents are not required to unduly disrupt their employment, training, or education to complete eligibility redetermination, pursuant to § 98.21(d); limiting any requirements to report changes in circumstances in accordance with § 98.21(e); policies that take into account children's development and learning when authorizing child care services pursuant to § 98.21(f); and other policies and practices such as timely eligibility determination and processing of applications. Comments on this topic are discussed later.

Child care services. Section 98.16(i)(2), as re-designated, is amended to reference § 98.30(e)(1)(iii). Section 98.16(i)(5), as re-designated, is amended to require that all eligibility criteria and priority rules, including those at § 98.46, are described in the CCDF Plan. The remaining subparagraphs remain unchanged.

Consumer education. Section 98.16(j), as re-designated, incorporates statutory changes to provide comprehensive consumer and provider education, including the posting of monitoring and inspection reports, pursuant to § 98.33, changes which are discussed later in this rule.

Co-payments. Section 98.16(k), as re-designated, requires Lead Agencies to include a description of how co-payments are affordable for families, pursuant to § 98.45(k), including a description of any criteria established by the Lead Agency for waiving contributions for families. This change is discussed in more detail later in the rule.

Health and safety standards and monitoring. The final rule adds a provision at § 98.16(l), as re-designated, requiring Lead Agencies to provide a description of any exemptions to health and safety requirements for relative providers made in accordance with § 98.41(a)(2), which is discussed later in this rule. We received no comments and have retained this language as proposed in the NPRM.

The final rule adds three new paragraphs, (m) through (o), as proposed in the NPRM, requiring Lead Agencies to describe the child care standards for child care providers receiving CCDF funds, that includes group size limits, child-staff ratios, and required qualifications for caregivers, teachers, and directors, in accordance with § 98.41(d); monitoring and other enforcement procedures to ensure that child care providers comply with applicable health and safety requirements pursuant to § 98.42; and criminal background check requirements, policies, and procedures, including the process in place to respond to other States', Territories', and Tribes' requests for background check results in order to accommodate the 45-day timeframe, in accordance with § 98.43.

Comment: We received one comment on 98.16(m) that the States should not be required to provide in their Plan the group size, child-staff ratios and required qualifications.

Response: Although the Act does not allow the Secretary to establish standards for group size, child-staff ratios, and required qualifications, there is nothing that prohibits the Secretary from requesting this information in the Plan. This final rule does not establish group size, ratios, or qualifications. However, this is helpful information in understanding the conditions of care children are experiencing and the child care workforce.

Training and Professional Development. The final rule adds § 98.16(p) requiring Lead Agencies to describe training and professional development requirements for caregivers, teachers, and directors of child care providers who receive CCDF funds in accordance with § 98.44. We received no comments and have retained the proposed language. Paragraph (q), as re-designated, remains unchanged.

Payment rates. The final rule revises § 98.16(r), as re-designated, to include the option of using an alternative methodology to set provider payment rates. This provision is described later in this final rule. It also deletes the word "biennial" as the reauthorized Act requires the market rate survey to be conducted every three years.

The final rule revises paragraph (s), as re-designated, to include a detailed description of the State's hotline for complaints and process for substantiating and responding to complaints, including whether or not the State uses monitoring as part of its process for responding to complaints for both CCDF and non-CCDF providers. This provision is described later in the rule at § 98.32. Paragraph (t), as re-designated (previously paragraph (n)), remains unchanged.

The final rule revises § 98.16(u), as re-designated (previously paragraph (o)), to include in the description of the licensing requirements, any exemption to licensing requirements that is applicable to child care providers receiving CCDF funds; a demonstration of why this exemption does not endanger the health, safety, or development of children; and a description of how the licensing requirements are effectively enforced, pursuant to § 98.42. We received no comments on this section.

Building supply and quality. The final rule adds a new § 98.16(x) based on statutory language at Section 658E(c)(2)(M) of the Act, which requires the Lead Agency to describe strategies to increase the supply and improve the quality of child care services for children in underserved areas, infants and toddlers, children with disabilities, and children who receive care during nontraditional hours. As described in the Act, strategies may include alternative payment rates to child care providers, the provision of direct contracts or grants to community-based organizations, offering child care certificates to parents, or other means determined by the Lead Agency. For grants or contracts to be effective at increasing the supply of high-quality care, they should be funded at levels that are sufficient to meet any higher quality standards associated with that care. Along with increased rates and contracts, we encourage Lead Agencies to consider other strategies, including training and technical assistance to child care providers to increase quality for these types of care. We recommend States, Territories, and Tribes consider the recommendations of different strategies in the Information Memorandum from the Administration for Children and Families, *Building the Supply of High-Quality Child Care* (November 6, 2015).

The final rule at § 98.16(x) adds that the Plan must: Identify shortages in the supply of high-quality child care providers; list the data sources used to identify supply shortages; and describe the method of tracking progress to support equal access and parental choice. In the NPRM, a similar requirement to identify supply shortages was included in the section on grants and contracts (which has been deleted in the final rule). We have moved this requirement to § 98.16(x) since identification of supply gaps of high-quality care is a critical step of building supply and quality for certain populations, as required by the Act. To identify supply shortages, the Lead Agency may analyze available data from market rate surveys, alternative methodologies (if applicable), child care resource and referral agencies, facilities studies and other community needs assessments, Head Start needs assessments, and other sources. ACF recommends that the Lead Agency examine all localities in its jurisdiction, recognizing that each local child care market has unique characteristics—for example, many rural areas face supply shortages. Further, we recommend that the Lead Agency's analysis consider all categories of care, recognizing that a community with an adequate supply of one category of care (*e.g.*, centers) may face shortages for another category (*e.g.*, family child care).

Comment: We received a comment from a child care worker organization asking us to include compensation improvements as an example of a supply building strategy.

Response: We urge Lead Agencies, as they consider setting the rate for certificates and grants or contracts, to examine compensation as a factor in quality and in recruiting and retaining knowledgeable and skilled staff to work in child care, particularly in hard-to-serve communities.

Comment: One national organization urged us to include supply building strategies that reflect the linguistic and cultural characteristics of the families and children.

Response: High-quality child care respects and supports linguistic and cultural diversity of children and their families. As well, the building of supply in underserved areas, to serve more infants and toddlers, and to respond to the needs of families who need child care during non-traditional hours will include communities and children who are English language learners. Section 98.16(dd) addresses outreach to English language learner families and facilitates participation of providers who are English language learners in the subsidy system. The final rule also recognizes the importance of home culture and language in other provisions.

Comment: We received a comment from a multi-state private provider company asking us to modify the language that the strategies to increase supply should be directed to supplying high-quality child care.

Response: We think that the Act and this final rule will raise the quality of child care, especially for CCDF-funded children. The statutory language focuses on improving the supply and quality of care. Taken together, this means Lead Agencies should focus on building the supply of high-quality care.

Significant concentrations of poverty and unemployment. A new § 98.16(y), as proposed in the NPRM, requires Lead Agencies to describe how they prioritize increasing access to high-quality child care and development services for children of families in areas that have significant concentrations of poverty and unemployment and that do not have sufficient numbers of such programs, pursuant to § 98.46(b). This provision is discussed later in this rule.

Comment: We received a comment from a national organization in support of this provision and a recommendation that the Plan describe how the Lead Agency will develop programs and services that are culturally and linguistically relevant and support a diverse child care workforce.

Response: We decline to add language to § 98.16(y) but we do address issues of cultural and linguistically responsive child care services as well as the diversity of the child care workforce in other sections of this final rule.

Business practices. This final rule adds a new § 98.16(z) reiterating the statutory requirement for Lead Agencies to describe how they develop and implement strategies to strengthen the business practices of child care providers to expand the supply, and improve the quality of, child care services. Some child care providers need support on business and management practices in order to run their child care businesses more effectively and devote more time and attention to quality improvements. Improved business practices can benefit caregivers and children. An example of a key business practice is providing paid sick leave for caregivers to keep children healthy. Without paid time off, caregivers may come to work sick and risk spreading illnesses to children in care. We also encourage child care providers to provide paid sick leave because it promotes better health for child care employees, which is important to maintaining a stable workforce as well as consistency of care for children. According to The Council of Economic Advisors, "[Pa]id sick leave also induces a healthier work environment by encouraging workers to stay home when they are sick." (The Economics of Paid and Unpaid Leave, The Council of Economic Advisors, June 2014.)

Shared services is another business practice strategy, particularly for a network of family child care providers or small centers. The hub of the network or alliance provides business services such as billing and accounting, facility management, human resources management, and purchasing. It may also involve shared professional development and coaching and other pedagogical leadership. This business strategy can help providers leverage their limited resources more effectively and efficiently. We received no comments on this provision and have retained the language as proposed in the NPRM.

Emergency preparedness. The final rule adds a new § 98.16(aa) to the regulation, as proposed in the NPRM, based on Section 658E(c)(2)(U) of the Act, to require the Lead Agency to demonstrate how the Lead Agency will address the needs of children, including the need for safe child care, before, during and after a state of emergency declared by the Governor or a major disaster or emergency (as defined by section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5122) through a Statewide Child Care Disaster Plan (or Disaster Plan for a Tribe's service area). The Disaster Plan must be developed in collaboration with the State/Territory human services agency, the State/Territory emergency management agency, the State/Territory licensing agency, local and State/Territory child care resource and referral agencies, and the State/Territory Advisory Council on Early Childhood Education and Care, or similar coordinating body. Tribes must have similar Disaster Plans, for their Tribal service area, developed in consultation with relevant agencies and partners. The Disaster Plan must include guidelines for continuation of child care subsidies and child care services, which may include the provision of emergency and temporary child care services and temporary operating standards for child care during and after a disaster; coordination of post-disaster recovery of child care services; and requirements that providers receiving CCDF funds and other child care providers, as determined appropriate by the Lead Agency, have in place procedures for evacuation, relocation, shelter-in-place, lock-down, communication and reunification with families, continuity of operations, accommodations of infants and toddlers, children with disabilities, and children with chronic medical conditions; and procedures for staff and volunteer emergency preparedness training and practice drills, including training requirements for caregivers of providers receiving CCDF.

This provision largely reflects statutory language of Section 658E(c)(2)(U) of the Act, but we have clarified that the Plan must apply, at a minimum, to CCDF providers and may apply to other providers (such as all licensed providers) at the Lead Agency option. We also added language on post-disaster recovery.

In past disasters, the provision of emergency child care services and rebuilding and restoring of child care facilities and infrastructure emerged as an essential service. The importance of the need to improve emergency preparedness and response in child care was highlighted in an October 2010 report released by the National Commission on Children and Disasters. The Commission's report included two primary sets of recommendations for child care: (1) To improve disaster preparedness capabilities for child care; and (2) to improve capacity to provide child care services in the immediate aftermath and recovery from a disaster (2010 Report to the President and Congress, National Commission on Children and Disasters, p. 81, October 2010). Child care has also been recognized by the Federal Emergency Management Agency (FEMA) as an essential service and an important part of disaster response and recovery. (FEMA Disaster Assistance Fact Sheet 9580.107, Public Assistance for Child Care Services Fact Sheet, 2013).

Maintaining the safety of children in child care programs during and after disaster or emergency situations necessitates planning in advance by State/Territory agencies and child care providers. The reauthorization of the CCDBG Act, and this final rule, implement the key recommendation of the National Commission on Children and Disasters by requiring a child care-specific Statewide Disaster Plan. ACF has previously issued guidance (CCDF–ACF–IM–2011–01) recommending that Disaster Plans include five key components: (1) Planning for continuation of services to CCDF families; (2) coordinating with emergency management agencies and key partners; (3) regulatory requirements and technical assistance for child care providers; (4) provision of temporary child care services after a disaster, and (5) rebuilding child care after a disaster. The guidance recommends that disaster plans for child care incorporate capabilities for shelter-in-place, evacuation and relocation, communication and reunification with families, staff training, continuity of operations, accommodation of children with disabilities and chronic health needs, and practice drills. ACF intends to provide updated guidance and technical assistance to States, Territories, and Tribes as they move forward with implementing Disaster Plans as required by the reauthorization. We received no comments on this provision and have retained the language as proposed in the NPRM.

Payment practices. The final rule adds new § 98.16(bb), requiring Lead Agencies to describe payment practices applicable to child care providers receiving CCDF, pursuant to § 98.45(l), including practices to ensure timely payment for services, to delink provider payments from children's occasional absences to the extent practicable, and to reflect generally-accepted payment practices. This is discussed later in this rule. We received no comments on this provision but have made a conforming citation when referencing section 98.45(l). The rest of the language is retained as proposed in the NPRM.

Program integrity. The final rule adds new § 98.16(cc), requiring Lead Agencies to describe processes in place to describe internal controls to ensure integrity and accountability; processes in place to investigate and recover fraudulent payments and to impose sanctions on clients or providers in response to fraud; and procedures in place to document and verify eligibility, pursuant to § 98.68. This change corresponds to a new program integrity section included in subpart G of the regulations, which is discussed later in this rule.

Outreach and services for families and providers with limited English proficiency and persons with disabilities. The final rule adds new § 98.16(dd) to require that the Lead Agency describe how it provides outreach and services to eligible families with limited English proficiency and persons with disabilities, and facilitate participation of child care providers with limited English proficiency and disabilities in CCDF. Currently, the Plan requires Lead Agencies to describe how they provide outreach and services to eligible limited English proficient families and providers. In the FY 2016–2018 CCDF Plans, States and Territories reported a number of strategies to overcome language barriers. Forty-nine States and Territories have bilingual caseworkers or translators, 45 have applications in multiple languages, and 19 offer provider contracts or agreements in multiple languages. The final rule requires Lead Agencies to develop policies and procedures to clearly communicate program information such as requirements, consumer education information, and eligibility information, to families and child care providers of all backgrounds.

Comment: One comment requested language in the Plan to require a description of how Lead Agencies will develop child care services and programs that are culturally and linguistically relevant to the children and families that they serve, and how it will implement recruitment and workforce development strategies that will seek to increase the number of child care providers who are representative of the communities in which they serve.

Response: This concern is addressed in § 98.16(dd). We strongly agree that Lead Agencies should support children and families whose native language is not English, and providers who may be English language learners. The Migration Policy Institute's recent study shows that a large segment of the child care workforce, like the children and families they serve, are English language learners and come from a range of cultures. There is a strong body of research on the importance of child care providers respecting and supporting children's home language and culture in order to promote learning achievement.

Suspension and expulsion policies. The final rule adds a new § 98.16(ee) to require that the Lead Agency describe its policies to prevent suspension, expulsion, and denial of services due to behavior of children from birth to age five in child care and other early childhood programs receiving CCDF funds, which must be disseminated as part of consumer and provider education efforts in accordance with § 98.33(b)(1)(v).

Comment: We received several comments from national organizations supporting the attention to reducing or eliminating the high rates of suspension and expulsion of young children. We received a comment from one State expressing concern that it will be difficult to enforce such policies. National organizations representing children with disabilities urged language prohibiting the use of suspension and expulsion. They raise concerns that such practices have excluded children with disabilities.

Response: We added in the rule that the Lead Agency must describe policies *to prevent* suspension and expulsion. Recent data demonstrates a high rate of suspensions and expulsions of children as young as preschool, practices that are associated with negative educational and life outcomes. The data also demonstrates a greater prevalence of suspension and expulsion of children of color and boys. These disturbing trends warrant immediate attention from the early childhood and education fields to prevent expulsion and suspension while ensuring the safety and well-being of young children (themselves and others) in early learning settings. Furthermore, if administered in a discriminatory manner, suspensions and expulsions of children may violate Federal civil rights laws. In addition, early childhood programs must comply with applicable legal requirements governing the discipline of a child for misconduct caused by, or related to, a child's disability, including, as applicable, implementing reasonable modifications to policies, practices, or procedures to ensure that children with disabilities are not suspended or expelled because of their disability-related behaviors unless a program can demonstrate that making such modifications would result in a fundamental alteration in the nature of a service, program, or activity.

The Child Care and Development Block Grant (CCDBG) Act of 2014 also allows States to target CCDF quality enhancement funds to professional development that includes effective behavior management strategies and training on strategies to promote social-emotional development. These kinds of supports, both through formal coursework, and field-based, ongoing support in the form of coaching, mentoring, or mental health consultation, have been demonstrated to reduce the challenging behavior in children that is associated with expulsions.

We strongly encourage States and child care providers (including school age providers) to utilize the guidance, policy statements, and resources made available by federal agencies. For school-age children, the following resources are available:

- *Supporting and responding to behavior:* Evidence-based classroom strategies for teachers: *https://www.osepideasthatwork.org/evidencebasedclassroomstrategies/*
- *Positive Behavioral Interventions & Supports (PBIS) National Technical Assistance Center:*
- *Rethinking Discipline 101:* Why it matters (webinar): *https://www.youtube.com/watch?v=Qg-qkilRw18&feature=youtu.be*

With regard to young children, we urge States and child care providers to consider the recommendations in the Policy Statement on Expulsion and Suspension Policies in Early Childhood Settings issued by the Secretaries of Health and Human Services and Education at *https://www2.ed.gov/policy/gen/guid/school-discipline/policy-statement-ece-expulsions-suspensions.pdf.*

Reports of serious injuries or death in child care. The final rule adds a new § 98.16(ff) to require the Lead Agency to designate a State, Territorial, or Tribal entity to which child care providers must submit reports of any serious injuries or deaths of children occurring in child care, regardless of whether or not they receive CCDF assistance. Comments are discussed later under the related requirement at § 98.42(b)(4).

Family engagement. The final rule adds new § 98.16(gg) to require the Lead Agency to describe how it supports child care providers in the successful engagement of families in children's learning and development. We received no comments on this provision and have left the language unchanged in the final rule.

Complaints received through the national hotline and Web site. The final rule adds new § 98.16(hh) to require the Lead Agency to describe how it will respond to complaints received through the national hotline and Web site, as required by (Section 658L(b)(2)) of the reauthorized Act. The description must include the designee responsible for receiving and responding to those complaints for both licensed and license-exempt child care providers. *Complaints received through the national hotline and Web site will be sent to the appropriate Lead Agency to make sure that they* are responded to quickly, especially when a child's health or safety is at risk. This provision is aimed at building those connections and ensuring that a process is in place for addressing complaints regarding both licensed and license-exempt child care providers. We received no comments and have left language unchanged in final rule.

Finally, the final rule re-designates paragraph (v) as paragraph (ii) with no other changes. We received no comments on this provision and have retained the language as proposed in the NPRM.

§ 98.17 Period Covered by Plan

This section describes the term of the Plan, which is now three years. We received no comments on this section.

§ 98.18 Approval and Disapproval of Plans and Plan Amendments

This section of the regulations describes processes and timelines for CCDF Plan approvals and disapprovals, as well as submission of Plan amendments. CCDF Plans are submitted triennially and prospectively describe how the Lead Agency will implement the program. To make a substantive change to a CCDF program after the Plan has been approved, a Lead Agency must submit a Plan amendment to ACF for approval. The purpose of Plan amendments is to ensure that grantee expenditures continue to be made in accordance with the statutory and regulatory requirements of CCDF, if the grantee makes changes to the program during the three- year Plan period.

Advance written notice. In conjunction with the change discussed at § 98.14(d) to make the Plan and any Plan amendments publicly available, the final rule adds a provision at § 98.18(b)(2) to require Lead Agencies to provide advance written notice to affected parties, specifically parents and child care providers, of changes in the program made through an amendment that adversely affect income eligibility, payment rates, and/or sliding fee scales so as to reduce or terminate benefits. The notice should describe the action to be taken (including the amount of any benefit reduction), the reason for the reduction or termination, and the effective date of the action.

Comment: Two States expressed concerns that the provisions on advance written notice would be administrative burdens. One State asked that its requirements for posting for administrative rule changes meet this requirement. The State also asked for clarification whether the advance written notice is separately required for any Plan amendment. By contrast, child care worker organizations submitted comments in support of this provision and requested additional requirements. They asked us to go further and require a public review and comment process for Plan amendments prior to Lead Agency submission to the federal government. They note that States prepared their three-year CCDF plans prior to the release of the final regulations, and thus there is a likelihood that many Plans will have to be modified in significant ways to fully meet the rule.

Response: The Lead Agency may choose to issue notification of adverse programmatic changes in a variety of ways, including a mailed letter or email sent to all participating child care providers and families. We are providing Lead Agencies with the flexibility to determine an appropriate time period for advance notice, depending on the type of policy change being implemented or the effective date of that policy change. Advance notice adds transparency to the Plan amendment process and provides a mechanism to ensure that affected parties remain informed of any substantial changes to the Lead Agency's CCDF Plan that may affect their ability to participate in the child care program. We note that while we encourage Lead Agencies to provide written notice of any changes that affect income eligibility, payment rates, and/or sliding fee scales, we only require written notice of those that adversely impact parents or providers. We do not require the Lead Agency to hold a formal public hearing or solicit comments on each Plan amendment, as is required by regulations at § 98.14(c) for the submission of the CCDF Plan. However, we encourage solicitation of public input whenever possible and consider this regulatory change to be consistent with the spirit and intent of the CCDF Plan public hearing provision. We encourage Lead Agencies to ensure that advanced written notice is provided in multiple languages, as appropriate, so that all parents and child care providers have access and can plan for changes. As noted above, the final rule adds a provision at § 98.16(dd) to require Lead Agencies to include in the Plan a description of processes to provide outreach and services to CCDF families and providers with limited English proficiency.

Comment: A comment submitted by a group of providers asked for a required time limit on when advance notice is provided to them. A large, multi-state child care provider requested at least 30 days advance written notice to parties.

Response: We decline to require a specific time period for the Lead Agency to provide written notice. We do urge Lead Agencies to provide this information as soon as possible because of the consequences to families and providers.

§ 98.19 Requests for Temporary Relief From Requirements

Section 658I(c) of the Act indicates that Lead Agencies are allowed to submit a request to the Secretary to waive one or more requirements contained in the Act on a temporary basis: To ensure that effective delivery of services are not interrupted by conflicting or duplicative requirements; to allow for a period of time for a State legislature to enact legislation to implement the provisions of the Act or this part; or in response to extraordinary circumstances, such as a natural disaster or financial crisis. We are extending the waiver option to rules under this part as well. Prior to the enactment of the CCDBG Act of 2014, there was no waiver authority within the CCDF program.

Through the changes in this final rule, we provide guidance and clarity on: The eligibility of States, Territories, and Tribes to request a waiver; what provisions are not eligible for waivers; and how the waiver request and approval (or disapproval) process works. In addition to outlining the requirements detailed in the CCDBG Act of 2014, § 98.19 includes clarifying provisions to provide greater understanding of the intent and implementation of the waiver process as temporary.

This section of the rule details the process by which the Secretary may temporarily waive one or more of the requirements contained in the Act or this part, with the exception of State Match and Maintenance of Effort requirements, consistent with the requirements described in section 658I(c)(1) of the Act. In order for a waiver application to be considered, the waiver request must: Describe circumstances that prevent the State, Territory, or Tribe from complying with any statutory or regulatory requirements of this part; demonstrate that the waiver, by itself, contributes to or enhances the State's, Territory's, or Tribe's ability to carry out the purposes of this part; show that the waiver will not contribute to inconsistency with the objectives of the Act; and meet the additional requirements in this section as described.

The final rule delineates the types of waivers that States, Territories, and Tribes can request into two distinct types: (1) Transitional and legislative waivers and (2) waivers for extraordinary circumstances. States, Territories, and Tribes may apply for temporary transitional and legislative waivers meeting the requirements described in this section that provide temporary relief from conflicting or duplicative requirements preventing implementation, or for a temporary extension in order for a State, Territorial, or Tribal legislature to enact legislation to implement the provisions of this subchapter.

Transitional and legislative waivers are designed to provide States, Territories, and Tribes at most one full legislative session to enact legislation to implement the provisions of the Act or this part, and are limited to a one-year initial period and at most, an additional one-time, one-year renewal from the date of approval of the extension (which may be appropriate for a State with a two-year legislative cycle, for example).

Waivers for extraordinary circumstances address temporary circumstances or situations, such as a natural disaster or financial crisis. Extraordinary circumstance waivers are limited to an initial period of no more than two years from the date of approval, and at most, an additional one-year renewal from the date of approval of the extension.

Both types of waivers are probationary, subject to the decision of the Secretary to terminate a waiver at any time if the Secretary determines, after notice and opportunity for a hearing, that the performance of a State, Territory, or Tribe granted relief under this subsection has been inadequate, or if such relief is no longer necessary to achieve its original purposes. In the final rule, we added language to specify that such a hearing would be based on the rules of procedure in 45 CFR part 99—which contains existing hearing procedures governing CCDF that logically extend to the waiver process.

In order to request a waiver, the Lead Agency must submit a written request, indicating which type of waiver the State, Territory, or Tribe is requesting and why. The request must also provide detail on the provision(s) from which the State, Territory, or Tribe is seeking temporary relief and how relief from that sanction or provision, by itself, will improve delivery of child care services for children and families. If a transitional waiver, the Lead Agency should describe the steps being taken to address the barrier to implementation (*i.e.,* a timeline for legislative action). Furthermore, the Act emphasizes the importance of children's health and safety. Importantly, in the written request, the State, Territory, or Tribe must certify and demonstrate that the health, safety, and well-being of children served through assistance received under this part will not be compromised as a result of the temporary waiver.

Within 90 days of submission of the request, the Secretary will notify the State, Territory, or Tribe of the approval or disapproval. If rejected, the Secretary will provide the State, Territory, or Tribe, the Committee on Education and the Workforce of the House of Representatives, and the Committee on Health, Education, Labor, and Pensions of the Senate of the reasons for the disapproval and give the State, Territory, or Tribe the opportunity to amend the request. If approved, the Secretary will notify and submit a report to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate on the circumstances of the waiver including each specific sanction or provision waived, the reason as given by the State, Territory, or Tribe of the need for a waiver, and the expected impact of the waiver on children served under this program.

No later than 30 days prior to the expiration date of the waiver, a State, Territory, or Tribe, at its option, may make a formal written request to re-certify the provisions described in this section, which must explain the necessity of additional time for relief from such sanction(s) or provisions. The State, Territory, or Tribe also must demonstrate progress toward implementation of the provision or provisions. The Secretary may approve or disapprove a request from a State, Territory, or Tribe for a one-time renewal of an existing waiver under this part for a period no longer than one year. The Secretary will adhere to the same approval or disapproval process for the renewal request as the initial request. Lastly, this final rule makes conforming technical amendments to the pre-existing procedures for a Lead Agency to appeal any ACF disapproval of a Plan or Plan amendment at § 98.18 to indicate that the appeal process also applies to any appeal of a disapproved request for temporary relief under § 98.19.

Comment: We received comments from many national and State organizations and a State supporting our limitation on the types and number of categories of waivers. For example, a child care worker organization wrote, "To prevent the States from backing out on investing in health, safety and quality standards, we commend the proposal for limiting waivers to reasons concerning transition, legislative action and extraordinary circumstances." A few States and a national organization had comments on the time limitation on waivers, with some commenters noting that the Act allows waivers for up to three years. A national organization asked for a three-year term for waivers of any type. Two States expressed concern that the two-year period for legislative and transitional waivers may not provide sufficient time for State legislatures to act, particularly legislatures in a few States that only convene in alternating years. Another State asked for a longer time frame to encompass a period for changing forms and processes reflecting newly adopted rules. A few States requested clarification on whether certain circumstances fall under the transitional and legislative category or extraordinary circumstances category.

Response: The final rule establishes parameters to ensure that States can move quickly to make any necessary legislative or transitional changes. The vast majority of State legislatures meet annually; only four States have a legislature that meets every other year. They have the potential to be approved for a one-year waiver followed by the possibility of being approved for a one-year renewal. Providing a longer base time period for a waiver could lead to delays in making the necessary legislative or transition changes.

Comment: One State commented that 90 days is too long for a decision by the Secretary and requested ACF to make a decision on a waiver application within 30 days.

Response: The Act says that the Secretary shall inform the State of approval of disapproval of the request within 90 days after the receipt of a State's request under this subsection. This final rule maintains a 90-day window, which is consistent with the period for reviewing Plan amendments for approval or rejection.

Comment: One State asked for clarification on the start date of the waiver.

Response: We refer Lead Agencies to the Office of Child Care's Program Instruction published December 17, 2015 (CCDF–ACF–PI–2015–09) which states: "If a State or Territory is not going to be in compliance with one or more provisions by the deadline required in the Act, then the State/Territory must request a temporary extension/waiver. Once the requirement(s) has been met, the Lead Agency must submit a Plan amendment to ACF for approval." Until such time, the State should make every effort to be in compliance. The start date of a waiver may vary depending on the circumstances. For example, a legislative or transitional waiver will typically start on the date corresponding with the federal statutory or regulatory deadline for compliance with the relevant requirement (*i.e.*, the requirement for which the Lead Agency is receiving a temporary extension). The start date for a waiver for extraordinary circumstances will typically be related to the timing of those circumstances (*e.g.*, natural disaster or financial crisis).

Comment: One State asked if ACF would consider delaying the need for a Plan amendment for a minimum of six months in circumstances when the State is submitting a request for a waiver for extraordinary circumstances.

Response: Lead Agencies need not submit the waiver request and Plan amendment together. Lead Agencies must submit temporary relief or waiver request at least 90 days before an effective date. Lead Agencies must submit Plan amendments within 60 days of a substantial change in the Lead Agency's program. We refer Lead Agencies to the Office of Child Care's Program Instruction published December 17, 2015 (CCDF–ACF–PI–2015–09). We recognize that requests for extension due to extraordinary circumstances will require a case-by-case decision on when the Plan amendment(s) needs to be submitted.

Comment: One State asked if it may submit a single application that combines multiple waiver requests.

Response: We have accepted submissions that combine multiple waivers. Each waiver request, however, must address separately each factor required by the Act.

Comment: Some States remarked on the need for extensions in order to make changes to the electronic systems to implement the rule. One State asked if this would fall into the category of an "extraordinary circumstance."

Response: Requests for a waiver relating to electronic system changes should be submitted under the "legislative or transitional" category.

Comment: One State recommended a third type of waiver when a State's current law may meet or exceed the intent of the regulations, and also in the case of experimental, pilot or demonstration projects, so long as children's health, safety, and well-being are not compromised and the waiver improves efficiency and effectiveness.

Response: We decline to add a third category of waiver. States and Territories have been innovative in a number of ways with CCDF, such as quality rating and improvement systems and scholarships for child care providers to enroll in college. Waivers are not necessary for States to create pilot or demonstration projects so long as those projects do not jeopardize children's health, safety and well-being and do not contradict requirements in the Act and this final rule. Further, multiple national and State groups supported limiting the waivers to the two types in the rule. The final rule adds language indicating that these waivers are conditional, dependent on progress towards implementation of the final rule. We think this adds important clarification to the expectation that these waivers are temporary and that Lead Agencies are expected to make progress toward full implementation. Other changes to this section proposed by the NPRM have been adopted in the final rule.

Subpart C—Eligibility for Services

This subpart establishes parameters for a child's eligibility for CCDF assistance and for Lead Agencies' eligibility and re-determination procedures. Congress made significant changes to CCDBG that emphasize stable financial assistance and continuity of care through CCDF eligibility policies, including establishing minimum 12-month eligibility for all children. In this subpart, the final rule restates these changes and provides additional clarification where appropriate.

§ 98.20 A Child's Eligibility for Child Care Services

A child's eligibility for child care services: This final rule clarifies at § 98.20(a) and § 98.20(b)(4) that eligibility criteria apply only at the time of eligibility determination or re-determination based on statutory language at Section 658E(c)(2)(N)(i) of the Act, which establishes a minimum 12-month eligibility period by affirmatively stating that the child will be considered to meet all eligibility requirements for such assistance and will receive such assistance, for not less than 12 months before the State or local entity re-determines the eligibility of the child. (We discuss minimum 12-month eligibility at greater length below in § 98.21 Eligibility Determination Processes.) We received no comments on this provision and have retained the proposed language in this final rule.

Income eligibility. This final rule revises § 98.20(a)(2), adding a sentence to clarify that the State median income (SMI) used to determine the eligibility threshold level must be based on the most recent SMI data that is published by the U.S. Census Bureau. This clarification ensures the eligibility thresholds are based on the most current and valid data. It is important for Lead Agencies to use current data as, once determined eligible, children may continue to receive CCDF assistance until their household income exceeds 85 percent of SMI for a family of the same size, pursuant to § 98.21(a)(1) discussed further below, or at Lead Agency option, the family experiences a non-temporary cessation of work, training, or education. Using the most recent SMI data also allows for consistency for cross-State comparisons and a better understanding of income eligibility thresholds nationally.

SMI data may not be available from the Census Bureau for some Territories, in which case an alternative source (subject to ACF approval through the CCDF State/Territory Plan process) may be used. Tribes are already allowed to use Tribal median income (TMI) (pursuant to § 98.81(b)(1)) and this will continue to be allowable under this rule. ACF also recognizes that some Lead Agencies establish eligibility thresholds that vary by geographic area and that some Lead Agencies use Area median income (AMI) to calculate income eligibility for different regions in order to account for cost of living variations across geographic areas. Lead Agencies may use AMI in their calculations, but must also report the threshold in terms of SMI in their Plan, and ensure that thresholds based on AMI are at or below 85 percent of SMI.

Comment: One State commented about the timelines necessary to comply with this provision, noting that "States should be given up to one year to update income limits and copays after the publication of new State Median Incomes." In this State, "income limits and copays are updated in October each year. The date that new State Median Incomes are published varies each year. Because of this variation it is important that States be given up to one year to make updates."

Response: Compliance with this provision will be determined through the State plan submission, which will occur every three years. The intent of the policy is to ensure that State income thresholds reflect the most recent information available, but we understand that Lead Agencies will require time to update their policies and will allow for a reasonable timeframe for compliance. In this instance, updating within the year would be considered reasonable.

Comment: In the proposed rule, we asked for comment on whether ACF should provide additional guidance and specificity on the SMI used to determine eligibility. The Act does not specify whether States should use the SMI with a single year estimate, a two-year average, or a three-year average (which is used by the Low Income Home Energy Assistance Program (LIHEAP)).

Some commenters requested that States retain the flexibility to "define methodology and data sources in calculating SMI." Other commenters requested additional clarification, most specifically on what to do when a State's median income unexpectedly decreases. A number of commenters asked that States be "encouraged to use 3-year estimates of State median income to determine income eligibility to reduce the large year-to-year fluctuations that the single year estimates tend to generate in some States." Others went further, specifically asking ACF to revise regulatory language to include that in "cases where a State's median income decreases; in such cases, a State should be required to maintain its income limit, rather than reducing it."

Response: While we agree with the sentiment behind the suggestion of maintaining eligibility thresholds even if a State's median income decreases, the final rule maintains State flexibility in this area to allow States to determine which SMI estimate to use for eligibility determinations. If a State's median income decreases as a result of a single year estimate, the State would have the option of using, and we strongly encourage it to consider, the 3-year estimate to lessen that impact of any single year fluctuation. This could mitigate some of the impacts of unexpected decreases, and, by aligning with LIHEAP, another benefit program which families may also be accessing, make it easier for families to manage income requirements across programs. It should be noted, however, that regardless of which measure the State chooses to use, it would still be bound by the upper income limit of 85% of SMI for a family of the same size.

Asset limit. Section 658P(4)(B) of the Act revised the definition of eligible child at so that in addition to being at or below 85 percent of SMI for a family of the same size, a member of the family must certify that the family assets do not exceed $1,000,000 (as certified by a member of such family). The final rule includes this requirement at § 98.20(a)(2)(ii). We interpret this language in paragraph (2)(ii) of this section to mean that this requirement can be met solely through self-certification by a family member, with no further need for additional documentation. This new requirement provides assurance that CCDF funds are being used for families with the greatest need, but is not intended to impose an additional burden on families. This final rule does not define "family assets," but instead allows the Lead Agency flexibility to determine what assets to count toward the asset limit.

Comment: One commenter had concerns that the "very high maximum asset level draws attention to the notion that CCDF funding could be given to families that are quite a distance from poverty." The commenter also claimed that "if there is any basis for the importance of a $1 million ceiling, self-certification by a family member seems to negate the accuracy of tracking this."

Response: The asset limit was established by the CCDBG Act of 2014. The high level is not meant to indicate that families far above poverty should be served, but rather provide a mechanism to ensure that funding does not inadvertently go to families with high asset levels that are not reflected in their income calculations. Further, clarification that self-certification is sufficient to meet this requirement and that there is no need for additional documentation does not unnecessarily impair the accuracy of this requirement, but is important to honor the intent of the requirement while minimizing any unnecessary burden on families. The final rule retains language in this provision as proposed in the NPRM.

Protective services. Section 658P(4) of the Act indicates that, for CCDF purposes, an eligible child includes a child who is receiving or needs to receive protective services. This final rule adds language at § 98.20(a)(3)(ii) to clarify that the protective services category may include specific populations of vulnerable children as identified by the Lead Agency. Children do not need to be formally involved with child protective services or the child welfare system in order to be considered eligible for CCDF assistance under this category. The Act references children who "need to receive protective services," demonstrating that the intent of this language was to provide services to at-risk children, not to limit this definition to serve children already in the child protective services system.

It is important to note that including additional categories of vulnerable children in the definition of protective services is only relevant for the purposes of CCDF eligibility and does not mean that those children should automatically be considered to be in official protective service situations for other programs or purposes. It is critical that policies be structured and implemented so these children are not identified as needing formal intervention by the CPS agency, except in cases where that is appropriate for reasons other than the inclusion of the child in the new categories of vulnerable child for purposes of CCDF eligibility. We received limited comments on this section and discuss these below.

Similarly, this final rule removes the requirement that case-by-case determinations of income and co-payment fees for this eligibility category must be made by, or in consultation with, a child protective services (CPS) worker. While consulting with a CPS worker is no longer a requirement, it is not prohibited; a Lead Agency may consult with or involve a CPS caseworker as appropriate. We encourage collaboration with the agency responsible for children in protective services, especially when a child also is receiving CCDF assistance.

These changes provide Lead Agencies with additional flexibility to offer services to those who have the greatest need, including high-risk populations, and reduce the burden associated with eligibility determinations for vulnerable families.

Under previous regulations at § 98.20(a)(3)(ii)(B), at the option of the Lead Agency, this category could already include children in foster care. The regulations already allowed that children deemed eligible based on protective services may reside with a guardian or other person standing "in loco parentis" and that person is not required to be working or attending job training or education activities in order for the child to be eligible. In addition, the prior regulations already allowed grantees to waive income eligibility and co-payment requirements as determined necessary on a case-by-case basis, by, or in consultation with, an appropriate protective services worker for children in this eligibility category. This final rule clarifies, for example, that a family living in a homeless shelter may not meet certain eligibility requirements (*e.g.*, work or income requirements), but, because the child is in a vulnerable situation, could be considered eligible and benefit from access to high-quality child care services.

We note that this new provision does not require Lead Agencies to expand their definition of protective services. It merely provides the option to include other high-needs populations in the protective services category solely for purposes of CCDF, as many Lead Agencies already choose to do.

We did not receive many comments on this policy, but those who did comment were supportive of this clarification and appreciative of the "discretion to include specific populations of vulnerable children, especially if they do not need to be formally involved with CPS or child welfare system." The regulatory language proposed in the NPRM is retained in this final rule.

Additional eligibility criteria. Under pre-existing regulations, Lead Agencies are allowed to establish eligibility conditions or priority rules in addition to those specified through Federal regulation so long as they do not discriminate, limit parental rights, or violate priority requirements (these are described in full at § 98.20(b)). This final rule revises this section in paragraph 98.20(b)(4) to add that any additional eligibility conditions or priority rules established by the Lead Agency cannot impact eligibility other than at the time of eligibility determination or re-determination. This revision was made to be consistent with the aforementioned change to § 98.20(a) which says that eligibility criteria apply only at the time of determination or re-determination. It follows that the same would be true of additional criteria established at the Lead Agency's option.

The final rule adds paragraph (c), clarifying that only the citizenship and immigration status of the child, the primary beneficiary of CCDF, is relevant for the purposes of determining eligibility under PRWORA and that a Lead Agency, or other administering agency, may not condition eligibility based upon the citizenship or immigration status of the child's parent. Under title IV of PRWORA, CCDF is considered a program providing Federal public benefits and thus is subject to requirements to verify citizenship and immigration status of beneficiaries. In 1998, ACF issued a Program Instruction (ACYF–PI–CC–98–08) which established that "only the citizenship status of the child, who is the primary beneficiary of the child care benefit, is relevant for eligibility purposes." This proposal codifies this policy in regulation and clarifies that Lead Agencies are prohibited from considering the parent's citizenship and immigration status.

ACF has previously clarified through a program instruction (ACYF–PI–CC–98–09) that when a child receives Early Head Start or Head Start services that are supported by CCDF funds and subject to the Head Start Performance Standards, the PRWORA verification requirements do not apply. Verification requirements also do not apply to child care settings that are subject to public educational standards. These policies remain in effect.

All comments received were supportive of the clarification on citizenship and this policy will remain in this final rule. One national organization commented that "ensuring that the citizenship or immigration status of a child's parent does not impact their ability to access CCDF-funded child care maintains the program's focus on ensuring access to high-quality child care services for vulnerable populations. Given that this policy was previously contained in sub-regulatory guidance to States, we are very appreciative of ACF's proposal to codify it within the CCDF program regulations."

§ 98.21 Eligibility Determination Processes

In this final rule, § 98.21 addresses the processes by which Lead Agencies determine and re-determine a child's eligibility for services. In response to comment, this final rule includes a new § 98.21(a)(5) which describes limited additional circumstances for which assistance may be terminated prior to the end of the minimum 12-month eligibility period, which will be discussed in greater detail below.

Minimum 12-month eligibility. Section 98.21 reiterates the statutory change made in Section 658E(c)(2)(N)(i) of the Act, which establishes minimum 12-month eligibility periods for all CCDF families, regardless of changes in income (as long as income does not exceed the Federal threshold of 85 percent of SMI) or temporary changes in participation in work, training, or education activities. Under the Act, Lead Agencies may not terminate CCDF assistance during the 12-month period if a family has an increase in income that exceeds the Lead Agency's income eligibility threshold but not the Federal threshold, or if a parent has a temporary change in work, education or training.

We note that, during the minimum 12-month eligibility period, Lead Agencies may not end or suspend child care authorizations or provider payments due to a temporary change in a parent's work, training, or education status. In other words, once determined eligible, children are expected to receive a minimum of 12 months of child care services, unless family income rises above 85% of SMI or, at Lead Agency option, the family experiences a non-temporary cessation of work, education, or training.

As the statutory language states that a child determined eligible will not only be considered to meet all eligibility requirements, but also "will receive such assistance," Lead Agencies may not offer authorization periods shorter than 12 months as that would functionally undermine the statutory intent that, barring limited circumstances, eligible children shall receive a minimum of 12 months of CCDF assistance. We note that, despite the language that the child "will receive such assistance," the receipt of such services remains at the option of the family. The Act does not require the family to continue receiving services nor does it force the family to remain with a provider if the family no longer chooses to receive such services. Lead Agencies would not be responsible for paying for care that is no longer being utilized. This is discussed further in the new § 98.21(a)(5).

Comment: Comments were generally supportive of the statutory change to a minimum 12-month eligibility period, though there were concerns about the costs and possible impacts on enrollment patterns. Those in support emphasized that this change "would make it easier for families to access and retain more stable child care assistance and increase continuity of care for children." These commenters considered this a significant improvement to the previous law which "commonly resulted in children experiencing short periods of assistance of usually less than a year, and families cycling on and off assistance," and had the unintended consequence of "modest increases in earnings or brief periods of unemployment or reductions in work hours caus[ing] families to lose child care assistance."

Other commenters also thought that "setting eligibility for longer periods will dramatically reduce the significant administrative burden on small businesses and at-risk families," and that this policy will facilitate "the ability to partner with others such as Head Start and Early Head Start and increases the quality of those partnerships."

However, some commenters, particularly States, shared concerns about the implications of this change, wanting to "draw attention to the significant cost of this requirement especially in light of stagnant funding levels to implement all the required changes." Another commenter focused on the idea that the "unintended consequence of these proposed rules is that by extending eligibility for current recipients of child care subsidies, other families in need will never have a chance to access the subsidies because federal funding has not been sufficiently increased to cover the cost."

Response: While we recognize the logistical challenges that States will experience as they are transitioning to minimum 12-month eligibility, we re-emphasize that this is a statutory requirement. We also think these longer periods of assistance will ensure that families derive greater benefit from the assistance and that this policy creates more opportunity for families to work towards economic stability. Any policy decision will have significant tradeoffs, and while the total number of families served may decrease as families stay on longer, this effect would be due to a decrease in churn, meaning that the number of children and families served at any given point would not be affected by families staying on longer. We think that the added benefit of continuity of services provided by reducing churn will have a positive overall impact on children and families and be a more effective use of federal dollars.

However, we do recognize that during the minimum 12-month redetermination periods, it may be necessary to collect some information to complete the redetermination process in time. We allow such practices, so long as it is limited (*e.g.* a few days or weeks in advance) and is not used as a way to circumvent the minimum 12-month period. Even if information is collected in advance, eligibility cannot be terminated prior to the minimum 12-month period, even if disqualifying information is discovered during the preliminary collection of documentation (unless it indicates that family income has exceeded 85% of SMI or, at the Lead Agency option, the family has experienced a non-temporary cessation in work, or attendance at a training or education program).

Comment: One commenter questioned our interpretation of the Act that "assistance must be at the same level throughout the period." This commenter thought that "a State should be able to adjust the number of authorized hours (and thus the payment level) within the 12-month period due to a change in the number of hours of child care needed for a parent to work or participate in education or training, while maintaining eligibility for the entire 12-month period."

Response: Section 658E(c)(2)(N)(i)(I) of the Act states that each child who receives assistance under this subchapter in the State will be considered to meet all eligibility requirements for such assistance "and will receive such assistance" for not less than 12 months before the State or designated local entity re-determines the eligibility of the child under this subchapter. "[A]nd will receive such assistance" clearly indicates that eligibility and authorization for services, as determined at the time of eligibility determination or redetermination, should be consistent throughout the period. To clarify the regulatory language on this policy, we are adding language at § 98.21(a)(1) to say that once deemed eligible, the child shall receive services "at least at the same level" for the duration of the eligibility period. This also makes this section more consistent with the Act, which says that the child will receive such assistance, for not less than 12 months, and § 98.21(a)(3) of the final rule, which prohibits Lead Agencies from increasing family co-payments within the minimum 12-month eligibility period.

We are making a change to the language as proposed in the NPRM to now say that, once deemed eligible, the child shall receive services "at least at the same level." This makes it clear that the Lead Agency still has the ability to increase the child's benefit during the eligibility period, aligning the section with the provision at § 98.21(e)(4)(i), which requires Lead Agencies to act on information provided by the family if it would reduce the family's co-payment or increase the family's subsidy.

However, we do note that a State is not obligated to pay for services that are not being used, so if a family voluntarily changes their care arrangement to use less care, the State can adjust their payments accordingly. We do want to reemphasize, however, that as this rule makes it clear that authorizations do not have to be tied to a family's work, training, or education schedule, even if the parents' schedule changes, in the interest of child development and continuity, the child must be allowed the option to stay with their care arrangement.

Definition of temporary: This final rule defines "temporary change" at § 98.21(a)(1)(ii) to include, at a minimum: (1) Any time-limited absence from work for employed parents due to reasons such as need to care for a family member or an illness; (2) any interruption in work for a seasonal worker who is not working between regular industry work seasons; (3) any student holiday or break for a parent participating in training or education; (4) any reduction in work, training or education hours, as long as the parent is still working or attending training or education; and (5) any cessation of work or attendance at a training or education program that does not exceed three months or a longer period of time established by the Lead Agency.

The above circumstances represent temporary changes to the parents' schedule or conditions of employment, but do not constitute permanent changes to the parents' status as being employed or attending a job training or educational program. This definition is in line with Congressional intent to stabilize assistance for working families. Lead Agencies must consider all changes on this list to be temporary, but should not be limited by this definition and may consider additional changes to be temporary. The final rule modifies language proposed in the NPRM at § 98.21(a)(1)(ii)(A), which addresses absences from employment. Whereas the NPRM stipulated that the definition of temporary had to include family leave (including parental leave) or sick leave, the final rule modifies this to say any time-limited absence from work for an employed parent due to reasons such as need to care for a family member or an illness. This change was made to acknowledge that while a parent may have a legitimate reason for an absence, there may be circumstances where leave is not granted by the employer. This language ensures that even if official leave has not been granted, CCDF assistance should still be continued. To clarify, in this new language still accounts for family leave (or parental leave), which will now be included under the need to care for a family member.

Section 98.21(a)(ii)(F) clarifies that a child must retain eligibility despite any change in age, including turning 13 years old during the eligibility period. This is consistent with the statutory requirement that a child shall be considered to meet all eligibility requirements until the next re-determination. This allows Lead Agencies to avoid terminating access to CCDF assistance immediately upon a child's 13th birthday in a manner that may be detrimental to positive youth development and academic success or that might abruptly put the child at-risk if a parent cannot be with the child before or after school.

Comment: Commenters were supportive of this clarification, one stating that "taken together, these provisions protect children from losing access to child care because their parent experiences a temporary change in employment status, small increase in income, or has to move within the State," and another commenter stated that they found it particularly helpful "that ACF declares eligibility is maintained when a parent is using sick leave or parental leave or is on a student holiday break from classes."

However, one comment indicated that the State "would incur significant costs if allowed children to stay on after they turn 13," and recommended "State discretion to do this pending available funds."

Response: Given that there were few comments opposing this new policy allowing children to remain eligible after they turn 13, we are keeping this provision in this final rule. Additionally, given the nature of funding for CCDF, this "significant cost" is more accurately characterized as a reallocation of expenses rather than new costs. For the small subset of CCDF children who will turn 13 during their eligibility period, there is value in allowing them to retain eligibility, and that the benefits of such policies outweigh the potential challenges. We also note that if the family chooses to stop utilizing care prior to the end of the eligibility period (*e.g.* the school year ends and there are no plans for care during the summer), then the State would no longer be obligated to pay for the care that is not being used.

At § 98.21(a)(ii)(G), this final rule requires that a child retain eligibility despite any change in residency within the State, Territory, or Tribal service area. This provides stability for families who, under current practice, may lose child care assistance despite maintaining their State, Territory or Tribal residency. This may require coordination between localities within States, Territories, or Tribes or necessitate some Lead Agencies to change practices for allocating funding. This level of coordination is essential, as the State, Territory, or Tribe is the entity responsible for CCDF assistance.

Comment: We received a number of comments in this area, some that were supportive of this policy and its importance for ensuring that families retain their benefits, and others, particularly States that are county-administered, that were concerned about the implementation of this requirement. A number of States indicated that "due to the unique administrative structure of [county administered] States, with delegated authority to local entities for administration of programs and services, the transference of eligibility, from one part of the State to another, poses uniquely difficult situations when each locality has a distinctive financial situation. For example, the States are unsure how to handle continuity of services and maintenance of 12-month eligibility during situations where a family moves out of the county where they initially became eligible and into a county that is out of funding and has a wait list." Some commenters asked for further clarification, particularly as it related to which county would be responsible for the ongoing payment, "If a child is eligible for 12 months, does the originating county continue payments or the receiving county? Or, should the State reserve funding to address the inter-county movement of families?" This commenter further emphasized that "given the financial impact, additional guidance is needed with regard to how 12-month eligibility is funded."

This also raised the issue of what happens when a family moves out of State. One commenter said, "There are also situations where a customer moves out of State. In some instances, they move without notifying the Lead Agency. [This] Lead Agency recommends that the rule is amended to allow Lead Agencies to terminate benefits prior to 12-months if it is discovered that a family moved out of State."

Response: Given the number of comments on this issue, we carefully considered the various factors in play and are keeping the policy on retaining eligibility if a family moves within the State, but are adding new language that would allow a Lead Agency to terminate eligibility prior to the end of the eligibility period if the family moves out of the State.

While we understand some of the unique challenges facing county-administered States, given that the CCDF block grant is a block grant to the State, it is reasonable for the State to develop policies that allow a family to retain their eligibility as long as they remain within the State. The question of whether the receiving or originating county should pay for the assistance is a question best left up to the State. These are logistical and implementation issues that will vary depending on each State's approach to administering the program. However, we do emphasize that this does not prohibit counties from establishing different eligibility criteria to take into account local variation.

As for a family that moves out of the State, we agree that this would be considered appropriate grounds for termination. We have added a new section at § 98.21(a)(5) describing additional limited circumstances that would allow a Lead Agency to end assistance prior to the end of the minimum 12-month eligibility period. We discuss this in more detail below, but the new regulatory language at § 98.21(a)(5)(ii) allows Lead Agencies to terminate assistance due to a change in residency outside of the State, Territory, or Tribal service area. However, while the final rule allows Lead Agencies to terminate for this reason, this is a permissive policy and not a requirement. Neighboring States/Territories/Tribes can still develop agreements to allow families to retain their eligibility if they cross State/Territory/Tribal boundaries. For example, in large metropolitan areas where daily commutes and neighborhoods regularly cross State boundaries, or Tribal populations which may move outside the Tribal service area but remain within a State boundary, it may be appropriate to develop such agreements. We encourage Lead Agencies to develop policies to meet the needs of their families and match the realities of their population's geographic and economic mobility.

Nothing in this rule prohibits Lead Agencies from establishing eligibility periods longer than 12 months or lengthening eligibility periods prior to a re-determination. We encourage (but do not require) Lead Agencies to consider how they can use this flexibility to align CCDF eligibility policies with other programs serving low-income families, including Head Start, Early Head Start, Medicaid, or SNAP. For example, once determined eligible, children in Head Start remain eligible until the end of the succeeding program year. Children in Early Head Start are considered eligible until they age out of the program. Consistent with existing ACF guidance (ACYF–PIQ–CC–99–02) a Lead Agency could establish eligibility periods longer than 12 months for children enrolled in Head Start and receiving CCDF in order to align eligibility periods between programs. Similarly, Lead Agencies are encouraged to establish longer eligibility periods during an infant or toddler's enrollment in Early Head Start or in other collaborative models, such as Early Head Start-Child Care Partnerships.

Operationalizing alignment across programs can be challenging, particularly if families enroll in programs at different times. While the Lead Agency must ensure that eligibility is not re-determined prior to 12 months, it could align with other benefit programs by "resetting the clock" on the eligibility period to extend the child's CCDF eligibility by starting a new 12-month period if the Lead Agency receives information, such as information pursuant to eligibility determinations or re-certifications in other programs, that confirms the child's eligibility and current co-payment rate. Alignment promotes conformity across Federal programs, such as SNAP, and can simplify eligibility and reporting processes for families and administering agencies. However, it should be noted that a Lead Agency cannot terminate assistance for a child prior to the end of the minimum 12-month period if the recertification process of another program reveals a change in the family's circumstances, unless those changes impact CCDF eligibility (*e.g.*, a change in income over 85 percent of SMI or, at the option of the Lead Agency, a non-temporary change in the work, job training, or educational status of the parent). We retained the language in section 98.21(a)(1) as proposed in the NPRM.

Continued assistance. In 98.21(a)(2) of this final rule, if a parent experiences a non-temporary job loss or cessation of education or training, Lead Agencies have the option—but are not required—to terminate assistance prior to the minimum 12 months. Per the Act, prior to terminating assistance, the Lead Agency must provide a period of continued assistance of at least three months to allow parents to engage in job search activities. By the end of the minimum three-month period of continued assistance, if the parent is engaged in an eligible work, education, or training activity, assistance should not be terminated and the child should either continue receiving assistance until the next scheduled re-determination or be re-determined eligible for an additional minimum 12-month period. This final rule clarifies that assistance must be provided at least at the same level during the period. This clarification is important because reducing levels of assistance during this period would undermine the statutory intent to provide stability for families during times of increased need or transition.

It is important to note that the Act allows Lead Agencies to continue child care assistance for the full minimum 12-month eligibility period even if the parent experiences a non-temporary job loss or cessation of education or training. The default policy is that a child remains eligible for the full minimum 12-month eligibility period, but the Lead Agency has the option to terminate assistance under these particular conditions. A Lead Agency may choose not to terminate assistance for any families prior to a re-determination at 12 months.

If a Lead Agency chooses to terminate assistance under these conditions after at least three months of continued assistance, it has the option of doing so for all CCDF families or for only a subset of CCDF families. For example, a Lead Agency could choose to allow priority families (*e.g.*, children with special needs, children experiencing homelessness) to remain eligible through their eligibility period despite a parent's loss of work or cessation of attendance at a job training or educational program, but terminate assistance (after a period of continued assistance) for families who do not fall in a priority category. Or, a Lead Agency may choose to allow families in certain types of care, such as high-quality care, to remain eligible regardless of a parent's work or education activity.

While the Lead Agency must provide continued assistance for at least three months, there is no requirement to document that the parent is engaged in a job search or other activity related to resuming attendance in an education or training program during that time. In fact, we strongly discourage such policies as they would be an additional burden on families and be inconsistent with the purposes of CCDF.

If a Lead Agency does choose to terminate assistance under these circumstances, it must allow families that have been terminated to reapply as soon as they are eligible again instead of making the family wait until their original eligibility period would have ended in order to reapply.

A policy that provides continuous eligibility, regardless of non-temporary changes, reduces the burden on families and the administrative burden on Lead Agencies by minimizing reporting and the frequency of eligibility adjustments. Retention of eligibility during periods of family instability (such as losing a job) can alleviate some of the stress on families, facilitate a smoother transition back into the workforce, and support children's development by maintaining continuity in their child care. Moreover, studies show that the same families that leave CCDF often return to the program after short periods of ineligibility. A report published by the Assistant Secretary for Planning and Evaluation (ASPE) at HHS, *Child Care Subsidy Duration and Caseload Dynamics: A Multi-State Examination,* found that "many families receive subsidies sporadically over time and frequently return to the subsidy programs after they exit." Short periods of subsidy receipt can be the result of a variety of factors, including eligibility policies and procedures. The "churning" present in CCDF demonstrates that families often lose their child care assistance for conditions that are temporary, which is detrimental for the family and child and inefficient for the Lead Agency.

Lead Agencies considering the option to terminate assistance in response to "non-temporary" changes are encouraged to use administrative data to understand the extent to which CCDF families currently cycle on and off the program, to make a determination as to whether it is in the interest of anyone (child, parent, or agency) to terminate assistance for families who may ultimately return to the program.

Some Lead Agencies include in their definition of allowable work activities a period of job search and allow children to initially qualify for CCDF assistance based on their parent(s) seeking employment. It is not our intention to discourage Lead Agencies from allowing job search activities as qualifying work. Therefore, consistent with language included in the preamble to the NPRM, new regulatory language at § 98.21(a)(2)(iii) addresses this circumstance. This is consistent with the intent of the Act to allow Lead Agencies the option to end assistance prior to a re-determination if the parent(s) has not secured employment or educational or job training activities, as long as assistance has been provided for no less than three months. In other words, if a child qualifies for child care assistance based on a parent's job search, the Lead Agency has the option to end assistance after a minimum of three months if the parent has still has not found employment, although assistance must continue if the parent becomes employed during the job search period. Even if the parent does not find employment within three months, Lead Agencies could choose to provide additional months of job search to families as well or to continue assistance for the full minimum 12-month eligibility period.

Comment: Commenters were supportive of this policy. One State indicated while "continuity will have a fiscal impact," they thought that "allowing States the option to terminate assistance prior to 12 months, with a minimum of 3 months of continued assistance is reasonable." Other States voiced appreciation for the clarification that States have the "discretion to continue assistance to a subset of families such as those within a certain priority or type of care."

There was a request for clarification regarding how often the minimum 3-month period of continued assistance could apply within a particular eligibility period. The commenter asked "if, within the 12-month eligibility period, an individual experiences more than one occasion of permanent job loss or of education/training, do they continue to get 3 months of job search each time, and with each new loss?" These commenters asked for clarification about "whether there are any limitations to how many times within a single 12-month eligibility period a person is entitled to a 3-month job search period." This was raised as a concern because of the potential negative impact it could have on a parent's motivation "to truly reestablish employment or education if they are able to "work" for one day every three months and still continue to receive services."

Response: A plain reading of the statutory language does not provide a limit to the number of times a family could receive the period of continued assistance. Given that the 3-month period of continued assistance is at the State option and that the default policy (as stated above) is for families to retain their eligibility until the end of the eligibility period, it would be inconsistent to put a limit on how many times this could apply. Since the intent of this provision is to allow the parent some time to resume work, or resume attendance at a job training or educational activity, a parent who has successfully found new employment or resumed another qualifying activity within the minimum 3-month period should not be penalized by losing their child care assistance (and possibly undermining the stability of newfound employment, training, or education). Especially given the often unstable nature of employment among low-income communities, this will provide some measure of stability in instances where families, despite their best efforts, cycle in and out of employment. In these instances, when the home life may be in flux, a level of stability in the child's care arrangement becomes that much more valuable.

Additional circumstances for termination: In the proposed rule, we asked for comment on whether there are any additional circumstances other than those discussed above under which a Lead Agency should be allowed to end a child's assistance (after providing three months of continued assistance) prior to the minimum 12-month period. Commenters were reminded that since these regulations must comply with statutory requirements, any suggestions had to remain within the bounds of the Act in order to be considered.

Based on feedback from States and various stakeholders (received prior to the publication of the proposed rule), ACF had already considered possible exceptions to the minimum 12-month eligibility period for certain populations, such as children in families receiving TANF and children in protective services, but had decided that such special considerations would be in conflict with the Act, which clearly provides 12-month eligibility for all children.

Comment: We had a number of comments in this area. Commenters provided suggestions for reasons that a State should be able to terminate assistance prior to the end of the eligibility period, including: Non-use of subsidy, fraud or intentional program violations, moving out of the State, changes in household composition, protective services status (some emergency assistance that may not be required for a full eligibility period), change in priority group, and failure to cooperate with mandatory child support.

Response: We agreed with commenters on the need to provide some additional allowances in this area because there were legitimate reasons why a Lead Agency may need to terminate assistance prior to the end of the eligibility period. Therefore, in response to comments, the final rule adds a new § 98.21(a)(5), which describes additional limited circumstances that would allow a Lead Agency to end assistance prior to the end of the minimum 12-month eligibility period.

This new regulatory language states that notwithstanding paragraph (a)(1), the Lead Agency may discontinue assistance prior to the next re-determination in limited circumstances where there have been: (i) Excessive unexplained absences despite multiple attempts by the Lead Agency or designated entity to contact the family and provider, including notification of possible discontinuation of assistance; (A) If the Lead Agency chooses this option, it shall define the number of unexplained absences that shall be considered excessive; (ii) A change in residency outside of the State, Territory, or Tribal service area; or (iii) Substantiated fraud or intentional program violations that invalidate prior determinations of eligibility.

We have determined that these three were compelling reasons for which Lead Agencies would be justified in acting. Regarding termination due to excessive unexplained absences, we stress that every effort should be made to contact the family prior to terminating benefits. Such efforts should be made by the Lead Agency or designated entity, which may include coordinated efforts with the provider to contact the family. If a State chooses to terminate for this reason, the Lead Agency must define how many unexplained absences would constitute an "excessive" amount and therefore grounds for early termination. The definition of excessive should not be used as a mechanism for prematurely terminating eligibility and must be sufficient to allow for a reasonable number of absences. It is ACF's view that unexplained absences should account for at least 15 percent of a child's planned attendance before such absences are considered excessive. This 15 percent aligns generally with Head Start's attendance policy and ACF will consider it as a benchmark when reviewing and monitoring this requirement.

As discussed above, we are allowing States to terminate eligibility if the family moves outside of the State, Territory, or Tribal service area. This was not explicitly discussed in the proposed rule, but the discussion about maintaining eligibility when moving within State revealed the need for clarification in this area. Given that the CCDF program is a block grant with the State, it would not make sense for the family's benefit to be able to travel across those borders. As discussed above, this is a permissive policy and not a requirement. We encourage Lead Agencies to develop agreements where appropriate to accommodate parental movement, particularly in areas where appropriate and necessary to meet the needs of families. And as a reminder, as stated in § 98.21(a)(ii)(G), States cannot terminate assistance if a family is moving within the State.

As for changes in household composition, this is already allowed, in so far as the Lead Agency can require families to report such changes if they would result in a change that would raise the family's income level above 85% of SMI.

Fraud or intentional program violation would also be a legitimate reason to terminate assistance if such fraud invalidates the prior eligibility determination or redetermination. One commenter stated that it "is critical to have processes and procedures in place to limit improper payments and other fraudulent activities," and therefore recommended including a provision in the final rule that families could lose eligibility if they misrepresented circumstances at the initial determination and/or provided fraudulent information. Early termination of benefits is justified when there has been substantiated fraud or intentional program violation and such a family would not have been eligible. We caution that this does not change the limitations on what a State can require a family to report during the eligibility period. However, in instances where program integrity efforts reveal fraud or intentional program violations, under this final rule, the State would be able to terminate eligibility.

Co-payments. Section 98.21(a)(3) clarifies that a Lead Agency cannot increase family co-payment amounts within the minimum 12-month eligibility period as raising co-payments within the eligibility period would not be consistent with the statutory requirement that the child receive such assistance for not less than 12 months. Protecting co-payments levels within the eligibility period provides stability for families and reduces administrative burden for Lead Agencies. This final rule includes an exception to this rule for families that are eligible as part of the graduated phase-out provision discussed below.

In addition, the final rule requires the Lead Agency to allow families the option to report changes, particularly because we want to permit families to report those changes that could be beneficial to the family's co-payment or subsidy level. The Lead Agency must act upon such reported changes if doing so would reduce the family's co-payment or increase the subsidy. The Lead Agency is prohibited from acting on the family's self-reported changes if it would reduce the family's benefit, such as increasing the co-payment or decreasing the subsidy.

The limitation on raising co-payments, by protecting the child's benefit level for the minimum 12-month eligibility period, is consistent with the statutory requirement at 658E(c)(2)(N) of the Act that, once deemed eligible, a child shall receive such assistance, for not less than 12 months. Raising co-payments earlier than the 12-month period could potentially destabilize the child's access to assistance and has the unintended consequence of forcing working parents to choose between advancing in the workplace and child care assistance. This is discussed further below in the section on reporting changes in circumstances.

Comment: Comments received in this area were mixed. In general, States wanted to retain the ability to increase co-payments throughout the year, while national organizations and other stakeholders thought that keeping co-payments stable during the year was a worthwhile policy for families.

Those who supported this policy cited studies that showed that "high co-payments are a major reason that families leave the subsidy program." Commenters also referenced a Senate Health, Education, Labor, and Pensions Committee Report on the CCDBG Act, which notes that "The committee does not want to discourage families engaged in work from pursuing greater opportunities in the form of increased wages or earnings. . . . The committee strongly believes that if families are truly to achieve self-sufficiency that CCDBG cannot perversely incentivize families to forgo modest raises or bonuses for fear of losing assistance under the CCDBG program."

Those in favor of retaining the ability to increase co-pays pointed to the implications, primarily financial, should they be unable to adjust co-payments. One stated that they would be forced to "charge the highest co-payment amounts allowed in order to manage the fiscal liability" and another pointed out that such a policy "limits the Department's ability to utilize co-payments as a means of managing State fiscal resources," and an inability to do so would "result in serving fewer children and families and may force waitlists."

Other commenters stated that they thought increasing co-payment amounts during the eligibility period would not negatively affect a family's subsidy or co-payment and would not be unduly burdensome. This commenter reasoned that "In most cases, income changes reported are fairly small, and even if that change moves the family up on the co-pay schedule, the incremental change in the co-pay will likely be less than $4 per week." Commenters also pointed out that increasing co-payment amounts was beneficial to families to help them transition off child care assistance and thus avoid the cliff effect that comes with losing the subsidy.

Response: While we recognize the States' positions, for the following reasons, we are declining to change this for this final rule. Regarding the use of co-payments to manage budgets and wait lists, such ongoing incremental changes are to the overall detriment of participating families and ultimately undermine the effectiveness of the program. One of the commenters above mentioned that these co-payment increases are usually minor and would not impact the family's financial situation. Given this incremental financial benefit to the State, the administrative burden to both the family (notification with every change in income) and the State (having to track and adjust co-payments with minor changes for families throughout the year) outweighs the benefit gained. Additionally, a small increase (such as the $4 increase mentioned above) may seem incremental from a policy perspective, but may represent a significant burden on low-income families managing the daily expenses of food, clothing, diapers, etc.

As for using co-payments to mitigate the impact of the cliff effect, this is an area where we agree. This is why § 98.21(e)(3) allows Lead Agencies to increase co-payments for families eligible due to the graduated phase-out provision. Since the graduated phase-out period (which will be discussed in the next section) was specifically designed to help families transition as their income rises, it is appropriate that co-payments be adjusted.

Graduated phase-out. New statutory language at Section 658E(c)(2)(N)(iv) of the Act requires Lead Agencies to have policies and procedures in place to allow for the provision of continued child care assistance at the time of re-determination for children of parents who are working or attending a job training or educational program and whose income has risen above the Lead Agency's initial income eligibility threshold to qualify for assistance but remains at or below 85 percent of State median income. Lead Agencies retain the authority to establish their initial income eligibility threshold at or below 85 percent of SMI. If a Lead Agency's initial eligibility threshold is set at 85 percent of SMI, it would be exempt from this requirement.

The proposed rule would have required Lead Agencies that set their initial income eligibility level below 85 percent of SMI (for a family of the same size) to provide for a graduated phase-out of assistance by establishing two-tiered eligibility (an initial, entry-level income threshold and a higher exit-level income threshold for families already receiving assistance) with the exit threshold set at 85 percent of SMI. States would have had the option of either allowing the family to remain income eligible until the family exceeded 85% of SMI or for a limited period of not less than an additional 12 months.

The purpose of this graduated phase-out provision is to promote continuity of care and is consistent with the statutory requirement that families retain child care assistance during an eligibility period as their income increases. However, as discussed below, in response to comment, the final rule makes two significant changes to this requirement: (1) Offering additional flexibility on setting the second tier of eligibility, and (2) removing the possible time limit on eligibility.

Comment: We received mixed comment on the proposed graduated phase-out requirement. While commenters were supportive of improving continuity for families, a number of commenters indicated that they thought setting the two tiered system with the exit threshold at 85% of SMI was too restrictive. Commenters also raised similar concerns about the cost of this provision and the impact that it could potentially have on the demographics of CCDF families served. One commenter said that "the down side of this otherwise sensible policy idea is that, absent sufficient resources, lower income families may be denied access to subsidies while higher income families continue to benefit. It's a difficult tradeoff."

Response: Given the comments that we received in this area, and in recognition of the difficult trade-offs inherent in this policy, the final rule revises language proposed by the NPRM for the graduated phase-out provision. This final rule still requires Lead Agencies to establish two-tiered eligibility thresholds, but the graduated phase-out requirement at § 98.21(b) now says that the second tier of eligibility (used at the time of eligibility re-determination) will be set at 85 percent of SMI for a family of the same size, but that the Lead Agency has the option of establishing a second tier lower than 85% of SMI as long as that level is above the Lead Agency's initial eligibility threshold, takes into account the typical household budget of a low income family, and provides justification that the eligibility threshold is (1) sufficient to accommodate increases in family income that promote and support family economic stability; and (2) reasonably allows a family to continue accessing child care services without unnecessary disruption.

This revision from what was proposed in the NPRM will give Lead Agencies additional flexibility to establish their second tier of eligibility. However, it is important to note that once deemed eligible, the family shall be considered eligible for a full minimum 12-month eligibility period even if their income exceeds the second eligibility level during the eligibility period, as long as it does not exceed 85 percent of SMI.

While the revised regulatory language offers Lead Agencies some flexibility to set the second tier of eligibility, we still strongly encourage that Lead Agencies establish this second tier at 85 percent of SMI (as a number of States have already done). Not only does this maximize continuity of subsidy receipt for the family, linking the exit threshold to the Federal eligibility limit is the most straightforward approach for families to navigate and for Lead Agencies to implement. However, ACF also understands that there are significant trade-offs associated with establishing the second tier at 85% of SMI, including how many lower income families can be served in the program.

As a result, the final rule provides Lead Agencies flexibility to set their second tier below 85% of SMI, provided they show that their exit threshold takes into account typical family expenses, such as housing, food, health care, diapers, transportation, etc., and is set at an income level that promotes and supports family economic stability and reasonably allows a family to continue accessing child care services without unnecessary disruption. Lead Agencies setting their second tier below 85% of SMI must take into account a number of factors to determine whether the family's increase in income is a substantial enough change to justify a loss of assistance without causing a "cliff effect." For example, the Lead Agency would need to show that there is a difference between the first and second eligibility tiers and that this difference is sufficient to accommodate increases in income over time that are typical for low-income workers. ACF encourages Lead Agencies setting their second tier below 85% SMI to also consider how families that lose their subsidy will access ongoing child care and potential impacts on families' economic security.

Additionally, when determining a family's ability to afford child care, the Lead Agency should be mindful that this final rule uses seven percent of family income as a benchmark for affordable child care. While Lead Agencies have flexibility in establishing their sliding fee scales and determining what constitutes a cost barrier for families, seven percent level is a recommended benchmark and any calculations about affordability should either incorporate this benchmark or provide justification for how families can afford to spend a higher percentage of their income on child care. Furthermore, to ensure Lead Agencies are fully taking into consideration the financial obligations of families, Lead agencies must also collect data on any amounts providers charge families more than the required family co-payment in instances where the provider's price exceeds the subsidy payment, if the State allows for such a practice, and to demonstrate a rationale for the allowance to charge families any additional amounts. This is mentioned in greater detail below in response to comments received specifically on the policies set forth in the proposed rule related to charging amounts above the co-payment. As for other concerns about the potential impact of the graduated phase-out provision, there are already several factors that will mitigate the possible negative impacts of this policy. First of all, the graduated phase-out provision provides some level of stability by protecting income growth, but there will still be natural attrition from the program due to other factors. Families have to go through redetermination every 12 months (or a longer period set by the Lead Agency) and be deemed otherwise eligible for the program. Families will also cycle out of the program through the Lead Agency option to terminate assistance due to job loss or cessation of education/training (after at least three months of continued assistance). According to analyses of CCDF administrative data, the current levels of attrition over time are steady and dramatic. Approximately 24 percent of families receive services for longer than a year, only about 10 percent receive it for 2 years, and the decline continues until approximately only 1 percent still receives the subsidy after 5 years. (Unpublished HHS tabulations based on CCDF administrative data reported by States on the ACF–801) We expect policies put into place to promote continuity will lengthen eligibility, but due to external factors, there will continue to be a turnover in the CCDF population.

In addition, the financial impact of this policy may be contained because: (1) The average cost of subsidy tends to naturally decline over time as the child's age increases, and (2) this final rule allows the Lead Agency to increase co-pays during the graduated phase-out period. CCDF administrative data shows that per child costs decline as the child ages. This is due to the fact that school-age care is typically part-time for much of the year and less expensive than care provided for younger children. Therefore, the cost of the subsidy for families who remain on the program will naturally decline, which will free up resources for new enrollment.

As discussed further below, this final rule at section 98.21(b)(3) allows Lead Agencies to adjust co-payments during the graduated phase-out period. Over time, this would result in more cost sharing with families and free up State funds to allow other children to enter the subsidy system. As co-pays rise for parents with increasing incomes, families will naturally choose to leave the program.

Comment: There were objections to the second option of the proposed graduated phase-out proposal, which would have allowed Lead Agencies to offer a period of graduated phase-out for a limited period of not less than an additional 12 months. A number of commenters objected to "any provision that allows or encourages States to set arbitrary time limits on child care assistance," and said that "income, rather than time spent in the program, is a far better measure of families' need for continued assistance."

Response: We agree with this concern and have removed the provision from this final rule. The option was included in the proposed rule to provide some parameters around the graduated phase-out provision, but we recognize now that the introduction of a time limit to the program could have unintended consequences and runs counter to the goals of the program, including to support parents trying to achieve independence from public assistance. And as described above, there are factors already in play within the graduated phase-out provision that will naturally limit the fiscal impact of this over time. That, combined with the new flexibility on establishing the second eligibility threshold, makes the previous option of "a limited period of not less than an additional 12 months" unnecessary.

We have also added language at § 98.21(b)(2) to clarify that once determined eligible under the graduated phase-out provision, the family is considered eligible under the same conditions described in § 98.20 and § 98.21, with the exception of the co-payment restrictions at § 98.21(a)(3). Pursuant to § 98.21(a)(3), Lead Agencies are prohibited from increasing family co-payments within the minimum 12-month eligibility period. However, in subparagraph (b)(2) of this section, Lead Agencies will be permitted to adjust family co-payment amounts during the graduated phase-out period to help families transition off of child care assistance as they become better able to afford the cost of care.

Lead Agencies have the option to gradually increase co-payments for families with children eligible under the graduated phase-out provision and may require additional reporting on changes to do so. However, this final rule further clarifies that such additional reporting requirements must not constitute an undue burden, pursuant to the conditions in (e)(2)(ii) and (e)(2)(iii). Such requirements must not require an office visit in order to fulfill notification requirements, and must offer a range of notification options (*e.g.*, phone, email, online forms, extended submission hours) to accommodate the needs of parents.

While such co-payment policies should help families gradually transition off of assistance, ACF encourages Lead Agencies to ensure that co-payment increases are gradual in proportion to a family's income growth and do not constitute too high a cost burden for families so as to ensure stability as family income increases. Lead Agencies must remain in compliance with the statutory requirement at Section 658E(c)(5) that the State's sliding fee scale is not a barrier to families receiving CCDF assistance.

Income eligibility policies play an important role in promoting pathways to financial stability for families. Currently, 16 Lead Agencies use two-tiered income eligibility. However, even with higher exit-level eligibility thresholds in these States/Territories, a small increase in earnings may result in families becoming ineligible for assistance before they are able to afford the full cost of care. While there are many factors that determine how a State sets their eligibility thresholds, an unintended consequence of low eligibility thresholds is that low income parents may pass up raises or job advancement in order to retain their subsidy, which undermines a key goal of CCDF to help parents achieve independence from public assistance. This rule allows low-income families to continue child care assistance as their income grows in order to support financial stability.

Irregular fluctuations in earnings. In § 98.21(c), we reiterate statutory language at Section 658E(c)(2)(N)(i)(II) of the Act which requires Lead Agencies to establish processes for initial determination and re-determination of eligibility that take into account parents' irregular fluctuations in earnings. We clarify that temporary increases in income should not affect eligibility or family co-payments, including monthly income fluctuations that show *temporary* increases, which if considered in isolation, may incorrectly indicate that a family is above the federal threshold of 85 percent of SMI, when in actuality their annual income remains at or below 85 percent of SMI.

Lead Agencies retain broad flexibility to set their policies and procedures for income calculation and verification. There are several approaches Lead Agencies may take to account for irregular fluctuations in earnings. Lead Agencies may average family earnings over a period of time (*e.g.*, 12 months) to better reflect a family's financial situation; Lead Agencies may adjust documentation requirements to better account for average earnings, for example, by requesting the earnings statement that is most representative of the family's income, rather than the most recent statement; or Lead Agencies may choose to discount temporary increases in income provided that a family demonstrates that an isolated increase in pay (*e.g.*, short-term overtime pay, lump sum payments such as tax credits, etc.) is not indicative of a permanent increase in income.

We did not receive substantive comment in this section and are therefore retaining the proposed language in this final rule.

Undue disruption. In accordance with Section 658E(c)(2)(N)(i)(II) of the Act, the final rule adds § 98.21(d), which requires the Lead Agency to establish procedures and policies to ensure that parents, especially parents receiving TANF assistance, are not required to unduly disrupt their education, training, or employment in order to complete the eligibility re-determination process. This provision of the Act seeks to protect parents from losing assistance for failure to meet renewal requirements that place unnecessary barriers or burdens on families, such as requiring parents to take leave from work in order to submit documentation in person or requiring parents to resubmit documents that have not changed (*e.g.*, children's birth certificates).

To meet this provision, Lead Agencies could offer a variety of family-friendly mechanisms through which parents could submit required documentation (*e.g.*, phone, email, online forms, extended submission hours, etc.). Lead Agencies could also consider strategies that inform families, and their providers, of an upcoming re-determination and what is required of the family. Lead Agencies could consider only asking for information necessary to make an eligibility determination or only asking for information that has changed and not asking for documentation to be re-submitted if it has been collected in the past (*e.g.*, children's birth certificates; parents' identification, etc.) or is available from other electronic data sources (*e.g.*, verified data from other benefit programs). Lead Agencies can pre-populate renewal forms and have parents confirm that information is accurate.

In general, ACF strongly encourages Lead Agencies to adopt reasonable policies for establishing a family's eligibility that minimize burdens on families. Given the new eligibility provisions established by reauthorization, Lead Agencies are encouraged to re-evaluate processes for verifying and tracking eligibility to simplify eligibility procedures and reduce duplicative requirements across programs. Simplifying and streamlining eligibility processes along with other changes in the subpart may require significant change within the CCDF program. Lead Agencies should provide appropriate training and guidance to ensure that caseworkers and other relevant child care staff (including those working for designated entities) clearly understand new policies and are implementing them correctly. Comments received in this section were supportive of the proposed policies and we are therefore keeping these provisions in this final rule.

Reporting changes in circumstance. Currently, many Lead Agencies have policies in place to monitor eligibility on an ongoing basis to ensure that at any given point in time a family is eligible for services, often called change-reporting or interim-reporting. As the revised statute provides that children may retain eligibility through most changes in circumstance, it is our belief that comprehensive reporting of changes in circumstance is not only unnecessary but runs counter to CCDF's goals of promoting continuity of care and supporting families' financial stability.

Additionally, there are challenges associated with interim monitoring and reporting, including costs to families trying to balance work or education and family obligations and costs to Lead Agencies administering the program. Overly burdensome reporting requirements can also result in increased procedural errors, as even parents who remain eligible may face difficulties complying with onerous reporting rules.

Lead Agencies should significantly reduce change reporting requirements for families within the eligibility period, and limit the reporting requirements to changes that impact federal CCDF eligibility. Section 98.21(e) of final rule requires Lead Agencies to specify in their Plans any requirements for families to notify the Lead Agency (or its designee) of changes in circumstances between eligibility periods, and describe efforts to ensure such requirements do not place an undue burden on eligible families that could impact continued eligibility between re-determinations.

Under § 98.21(e)(1), the Lead Agency must require families to report a change at any point during the minimum 12-month period only when the family's income exceeds 85% of SMI, taking into account irregular income fluctuations. At the option of the Lead Agency, the Lead Agency may require families to report changes where the family has experienced a non-temporary cessation of work, training, or education.

Section 98.21(e)(2) specifies that any notification requirements may not constitute an undue burden on families and that compliance with requirements must include a range of notification options (*e.g.*, phone, email, online forms, extended submission hours) and not require an in-person office visit. This includes parents who are working, as well as those participating in job training or educational programs.

The final rule also limits notification requirements only to items that impact a family's eligibility (*e.g.*, income changes over 85 percent of SMI, and at Lead Agency option, the status of the child's parent as working or attending a job training or educational program) or those that are necessary for the Lead Agency to contact the family or pay providers (*e.g.*, a family's change of address or a change in the parent's choice of provider). Lead Agencies may examine additional eligibility criteria at the time of the next re-determination.

Section 98.21(e)(4) requires Lead Agencies to allow families the option of reporting information on an ongoing basis, particularly to allow families to report information that would be beneficial to their assistance (such as an increase in work hours that necessitates additional child care hours or a loss of earnings that could result in a reduction of the family co-payment). While we encourage limiting reporting requirements for families, it was not our intent to limit the family's ability to report changes in circumstances, particularly in cases where they may have entered into more stressful or vulnerable situations or would be eligible for additional child care assistance. Moreover, if a family voluntarily reports changes on an ongoing basis to the Lead Agency that do not make the family ineligible, the Lead Agency must act on these provisions if it would increase the family's benefit, but cannot act on any information that would reduce the family's benefit. (We do note, however, that a Lead Agency may adjust the subsidy amount in accordance with its payment rate schedule in the event that a family voluntarily changes child care providers during the eligibility period). All of the above provisions apply to any entities that perform eligibility functions in the CCDF program on the Lead Agency's behalf.

Finally, some Lead Agencies currently use electronic data from other State/Territory and Federal databases to verify or monitor CCDF eligibility. Lead Agencies may continue this practice, which is particularly useful in reducing the burden on families at the time of initial determination or re-determination. However, Lead Agencies should ensure any such data that is acted upon during the minimum 12-month eligibility period conform to the above requirements for change reporting and all CCDF rules.

We recognize that some States currently send interim reporting forms to families during the eligibility period to request that families verify or update information. Some States use such interim reporting to align with processes in other programs, such as semi-annual SNAP simplified change reporting. Such periodic reporting forms are contrary to the spirit of the Act, which provides for minimum 12-month eligibility between redeterminations. In the NPRM, we asked for comments on whether States should have the option for 6-month interim reporting forms for CCDF, and if such reports are allowed, the best way to structure them so as to promote continuity of services for the minimum 12-month eligibility period for eligible families, consistent with the Act. We also asked for comment on whether States should be able to adjust co-payments or otherwise act on verified information (*e.g.*, updated income information) received from other programs or sources.

As discussed earlier, acting on information received pursuant to eligibility determinations or re-certifications in other programs allows CCDF Lead Agencies to extend a child's eligibility by "resetting the clock" and starting a new 12-month period. We asked for comments on whether the benefits of this approach outweigh the impact of any co-payment increases, if allowed, during the minimum 12-month period, and whether those benefits would be a reason to allow Lead Agencies to act on verified information from other programs.

Comment: Comments received in this area were mixed, mostly between States who value interim and six-month reporting as a mechanism for working with families and ensuring that their information is still accurate, and other commenters who prioritized stability for the family and minimizing administrative burden.

One State commented that six month reporting was necessary "to ensure that a need for care still exists and to review any changes that may benefit the client." Another said that it "utilizes a 6 month review form for parents to report changes in circumstances." This process, according to the State, "does not require the parent to show up in person and thus does not constitute an undue burden on families."

Another area of concern for States was alignment with other programs. There was concern that if a State cannot act on information discovered through interim reporting and "if these changes cannot be applied, the program will need to be de-linked from other eligibility programs. This would impose a significant administrative burden and will be costly."

Other commenters had concerns about the impact that interim reporting would have on families and were particularly wary of any such reporting undermining the minimum 12-month eligibility established by the Act. One commenter pointed out that the process "can be overly burdensome to poor and low-income families, adds an additional administrative cost and, as noted in the proposed rules, is not in keeping with the spirit of the Act's minimum 12-month eligibility period."

Response: Despite concerns to the contrary, limiting interim reporting and, in particular, prohibiting 6-month reporting is essential to maintaining the advances made by the CCDBG Act of 2014. We are concerned that 6-month interim checks will lead to de-facto redeterminations, with many families potentially losing subsidy for failure to submit interim reports (even if they otherwise continue to meet eligibility requirements). Additionally, because the Act specifies that, once determined to be eligible, a child will be considered to meet all eligibility requirements for such assistance and will receive such assistance, for not less than 12 months, there is no longer sufficient rationale for verifying information (such as a need for care) or tracking changes within the eligibility period. The Act now specifically mandates that children will be considered to meet eligibility requirements, so tracking changes would be not only unnecessary, but in conflict with the Act. While some States indicate that interim reporting is not burdensome to families, the fact remains that, if a family did not complete a report, they would most likely be terminated from assistance. This is counter to the minimum 12-month redetermination period established by the Act.

However, for the purposes of adjusting co-payments, in section 98.21(e)(3) we do allow Lead Agencies to require additional reporting on changes in family income for families in the graduated phase-out category. This should alleviate some of the concern from States and allow some measure of reporting, but limited to those families who have already exceeded the State's initial eligibility threshold.

Research and experience in the field suggests that administrative burden is a barrier to continuity; the Act requires that redetermination processes should not unduly disrupt parents' employment. A literature review of research on child care subsidies found, "According to an experimental study in Illinois and analyses of administrative data in six other States, the length of subsidy spells is associated with the timing of subsidy redetermination, with shorter redetermination periods being associated with shorter subsidy spells and subsidy spells tending to end at the time of redetermination." (Forry, et al., Child Trends, December 2013) We are therefore keeping this final rule consistent with what was proposed in the NPRM.

For commenters concerned about limitations on interim reporting being a barrier to linking with other programs, we want to emphasize that that these limits refer to CCDF reporting requirements. If a family is participating in another benefit program that has interim reporting requirements, nothing in this final rule prohibits those programs from interim reporting. This would, however, limit the Lead Agency's ability to act, for CCDF purposes, on information gathered through another program's reporting. We recognize the possible logistical challenges of alignment, and will make technical assistance providers with experience in this area available to work with and support Lead Agencies in maintaining alignment with other programs while implementing these new requirements.

For those commenters who expressed a desire for interim reporting so that families could report beneficial changes, § 98.21(e)(4) of this final rule requires that Lead Agencies must allow families the option to voluntarily report changes on an ongoing basis. This ensures that a family will not be limited in their ability to report, particularly in instances that would be to their benefit.

Program integrity. It is important to ensure that CCDF funds are effectively and efficiently targeted towards eligible low-income families. Policies to promote continuity, such as lengthening eligibility periods and allowing a child to remain eligible between re-determination periods, are consistent with and support a strong commitment to program integrity. ACF expects Lead Agencies to have rigorous processes in place to detect fraud and improper payments, but these should be reasonably balanced with family-friendly practices.

In order to remain consistent with the requirements in this subpart, § 98.21(a)(4) affirmatively states that, because a child meeting eligibility requirements at the most recent eligibility determination or re-determination is considered eligible between re-determinations as described in § 98.21(a)(1), any payment for such a child shall not be considered an error or improper payment under Subpart K due to the family's circumstances. This clarifies that compliance with the policies in this Subpart do not constitute an error and Lead Agencies will not be held accountable for payments within these parameters.

When implementing their CCDF programs, Lead Agencies must balance ensuring compliance with eligibility requirements with other considerations, including administrative feasibility, program integrity, promoting continuity of care for children, and aligning child care with Head Start, Early Head Start, and other early childhood programs. These changes are intended to remove any uncertainty regarding applicability of Federal eligibility requirements for CCDF and the threat of potential penalties or disallowances that otherwise may inhibit a Lead Agencies' ability to balance these priorities in a way that best meets the needs of children.

Some Lead Agencies currently use "look back" and recoupment policies as part of eligibility re-determinations. These review a family's eligibility for the prior eligibility period to see if the family was ineligible during any portion of that time and recoup benefits for any period where the family had been ineligible. However, there is no Federal requirement for Lead Agencies to recoup CCDF overpayments, except in instances of fraud. We strongly discourage such policies as they may impose a financial burden on low-income families that is counter to CCDF's long-term goal of promoting family economic stability. The Act affirmatively states an eligible child will be considered to meet all eligibility requirements for a minimum of 12 months regardless of increases in income (as long as income remains at or below 85 percent of SMI) or temporary changes in parental employment or participation in education and training. Therefore, there are very limited circumstances in which a child would not be considered eligible after an initial eligibility determination. We encourage Lead Agencies instead to focus program integrity efforts on the largest areas of risk to the program, which tend to be intentional violations and fraud involving multiple parties.

Existing regulations at § 98.60 indicate that Lead Agencies shall recover child care payments that are the result of fraud from the responsible party. While the final rule does not define the term fraud and leaves flexibility to Lead Agencies, fraud in this context typically involves knowing and willful misrepresentation of information to receive a benefit. We urge Lead Agencies to carefully consider what constitutes fraud, particularly in the case of individual families.

Taking into consideration children's development and learning. This final rule affirms that both the child's development and the parent's need to work or attend school or training are factors in the child care needs of each family. This rule amends § 98.21 to add paragraph (f) to require that Lead Agencies take into consideration children's development and learning and promote continuity of care when authorizing child care services. There are myriad ways in which this provision could be incorporated into Lead Agencies' eligibility, intake, authorization, and CCDF policies and practices. ACF intends to work with Lead Agencies to provide technical assistance and identify a variety of strategies to fit different eligibility processes. As an example, in serving a preschool-aged child (*i.e.,* age 3 or 4), the Lead Agency may consider whether or not the child has access to a high-quality preschool setting and how CCDF can make enrollment in a high-quality preschool more likely.

Lead Agencies could partner with Head Start, pre-kindergarten, or other high-quality programs to build an intentional package of arrangements for the child that allows for attendance at preschool and a second arrangement that accommodates the parent's work schedule. For infants and toddlers, a Lead Agency may want to coordinate services with Early Head Start, while also maintaining a secondary child care arrangement to preserve the relationship with a familiar caregiver, as it is particularly important for infants and toddlers to build and maintain secure relationships with caregivers. A Lead Agency could also offer parents the choice to select high-quality infant slots that are funded through contracts or grants. For children of all ages, providing more intensive case management for families with children with multiple risk factors can increase the likelihood that the family will find a stable, quality child care provider that is willing to work with other service providers in assisting the child and family.

The intent of this provision is that the Lead Agency has some mechanism in place to consider the child's development and learning, but a Lead Agency has broad flexibility to determine how this is done. At a minimum, we expect Lead Agencies to collect sufficient information during the CCDF intake process in order to make necessary referrals for services. For example, a Lead Agency could ensure there is an automatic referral of eligible children to Early Head Start or Head Start. A Lead Agency could also include in their eligibility determination process a question about whether or not the child has an Individualized Education Program (IEP) or Individual Family Service Plan (IFSP), so that the parent could be provided with information on providers that are equipped to provide services that meet the child's individual needs.

ACF encourages Lead Agencies to engage in public-private partnerships so that responsibility for implementing this provision does not fall solely on CCDF eligibility workers. Partnerships with child care resource and referral agencies, early intervention agencies, and others may mean that a few well-chosen questions during the intake process prompt the eligibility worker (or automated system if the process is online) to direct the family to appropriate resources. This requirement does not require a developmental screening of every child as part of the eligibility process; however, child care agencies should partner to ensure that children in the CCDF subsidy system can access appropriate screening and follow-up.

We recognize that, given constraints on funding, limited human resource capacity, and the inadequate supply of high-quality care, a perfect arrangement will not be found in all cases. Rather, we expect Lead Agencies to consider how they can best meet the developmental and learning needs of children in their policies and practices and to encourage partnerships among high-quality providers, child care resource and referral agencies, and case management partners to strengthen CCDF's capacity to fulfill its child development mission for families.

Comment: While comments in this area were supportive of the addition of child development, there were some concerns regarding implementation. One commenter pointed out that, in their State, "parents apply online for child care assistance and are not required to have an interview. The proposed requirement would result in adding a list of additional questions to the application for services. Eligibility workers process multiple programs (TANF, SNAP, Medicaid, Child Care) and do not have the expertise in this area. The questions would need to be automatically screened and referrals sent. This would require extensive programming changes."

Response: As stated above, the intent of this provision is that the Lead Agency has some mechanism in place to consider the child's development and learning, but a Lead Agency has broad flexibility to determine how this is done. In one of the examples given, eligibility for Early Head Start or Head Start, this could be determined through information already collected during the eligibility process. It may be necessary for the State to add additional questions to fulfill this requirement (for instance, the IEP or IFSP question mentioned above) However, given the broad flexibility that States have in this area, we will work with the State to implement these changes within a reasonable timeline and provide technical assistance where appropriate to support these efforts. We have retained the language in § 98.21(f) from the NPRM.

No requirement to limit authorized care to parent schedule. The final rule clarifies at § 98.21(g) that Lead Agencies are not required to limit authorized child care services strictly based on the work, training, or educational schedule of the parent(s) or the number of hours the parent(s) spend in work, training, or educational activities. Tying child care subsidy authorizations closely to parental work, education, or training hours may limit access to high-quality settings and does not support the fixed costs of providing care. In particular, it creates challenges for parents with variable schedules and inhibits their children from accessing a consistent child care arrangement. This provision clarifies that "matching" the hours of child care to a parent's hours of work is not required. In some cases, such "matching" works against the interests of the parent or child.

Lead Agencies are encouraged to authorize adequate hours to allow children to participate in a high-quality program, which may be more hours than the parent is working or in education or training. For example, if most local high-quality early learning programs offer only full-time slots, a child whose parent is working part-time may need authorization for full-time care. Commenters were supportive of this policy, and the final rule therefore retains it.

Subpart D—Program Operations (Child Care Services) Parental Rights and Responsibilities

Two of the Act's purposes are: (1) To promote parental choice to empower working parents to make their own decisions regarding the child care services that best suit their family's needs; and (2) to encourage States to provide consumer education information to help parents make informed choices about child care services and to promote involvement by parents and family members in the development of their children in child care settings. Subpart D of the regulations describes parental rights and responsibilities and provisions related to parental choice, including parental access to their children, requirements that Lead Agencies maintain a record of parental complaints, and consumer education activities conducted by Lead Agencies to increase parental awareness of the range of child care options available to them.

This final rule makes a number of changes to this subpart, including, establishment of a hotline for parents to submit complaints about child care providers, establishment of a consumer education Web site with provider-specific information including monitoring and inspection reports, ensuring parents and providers receive information about developmental screenings for children, and requiring Lead Agencies to affirmatively provide CCDF parents with a consumer statement with specific information about the child care provider they select.

§ 98.30 Parental Choice

This final rule includes a technical change to delete *group home child care* from the variety of child care categories at § 98.30(e) from which parents receiving a certificate for child care service must be able to choose. This is a conforming change consistent with revisions at § 98.2 removing group home child care from the definition of categories of care and eligible child care provider. As discussed earlier, instead the final rule modifies the definition of family child care provider to include one or more individuals to be inclusive of group home child care within this category. Lead Agencies may continue to use the category of group homes, but we are no longer requiring it as a separate category for federal reporting purposes. We did not receive comments on this provision and the final rule retains the language from the NPRM.

In-home care. This final rule revises § 98.30(f)(2) to explicitly allow for Lead Agencies to adopt policies that may limit parental access to in-home care. This change aligns with previously-existing policy as discussed in the preamble to the 1998 Final Rule. Specifically, the preamble documented Lead Agencies' "complete latitude to impose conditions and restrictions on in-home care." (63 FR 39950) As discussed in the 1998 preamble, monitoring the quality of care and the appropriateness of payments to in-home providers poses special challenges for Lead Agencies.

Comment: The few comments we received on this provision were generally supportive. One State commented that it would not prohibit or limit in-home care because it is often chosen in that State to provide care for families with non-traditional work hours.

Response: To clarify, this provision does not limit or prohibit a State from allowing parents to choose in-home care. Rather, it provides Lead Agencies with the flexibility to limit the use of that care. We understand there are many factors that may lead parents to choose in-home care, including the need for care at non-traditional hours or care for children with special needs, and urge Lead Agencies to consider those factors when deciding whether to put limitations on in-home care. It is crucial that parents have access to the types of care necessary for them to work and for their children to be in a safe and enriching environment. While this change codifies Lead Agencies' ability to impose limits on the use of in-home care, it does not allow for Lead Agencies to flatly prohibit the use of in-home care. As this is longstanding policy, we do not expect the change to have a significant impact on families or Lead Agencies. We have retained the language proposed in the NPRM.

Parental choice and child care quality. Regulations at § 98.30(f) prohibit Lead Agencies from implementing health and safety or regulatory requirements that significantly restrict parental choice by expressly or effectively excluding any category or type of provider, as defined at § 98.2, or any type of provider within a category of care. Section 98.2 defines categories of care as center-based child care, family child care, and in-home care (*i.e.,* a provider caring for a child in the child's own home). Types of providers are defined as non-profit, for-profit, sectarian, and relative providers.

This final rule adds paragraph (g) at § 98.30 to clarify that, as long as parental choice provisions at paragraph (f) of this section are met, parental choice provisions should not be construed as prohibiting a Lead Agency from establishing policies that require child care providers that serve children receiving subsidies to meet higher standards of quality, such as those identified in a quality rating and improvement system or other transparent system of quality indicators pursuant.

In order to be meaningful, the parental choice requirements included in this section should give parents access to child care arrangements across a range of providers that foster healthy development and learning for children. Many Lead Agencies have invested a significant amount of CCDF funds to implement quality rating and improvement systems (QRIS) to promote high-quality early care and education programs, and some have expressed concerns that the previously existing regulatory language related to parental choice inhibited their ability to link the child care subsidy program to these systems. In order to fully leverage their investments, Lead Agencies are seeking to increase the number of children receiving CCDF subsidies that are enrolled with providers participating in the quality improvement system. ACF published a Policy Interpretation Question (CCDF–ACF–PIQ–2011–01) clarifying that parental choice provisions within regulations do not automatically preclude a Lead Agency from implementing policies that require child care providers serving subsidized children to meet certain quality requirements, including those specified within a quality improvement system. As long as certain conditions are met to protect a parent's ability to choose from a variety of categories and types of care, a Lead Agency could require that, in order to provide care to children receiving subsidies, the provider chosen by the parent must meet requirements associated with a specified level in a quality improvement system. This final rule incorporates the policy interpretation into regulation at § 98.30(g).

Comment: We received very few comments on this area. Faith-based and private education organizations recommended we delete the provision because it "potentially eliminates essential distinctions among providers and thus robs parents of choice."

Response: We declined to accept this comment and have left the provision as proposed in the NPRM. As a Lead Agency may make different allowances as they implement this policy, we do not think it will limit parental choice. There are certain tenants that the Lead Agency should follow when establishing these policies to ensure that parents continue to have access to the full range of providers. We encourage Lead Agencies to assess the availability of care across categories and types, and availability of care for specific subgroups (*e.g.,* infants, school-age children, families who need weekend or evening care) and within rural and underserved areas, to ensure that eligible parents have access to the full range of categories of care and types of providers before requiring them to choose providers that meet certain quality levels. Should a Lead Agency choose to implement a quality improvement system that does not include the full range of providers, the Lead Agency would need to have reasonable exceptions to the policy to allow parents to choose a provider that is not eligible to participate in the quality improvement system (*e.g.,* relative care). As an example, a Lead Agency may implement a system that incorporates only center-based and family child care providers. In cases where a parent selects a center-based or family child care provider, the Lead Agency may require that the provider meet a specified level or rating. However, the policy also must allow parents to choose other categories, such as in-home care, and types of child care providers, such as relative providers, that may not be eligible to participate in the quality improvement system. This is particularly important for geographic areas where an adequate supply of high-quality child care is lacking or when a parent has scheduling, transportation, or other issues that prevent the use of a preferred provider within the system.

In addition, this final rule includes § 98.30(h) to clarify that Lead Agencies may provide parents with information and incentives that encourage the selection of high-quality child care without violating parental choice provisions. This provision allows, but does not require, Lead Agencies to adopt policies that incentivize parents to choose high-quality providers as determined by a system of quality indicators. Lead Agencies are not required to adopt policies that encourage or incentivize parents to choose high-quality providers; however, we strongly encourage that they do adopt these policies.

Comment: We only received a few comments on the proposed provision. Faith-based and private education organizations recommended deleting the provision as it "substitutes the Lead Agency's interpretation of what constitutes 'high-quality' child care for the parent's interpretation." Another commenter supported keeping the provision but requested ACF provide examples of how Lead Agencies can use information and incentives to help parents choose high-quality providers.

Response: This provision codifies previously existing policy and provides Lead Agencies with needed tools to help support parents as they look for quality child care settings. Therefore, we have chosen to keep the provision as proposed in the NPRM. We want to emphasize that Lead Agencies are not required to implement these policies. Lead Agencies have the flexibility to determine what types of information and incentives to use to encourage parents to choose high-quality providers. One option is to lower parental co-payments for parents that choose a high-quality provider. We encourage Lead Agencies, or their partners such as child care resource and referral agencies, to use information from a QRIS or other system of quality indicators to make recommendations and help parents make informed child care decisions, for example, by listing the highest rated providers at the top of a referral list and providing information about the importance of high-quality child care. Lead Agencies are not limited to these examples and should design information sharing and incentives in a way that best fits the families they serve with CCDF.

§ 98.31 Parental Access

This final rule makes a technical change at § 98.31 to specify that Lead Agencies shall provide a detailed description "in the Plan" of how they ensure that providers allow parents to have unlimited access to their children while the children are in care. This corresponds to the provision at § 98.16(t). We received one comment from a national organization expressing support for this provision and have retained the proposed rule language

§ 98.32 Parental Complaints

Hotline for parental complaints. Section 658E(c)(2)(C) of the Act requires Lead Agencies to maintain a record of substantiated parental complaints, make information regarding such parental complaints available to the public on request, and provide a detailed description of how such a record is maintained and made available. This final rule adds § 98.32(a), which requires Lead Agencies to establish or designate a hotline or similar reporting process for parents to submit complaints about child care providers. In connection with this change we have added a provision at § 98.33(d), to require Lead Agencies to include the hotline number or other reporting process in the consumer statement for CCDF parents, pursuant to this requirement. Lead Agencies should identify the capability for the parental complaint hotline to be accessible to persons with limited English proficiency and persons with disabilities, such as through the provision of interpretation services and auxiliary aids.

Lead Agencies vary in how they meet the previously-existing requirement to keep a record of and make public substantiated parental complaints. According to an analysis of FY 2014–2015 CCDF Plans, as well as State child care and licensing Web sites, 18 States have a parental complaint hotline that covers all CCDF providers, 22 States have a parental complaint hotline that covers some child care providers, and 16 States and Territories do not have a parental complaint hotline.

The Department of Defense (DOD) military child care program runs a national parental complaint hotline. The Military Child Care Act of 1989 (Pub. L. 101–189) required the creation of a national 24 hour, toll-free hotline that allows parents to submit complaints about military child care centers anonymously. DOD has found the hotline to be an important tool in engaging parents in child care. In addition, complaints received through the hotline have helped DOD identify problematic child care programs. For example, information that was submitted through the hotline led to an investigation and the closure of some child care facilities in the early 1990s. (Campbell, N., Appelbaum, J., Martinson, K., *Be All That We Can Be: Lessons from the Military for Improving Our Nation's Child Care System,* National Women's Law Center, 2000)

We strongly encourage the Lead Agency to widely publicize the process for submitting a complaint about a provider and to consider requiring child care providers to publicly post the process, including the hotline number and/or URL for the web-based complaint system, in their center or family child care home to increase parental awareness. Other areas for posting may be on the Web site required by Section 658E(c)(2)(E) of the Act and § 98.33(a), through a child care resource and referral network, at local agencies where parents apply for benefits, or other consumer education materials distributed by the Lead Agency.

We also strongly encourage Lead Agencies to implement a single point of entry (*e.g.,* one toll-free hotline number) as the most straightforward way for parents to file a complaint. There should not be a burden for the parent in finding the correct hotline number or Web page address. Many parents may not know whether the provider is licensed or license-exempt, for example, and therefore will not know which hotline to call if there are separate contact points for providers. Lead Agencies that choose to combine existing lines or devolve responsibility to local agencies should set-up a single point of entry with a process to immediately refer the call to the appropriate agency.

Comment: A few States requested clarification about whether the hotline had to be monitored 24 hours a day.

Response: Lead Agencies have a great deal of flexibility in how they implement the parental complaint hotline. To be most useful, parents should be able to file a complaint at any time. We strongly recommend, but do not require, that a telephonic hotline be operational 24 hours a day, or at minimum include a voicemail system that allows parents to leave complaints when an operator is not available. Lead Agencies may also choose to have a web-based system that allows for 24-hour complaint submission.

Comment: One State opposed the requirement to implement a hotline or similar process for parents to submit complaints. The State argued that the reauthorized statute required a national hotline to be created and "the State can include the national toll-free hotline information as the 'single contact number'. . . if necessary".

Response: Section 658L(b)(2) of the Act requires HHS to create a national hotline for submitting complaints. HHS is currently working on designing and implementing this hotline as a tool for parents to submit concerns. However, the CCDBG Act of 2014 did not change the requirement that States keep and make available a record of substantiated complaints. Maintaining and sharing substantiated complaints continues to be a statutory requirement and establishing a clear, easily-accessible way for parents to file complaints is an important part of meeting that requirement. As this is a separate process from the national hotline, States still must have a means for collecting parental complaints. In addition, States and localities are in a much better position to react quickly to complaints, which can be critical when there are immediate concerns about a child's safety. By requiring States and Territories to have a parental complaint system, ACF aims to ensure that parents have the tools necessary to ensure their children are in safe environments. Therefore, we have retained the language in the proposed rule.

Furthermore, the requirement provides enough flexibility that States likely already have the infrastructure in place to operationalize a hotline or other reporting mechanism, and therefore we do not expect it will be a burden. We want to emphasize that the Lead Agency may choose a different agency at the State, Territory, Tribal, or local level to manage the parental complaint system or find ways to combine the process for collecting parental complaints with already existing hotlines. For example, in some States and Territories, the licensing agency handles complaints of licensed providers and a different agency handles license-exempt providers. Lead Agencies may choose to devolve management of a complaint system to the local level in order to facilitate more prompt and timely follow-up. We leave it to the discretion of the Lead Agency to determine the best way to manage the hotline.

Process for Substantiating and Responding to Complaints. This final rule requires Lead Agencies at § 98.32(d)(1) to describe in their Plans their processes for substantiating and responding to complaints, including whether the State, Territory or Tribe uses monitoring as part of its process for responding to complaints for both CCDF and non-CCDF providers. We encourage Lead Agencies to have a complaint response plan in place that includes appropriate time frames for following up on a complaint depending on the urgency or severity of the parent's concern and other relevant factors. States, Territories and Tribes must have a process for substantiating complaints, and we strongly recommend that this include unannounced inspections and monitoring visits, particularly in instances where there is a potential threat to safety, health, or well-being of children.

Comment: In the NPRM, we requested comments about requiring Lead Agencies at § 98.42 to use unannounced monitoring visits to respond to complaints related to health and safety of the child. As discussed later, many commenters supported States being required to conduct inspections in response to complaints. However, others felt that we should leave how Lead Agencies respond to complaints to the discretion of the State.

Response: This final rule does not require Lead Agencies to use a specific process for responding to complaints. However, it is important that the public know how a Lead Agency responds to and substantiates a complaint. This is especially true because of the long-standing statutory requirement for States to keep a record of any substantiated complaints made about a child care provider. In order to meet that requirement, Lead Agencies must have some process for examining complaints when they are submitted. Therefore, this final rule requires States to provide additional information in their Plans about how they respond to complaints, including whether or not the response includes monitoring visits of CCDF and non-CCDF providers.

§ 98.33 Consumer and Provider Education

In the 2014 reauthorization, Congress expanded the requirements related to consumer and provider education. Section 658E(c)(2)(E) of the Act requires Lead Agencies to collect and disseminate, through child care resource and referral organizations or other means as determined by the Lead Agency, to parents of eligible children, the general public, and, where applicable, providers, consumer education information that will promote informed child care services. In addition, Section 658E(c)(2)(D) requires monitoring and inspection reports of child care providers to be made available electronically. This focus on consumer education as a crucial part of parental choice has laid the foundation for a more transparent system, helping parents to better understand their child care options and encouraging providers to improve the quality of their services.

Every interaction parents have with the subsidy system is an opportunity to engage them in consumer education to help them make informed decisions about their child care providers, as well as provide resources that promote child development. This final rule requires consumer education services be directly included as part of the intake and eligibility process for families applying for child care assistance. Parents of eligible children often lack the information necessary to make informed decisions about their child care arrangement. Low-income working families may face additional barriers when trying to find information about child care providers, such as limited access to the internet, limited literacy skills, limited English proficiency, or disabilities. Lead Agencies can play an important role in bridging the gap created by these barriers by providing information directly to families receiving CCDF subsidies to ensure they fully understand their child care options and are able to assess the quality of providers.

When implementing consumer and provider education provisions, we recommend Lead Agencies consider three target audiences: Parents, the general public, and child care providers. While some components are aimed at ensuring parents have the information they need to choose a child care provider, others are equally important for caregivers who interact with parents on a regular basis and can serve as trusted sources of information.

Lead Agencies should ensure that all materials are consumer-friendly and easily accessible; this includes using plain language and considering the abilities, languages, and literacy levels of the targeted audiences. Lead Agencies should consider translation of materials into multiple languages, as well as the use of "taglines" on consumer education materials for frequently encountered non-English languages and to inform persons with disabilities how they can access auxiliary aids or services and receive information in alternate formats at no cost.

Consumer education Web site. This final rule amends paragraph (a) of § 98.33 to require Lead Agencies to collect and disseminate consumer education information to parents of eligible children, the general public, and providers through a consumer-friendly and easily accessible Web site. The Web site must, at a minimum, include seven components: (1) Lead Agency policies and procedures, (2) information on availability of child care providers, (3) quality of child care providers, (4) provider-specific monitoring and inspection reports, (5) aggregate number of deaths and serious injuries (for each provider category and licensing status) and instances of substantiated child abuse in child care settings each year, (6) referral to local child care resource and referral organizations, and (7) directions on how parents can contact the Lead Agency, or its designee, and other programs to better understand information on the Web site. The specifics of each component are discussed in detail below.

This final rule requires the Web site to be consumer-friendly and easily accessible. To ensure that the Web site is accessible for all families, it must provide for the widest possible access to services for families who speak languages other than English and persons with disabilities. Lead Agencies should make sure the Web site meets all Federal and State laws regarding accessibility, including the Americans with Disabilities Act (ADA) of 1990 (42 U.S.C. 12101, *et seq.*), to ensure individuals with disabilities are not excluded, denied services, segregated or otherwise treated differently because of the absence of auxiliary aids and services. We recommend Lead Agencies follow the guidelines laid out by section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794d), when designing their Web sites. Section 508 requires that individuals with disabilities, who are members of the public seeking information or services from a Federal agency, have access to and use of information and data that is comparable to that provided to the public who are not individuals with disabilities. The US Department of Justice has provided guidance and resources on how to create an accessible site at *http://www.ada.gov/Websites2.htm.*

Parents should be able to access all the consumer information they need to make an informed child care choice through a simple, single online source. We encourage Lead Agencies to review current systems and redesign if needed to allow for a single point of entry, especially if the systems are funded with CCDF funds. However, we recognize that Lead Agencies have made significant investments in databases and other web-based applications. For many States/Territories, the CCDF Lead Agency and the licensing agency may not be the same, leading to multiple data systems with different ownership. We do not intend to require completely new systems be built. Rather, the Web site is a single starting point for parents to access the various sources of public information required by the Act, including health and safety information, licensing history, and other related provider information. In the case where this information is already available on multiple Web sites, such as in a locally-administered State where each county has its own Web site, the Lead Agency could choose to create a single consumer-friendly Web page that connects to each of these Web sites, provided that each of the Web sites meets all the criteria at § 98.33(a). Similarly, if there are two Web sites, one that includes licensed providers and another that includes CCDF providers, we strongly encourage Lead Agencies to create a single Web site through which parents can access information.

The first required component of the consumer education Web site is a description of Lead Agency policies and procedures relating to child care. This includes explaining how the Lead Agency licenses child care providers, including the rationale for exempting providers from licensing requirements, as described at § 98.40; the procedure for conducting monitoring and inspections of child care providers, as described at § 98.42; policies and procedures related to criminal background checks for staff members of child care providers, as described at § 98.43; and the offenses that prevent individuals from being employed by a child care provider or receiving CCDF funds. The information about Lead Agency policies and procedures included on the consumer education Web site should be in plain language.

The second required component is a localized list of all providers that is searchable by zip code and differentiates whether they are licensed or license-exempt providers. This information must include all licensed child care providers, and at the discretion of the State, all license-exempt child care providers serving children receiving CCDF assistance, other than those only providing care for children to whom they are related. This means that the Lead Agency may choose to not include license-exempt family child care homes in the zip code search. When making information public, Lead Agencies should ensure that the privacy of individual caregivers and children is maintained, consistent with State, local, and tribal laws. Lead Agencies must ensure that this localized list includes a clear indicator if a serious injury or death due to a substantiated health and safety violation has occurred at that provider. This clear indicator should link to the monitoring and inspection report (or plain language summary of the report) that provides more detail and context on the serious injury or death that occurred. As described in more detail below, it is crucial that parents are able to clearly identify if a provider had a violation that led to the death of a child or a serious injury. We expect that providers with serious violations (*e.g.,* leading to a child's death) will no longer be operating once a State, Territory or Tribe takes compliance action.

While not required, we recommend that Lead Agencies include additional information with provider profiles, beyond what is required by statute, including contact information, enrollment capacity, years in operation, education and training of caregivers, and languages spoken by caregivers. We also suggest that the quality information and monitoring reports be included in the initial search results.

The third required component is provider-specific quality information as determined by the Lead Agency, in accordance with Section 658E(c)(2)(E)(i)(II) of the Act, for all child care providers for whom they have this information on the Web site. Lead Agencies may choose the best method for differentiating the quality levels of child care providers. In this rule, we are not requiring that Lead Agencies have a QRIS. However, we strongly encourage Lead Agencies to use a QRIS, or other transparent system of quality indicators, to collect the quality information required at § 98.33(a)(3). Lead Agencies that have a QRIS should use information from the QRIS to provide parents with provider-specific quality information. By transparent system of quality indicators we mean a method of clear, research-based indicators that are appropriate for different types of providers, including child care centers and family child care homes, and appropriate for providers serving different age groups of children, including infants, toddlers, preschool, and school-age children. The system should help families easily understand whether a provider offers services meeting Lead Agency-determined best practices and standards to promote children's development, or is meeting a nationally recognized, research-based set of criteria, such as Head Start or national accreditation. We encourage Lead Agencies to incorporate mandatory licensing requirements as the foundation of any system of quality indicators, as a baseline of information for parents. By building on licensing structures, Lead Agencies may have an easier transition to a more sophisticated system that differentiates between indicators of quality.

Because not all eligible and licensed non-relative child care providers may be included in a transparent system of quality indicators, this final rule clarifies that provider-specific quality information must only be posted on the consumer Web site if it is available for the individual provider, which is a caveat included in statute. We recognize that it takes time to build a comprehensive system that is inclusive of a large number of providers across a wide geographic area. However, in order for the quality information provided on the Web site to be meaningful and useful for parents it should include as many providers as possible. We are not requiring a specific participation rate, but the public should have contextual information regarding the extent of participation by providers in a system of quality indicators.

In designing a mechanism for differentiating child care quality, we suggest considering the following key principles: Provide outreach to targeted audiences; ensure indicators are research-based and incorporate the use of validated observational tools when feasible; ensure assessments of quality include program standards that are developmentally appropriate for different age groups; incorporate feedback from child care providers and families; make linkages between consumer education and other family-specific issues such as care for children with special needs; engage community partners; and establish partnerships that build upon the strengths of child care resource and referral programs and other public agencies that serve low-income parents.

The majority of States/Territories reported in their CCDF Plans that they have at least started to implement a QRIS. HHS has established a Priority Performance Goal to track the number of States that implement a QRIS meeting recommended benchmarks, and, as of FY 2015, 32 States/Territories met the benchmark, and 28 States/Territories have made progress on implementing a high-quality QRIS that meets HHS benchmarks since the goal was established in FY 2011.

While ACF encourages Lead Agencies to implement a systemic framework for evaluating, improving, and communicating the level of quality in child care programs, we are not limiting Lead Agencies to a QRIS as the only mechanism for collecting the required quality information. Lead Agencies have the flexibility to implement more limited, alternative systems of quality indicators. For example, Lead Agencies could choose to use a profile or report card of information about a child care provider that could include compliance with State/Territory licensing or health and safety requirements, information about ratios and group size, average teacher training or credentials, type of curriculum used, any private accreditations held, and presence of caregivers to work with young English learners or children with special needs. Lead Agencies could also build on existing professional development registries or other training systems to provide parents with information about caregiver training.

The fourth Web site requirement is Lead Agencies must post provider-specific results of monitoring and inspection reports, including those reports that are due to major substantiated complaints (as defined by the Lead Agency) about a provider's failure to comply with health and safety requirements and other Lead Agency policies. The definition of "major substantiated complaint" varies across the country. Therefore, we are not requiring a standard definition. However, this final rule requires Lead Agencies to explain how they define it on their consumer education Web sites. This requirement ensures that the results of monitoring and inspection requirements at § 98.42 are available to parents when they are deciding on a child care provider.

In following the statutory language at Section 658E(c)(2)(D) of the Act, Lead Agencies must post the monitoring and inspections results for child care providers, as defined at § 98.2. This means that the Web site must include any provider subject to the monitoring requirements at § 98.42, as well as all licensed child care providers and all child care providers eligible to deliver CCDF services. Lead Agencies are required to post inspection reports for child care providers that do not receive CCDF, if available. However, if information is not available, such as if a provider is not being inspected and there is no inspection report, States are not required to actively seek the information.

This final rule requires Lead Agencies to post full monitoring and inspection reports. In order for inspection results to be consumer-friendly and easily accessible, Lead Agencies must use plain language for parents and child care providers and caregivers to understand. Often monitoring and inspection reports are long and include jargon and references to codes or regulations without any explanation. Reports that include complicated references and lack explanation are not consumer-friendly, limiting a parent's ability to make an informed decision about a child care provider. In the case that full reports are not in plain language, Lead Agencies must post a plain language summary or interpretation in addition to the full monitoring and inspection report.

Lead Agencies must post reports in a timely manner and include information about the date of inspection, information about any corrective actions taken by the Lead Agency and child care provider, where applicable, and prominently display any health and safety violations, including any fatalities or serious injuries that occurred at that child care provider While this final rule does not define "consumer-friendly and easily accessible", it is crucial parents be able to clearly identify if a provider had a violation that led to the death of a child or a serious injury. To ensure this information is easily accessible, this final rule requires Led Agencies to clearly and prominently display any health and safety violations, including any fatalities or serious injuries taking place at the provider. Prominently displaying this information helps parents to access critical information quickly and without having to sift through other information or click through multiple pages. We recommend this information be the first item, after the provider name and identifying information, included on the report, and be highlighted in a way that makes it easy for parents to see, such as through a different or bold font or a special text box. As stated earlier in the rule, the localized list of providers should include a clear indicator if a serious injury or death occurred at the provider due to a substantiated health and safety violation, and this indicator should link to the monitoring and inspection report that contains greater detail and contextual information about the serious injury or death.

Lead Agencies must also post, at a minimum, three years of results, where available. A single year of results could mask patterns of infractions and is insufficient for a parent to judge the safety of the environment. We do not expect Lead Agencies to post reports retrospectively or prior to the effective date of this provision (November 19, 2017). Finally, while not required, if earlier reports are available, we encourage Lead Agencies to post them on the Web site in order to provide more information for parents.

Posting results and corrective actions in a timely manner is crucial to ensuring parents have updated information when making their provider decisions. The final rule does not define "timely." We are leaving it to the discretion of the Lead Agency to determine a reasonable amount of time based on the needs of its families and its capacity for updating. However, we do recommend Lead Agencies update results as soon as possible and no later than 90 days after an inspection or corrective action is taken.

This final rule also requires Lead Agencies to establish a process for correcting inaccuracies in the reports. Lead Agencies have discretion to determine the best process for ensuring that all the information included in the monitoring and inspection results is accurate. We recommend they work with child care providers to design and implement a process, and widely distribute the process to child care providers.

The fifth required component of the consumer education Web site is posting of the aggregate number of deaths, serious injuries, and instances of substantiated child abuse that occurred in child care settings each year, for eligible child care providers. This requirement is associated with the provider setting and therefore it should include information about any child in the care of a provider eligible to receive CCDF, not just children receiving subsidies. The information on deaths and serious injuries must be separately delineated by category of provider (*e.g.* centers, family child care homes) and licensing status (*i.e.,* licensed or license-exempt). The information should include: (1) The total number of children in care by provider category/licensing status; (2) the total number of deaths of children in care by provider category/licensing status; and (3) the total number of serious injuries in care by provider category/licensing status. We are not defining serious injuries or substantiated child abuse in this rule. We encourage Lead Agencies to use their State or Territory child welfare agency's definition of substantiated child abuse for consistent reporting across programs. We encourage Lead Agencies to include the data with the results of an annual review of all serious injuries and deaths occurring in child care, as required at § 98.53(f)(4).

The sixth required component of the consumer education Web site is the ability to refer to local child care resource and referral organizations, which is also a requirement of the national Web site discussed later in this final rule. The Web site should include contact information, as well as any links to Web sites for any local child care resource and referral organizations.

The final required component of the consumer education Web site is information on how parents can contact the Lead Agency, or its designee, or other programs that can help the parent understand information included on the consumer education Web site. The consumer education Web site required by § 98.33(a) represents a significant step in making it easier for parents to access information about the child care system and potential child care providers. However, the amount of information may be difficult to understand or find. In addition, parents searching for child care may prefer to speak with a person directly as they make decisions about their child's care. Therefore, the Web site must include information about how to contact the Lead Agency, or its designee, such as a child care resource and referral agency, to answer any questions parents might have after reviewing the Web site.

Commenters expressed support for the proposed consumer education requirements. In general, they felt strongly about the importance of increased access to information for parents and new opportunities for family engagement both by the Lead Agency and the child care provider.

Comment: The majority of commenters supported including all licensed child care providers on the consumer education Web site. However, commenters were mixed on whether license-exempt providers receiving CCDF should be included. Organizations representing school-age child care programs, family child care providers, and private child care providers felt it was important that license-exempt providers be included on the Web site because they may include more formal types of care, like afterschool programs based in schools and are therefore license-exempt. One commenter said "Because many States offer exemptions from licensing for school-aged care centers, it will be important to make these centers and their information available to parents by ensuring that Web sites are not limited to licensed care, moreover expanding the Web site to all eligible providers/centers further provides parents with choice." Further, as another commenter pointed out, "In many States, license-exempt providers are also family child care providers who view themselves in this profession but cannot get licensed by their State even if they wanted to." For these providers, they may want to be on the Web site, and a policy exempting all license-exempt providers might not work in their best interest.

On the other hand, several commenters, including States, national advocacy organizations, and unions representing child care workers, suggested providing Lead Agencies with flexibility about which providers must be included on the Web site. Their concerns centered on the fact that not all providers, especially license-exempt family child care homes, are a part of the child care market and therefore may not want to be available for to care for children they do not know. Alternatively, they may be at capacity and unable to accept additional children. One comment signed by several national organizations said "We believe that including license-exempt providers would serve to advertise their services to parents looking for child care . . . These providers are often not in the business of child care and only care for individuals with whom they have a prior relationship." A State also noted that "this might serve to advertise the providers' services to parents looking for care when the care is an informal situation." A few States also expressed concerns about privacy for these providers as they are providing care in their homes.

Response: The proposed rule included all licensed and eligible child care providers, other than those only serving children to whom they were related, in all of the provider-specific posting requirements, including the zip-code search. However, the commenters raise valid points about how some providers may not actually be a part of the market. Therefore, the final rule gives Lead Agencies the flexibility to decide which license-exempt CCDF providers are included in the localized list at § 98.33(a)(2). We strongly encourage Lead Agencies not to have a blanket policy regarding including these providers in the zip-code search, but rather suggest being mindful about the different types of license-exempt providers in their State, as well as mindful of providers that might want to be included in searches for marketing purposes.

However, we have not extended this flexibility to the provider-specific quality information at § 98.33(a)(3), as the statute and this final rule include the caveat that quality information must be included only if it is available for that child care provider. If a Lead Agency has quality information based on a QRIS or other transparent system of quality indicators, then this information should be available to parents and the general public, regardless of the provider's licensing status. We understand that some States do not include license-exempt child care providers in their QRIS, and this rule continues to allow States the flexibility to only include licensed child care providers in their quality ratings. However, if the QRIS includes license-exempt providers, this quality information must be posted on the Web site for those providers with ratings.

We also have not extended this flexibility to monitoring and inspections results required at § 98.33(a)(4), and are requiring Lead Agencies to post provider-specific information for all licensed and eligible child care providers, unless the provider is related to all the children in their care. This is more consistent with the requirements of the Act and critical to ensuring that parents have the information they need to make an informed child care decision. These providers are required to be monitored on an annual basis. Therefore, the Lead Agency will have the report already, limiting additional burden. In addition, research suggests that online publishing of licensing violations and complaints impact provider behavior. One study found that after inspection reports were posted online, there was an improvement in the quality of care, specifically the classroom environment and improved management at child care centers serving low-income children receiving child care subsidies. (Witte, A. and Queralt, M., *What Happens When Child Care Inspections and Complaints Are Made Available on the Internet?* National Bureau of Economic Research, 2004) While the zip-code search may be more about marketing and referrals to child care providers, the monitoring reports are about ensuring parents know the health and safety records of their child care provider, as well as about transparency of public dollars.

Lead Agencies with concerns regarding providers' privacy could use a unique identifier, such as a licensing number, to include on the profile. Parents interested in a certain provider can ask the provider or the Lead Agency for the identifier in order to look up more information about health and safety requirements met by a certain provider on the Web site. Lead Agencies also may choose to provide only limited information about a provider, such as provider name and zip code to make it easier for parents to identify their chosen provider without posting their full address.

Comment: Commenters recognized and supported the need to have more than one year of reports available for each provider, but the majority of commenters, including States and national organizations, expressed concern about the proposed requirement that the Web sites include at least five years of results. Several States noted that five years of information may not be useful and cause parents to overlook the improvements and corrections providers have made in the last five years. One State said "Providing older data that may be outdated could be confusing to parents and detrimental to child care providers who have made changes or improvement to practices." While others said that for States that do more than one visit each year, this would lead to an excess of information. Several national organizations suggested giving Lead Agencies flexibility with how many years they included, provided they included at least one year. A couple of States said two to three years would better fit existing State licensing policies.

Response: We appreciated commenters providing additional details about how reports are currently handled and how the proposed five-year requirement would interact with their policies. Based on these comments, we have changed the proposed regulation at § 98.33(a)(4)(iii) and now require that Lead Agencies include a minimum of either three years of results. This will balance the need for parents to have access to a comprehensive health and safety history of their provider with evolving State policies regarding monitoring and inspections.

Comment: Several national organizations commented that creating a plain language summary of individual monitoring and inspection reports would create a burden for Lead Agencies. Instead, they recommended "permitting States the alternative of posting an interpretation—for example, a plain language glossary of terms that could help parents interpret monitoring results".

Response: It is important to have individual monitoring and inspection reports easily accessible to both parents and providers. Expecting a parent to have to consult a separate guide or glossary in order to understand a monitoring and inspection report creates an additional burden to information. Therefore, we declined to allow a guide to take the place of the plain language summary. We encourage Lead Agencies to consider simplifying and translating their monitoring and inspection reports in order to create more consumer-friendly documents. This will help to ease any additional burden that might be created by having to create a plain language summary of the report.

Comment: Commenters, including national organizations and child care worker organizations, recommended that we add a regulatory requirement that Lead Agencies create an appeals process for findings included in the monitoring reports. Some commenters noted that sometimes reports have errors, and Lead Agencies should have a process to correct these errors to ensure proper information for both providers and parents. Others said providers should have time to appeal a finding before the report or finding is posted on the Web site.

Response: We agreed that Lead Agencies should have a process in place for quickly correcting errors on the Web site, and have made this a regulatory requirement at § 98.33(a)(4). However, we declined to add a regulatory requirement for States to have an appeals process for monitoring findings or to require a delay in posting this information while an appeal is in process. We leave it to the discretion of the Lead Agency to work with providers to determine the best approach.

We strongly support Lead Agencies implementing policies that are fair to providers, including protections related to the consumer education Web site. We recommend, but do not require, that Lead Agencies establish an appeals process for providers that receive violations, consistent with their own State laws and policies governing administrative appellate proceedings. This appeals process should include timeframes for filing the appeal, for the investigation, and for removal of any violations from the Web site determined on appeal to be unfounded. Lead Agencies also must ensure that the consumer education Web site is updated regularly. Some Lead Agencies currently allow providers to review monitoring and inspection results prior to posting on a public Web site. Nothing in this rule should be taken as prohibiting that practice moving forward. However, the requirement that information be posted in a timely manner means that Lead Agencies may need to limit the amount of time providers have to review the results prior to posting.

Comment: In the proposed rule, we requested comment on § 98.33(a) about whether the preamble to this final rule should set 90 days as a benchmark for timely posting of results. Commenters universally supported ACF not including a definition of "timely" in the regulatory language. We received many comments with a range of suggestions for how to define "timely". Several commenters, including many national organizations, said that 90 days was too long and recommended a 30-day benchmark. On the other hand, several States commented that while they are usually able to post reports within a few days, they can take up to 90 days when there are other agencies that need to be involved.

Response: We appreciated commenters providing feedback on this benchmark. We have chosen to leave it as proposed in the NPRM as a recommended 90 day benchmark, and are not adding a requirement to the regulatory language. We expect reports to be posted as quickly as possible, but believe 90 days is reasonable considering the complexities related to the monitoring and inspection process and reports.

Comment: We proposed to require that States post provider-specific information on the number of serious injuries and deaths that occurred in that provider setting. While a couple commenters supported the goal of this provision, the vast majority, including States, national organizations, and child care worker organizations, were strongly opposed to the proposal. Most of the commenters noted, as we did in the preamble to the proposed rule, that not all serious injuries and deaths that occur in child care are the fault of the child care provider, and any provider-specific information would need to include additional details about what happened. However, as one State said, "Providing information on the context of the situation would be labor intensive and may potentially violate the child and families' privacy. However, providing no context would be unfair to providers." Several States also commented that "Where a provider's conduct related to an injury or other incident fails to meet licensing requirements, the incident will result in an enforcement action that is publicly posted." Another State said "If the child care provider or a staff member is found to be responsible for a child's death, the child care provider would not continue to be registered, licensed, or employed at a licensed child care facility. Information on specific incidents would be available through the substantiated complaint information already required for the public Web site."

Response: Based on comments, we have chosen not to include the proposed requirement to post provider-specific information on serious injuries and deaths in this final rule, though nothing in this rule should be seen as prohibiting Lead Agencies from including this information on their Web sites if they so choose.

However, we continue to have concerns about a parent's ability to quickly access information about whether a death or serious injury had occurred at a specific child care provider. To balance the concerns of the commenters with the need for parents to be able to easily access this information, we have revised § 98.33(a)(4) to require that monitoring and inspection reports and summaries prominently display information about health and safety violations, including fatalities and serious injuries, that occurred at that child care provider. Parents will be able to access this important information more quickly if it is highlighted at the beginning of the report, as opposed to buried amongst other inspection items. Further, including this information as part of the monitoring and inspection report avoids providing information about deaths and serious injuries without the context necessary for parents to make an informed decision.

Additional consumer education. This final rule incorporates statutory requirements at Section 658E(c)(E)(i) of the Act by adding paragraph (b) at

§ 98.33, which requires Lead Agencies to provide additional consumer education to eligible parents, the general public, and, where applicable, child care providers. The consumer education may be done through child care resource and referral organizations or other means as determined by the Lead Agency, and can be delivered through the consumer education Web site at § 98.33(a). We strongly encourage Lead Agencies to use additional means to provide this information including through direct conversations with case workers, information sessions for parents and child care providers, outreach and counseling available at intake from eligibility workers, and to and through child care providers to parents.

This final rule requires consumer education to include: Information about the availability of child care services through CCDF, other programs for which families might be eligible, and the availability of financial assistance to obtain child care services; other programs for which families receiving CCDF may be eligible; programs carried out under Section 619 and Part C of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. 1419, 1431 *et seq.*); research and best practices concerning children's development, including meaningful parent and family engagement and physical health and development; and policies regarding the social-emotional behavioral health of children.

The first required piece of information is about the availability of child care services through CCDF and other programs that parents may be eligible for, as well as any other financial assistance that may be available to help parents obtain child care services. Lead Agencies should provide information about any other Federal, State/Territory/Tribal, or local programs that may pay for child care or other early childhood education programs, such as Head Start, Early Head Start and State-funded pre-kindergarten that would meet the needs of parents and children. This information should also detail how other forms of child care assistance, including CCDF, are available to cover additional hours the parent might need due to their work schedule.

The second requirement is for consumer education to include information about other assistance programs for which families receiving child care assistance may be eligible. These programs include: Temporary Assistance for Needy Families (TANF) (42 U.S.C. 601 *et seq.*); Head Start and Early Head Start (42 U.S.C. 9831 *et seq.*); Low-Income Home Energy Assistance Program (LIHEAP) (42 U.S.C. 8621 *et seq.*); Supplemental Nutrition Assistance Program (SNAP) (7 U.S.C. 2011 *et seq.*); Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) (42 U.S.C. 1786); Child and Adult Care Food Program (CACFP) (42 U.S.C. 1766); and Medicaid and the State Children's Health Insurance Programs (CHIP) (42 U.S.C. 1396 *et seq.*, 1397aa *et seq.*).

In providing consumer education, Lead Agencies may consider the most appropriate and effective ways to reach families, which may include information in multiple languages and partnerships with other agencies and organizations, including child care resource and referral. Lead Agencies should also coordinate with workforce development entities that have direct contacts with parents in need of child care. Some Lead Agencies co-locate services for families in order to assist with referrals or enrollment in other programs.

Families eligible for child care assistance are often eligible for other programs and benefits but many parents lack information on accessing the full range of programs available to support their children. More than half of infants and toddlers in CCDF have incomes below the federal poverty level, making them eligible for Early Head Start. Lead Agencies can work with Early Head Start programs, including those participating in Early Head Start-Child Care Partnerships, to direct children who are eligible for Early Head Start to available programs. Currently only approximately 5% of eligible children receive Early Head Start, and less than half of eligible children are served by Head Start.

Despite considerable overlap in eligibility among the major work support programs, historically, many eligible working families have not received all public benefits for which they qualify. For example, more than 40 percent of children who are likely to be eligible for both SNAP and Medicaid or CHIP fail to participate in both programs (Rosenbaum, D. and Dean, S. *Improving the Delivery of Key Work Supports: Policy & Practice Opportunities at A Critical Moment,* Center on Budget and Policy Priorities, 2011). A study using 2001 data found that only 5 percent of low-income working families obtained Medicaid or CHIP, SNAP, and child care assistance (Mills, G., Compton, J. and Golden, O., *Assessing the Evidence about Work Support Benefits and Low-Income Families,* Urban Institute, 2011). In addition to providing consumer education on the assistance programs listed at § 98.33(b)(1)(ii), Lead Agencies must provide outreach to families experiencing homelessness in accordance with § 98.51(c). As part of their outreach to families experiencing homelessness, we encourage Lead Agencies to provide consumer education about housing assistance programs when providing consumer information on other assistance programs.

In addition to informing families about the availability of these programs, some Lead Agencies have streamlined parents' access to other benefits and services by coordinating and aligning eligibility criteria or processes and/or documentation or verification requirements across programs. This benefits both families and administering agencies by reducing administrative burden and inefficiencies. Lead Agencies also coordinate to share data across programs so families do not have to submit the same information to multiple programs. Finally, Lead Agencies have created online Web sites or portals to allow families to screen for eligibility and potentially apply for multiple programs. We recommend Lead Agencies consider alignment strategies that help families get improved access to all benefits for which they are eligible.

Thirdly, consumer education must include information about programs for children with disabilities carried out under Part B Section 619 and Part C of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. 1419, 1431 *et seq.*).

The fourth piece of required consumer education is information about research and best practices concerning children's development, and meaningful parent and family engagement. It must also include information about physical health and development, particularly healthy eating and physical activity. This information may be included on the consumer education Web site, as well as be provided through brochures, in person meetings, from caseworks, and other trainings.

While this information is important for parents and the general public, we encourage Lead Agencies to target this information to child care providers as well. Each of these components is crucial for caregivers to understand in order to provide an enriching learning environment and build strong relationships with parents. Lead Agencies may choose to include information about family engagement frameworks in their provider education. Many States and communities have employed these frameworks to promote caregiver skills and knowledge through their QRIS, professional development programs, or efforts to build comprehensive early childhood systems. States have used publicly-available tools, including from the Office of Head Start. The Head Start *Parent, Family, and Community Engagement* framework is a research-based approach to program change that shows how different programs can work together as a whole—across systems and service areas—to support parent and family engagement and children's learning and development. This framework will be revised by joint technical assistance center for use by States and Territories and for child care providers. In addition, the U.S. Department of Health and Human Services and U.S. Department of Education in 2016 released a policy statement on family engagement from the early years to the early grades, including resources for States, early childhood programs, and others to build capacity to effectively partner with families.

Understanding research and best practices concerning children's development is an essential component for the health and safety of children, both in and outside of child care settings. Caregivers should be knowledgeable of important developmental milestones not only to support the healthy development of children in their care, but also so they can be a resource for parents and provide valuable parent education. Knowledge of developmental stages and milestones also reduces the odds of child abuse and neglect by establishing more reasonable expectations about normative development and child behavior. This requirement is associated with the requirement at § 98.44(b)(1) that orientation or pre-service for child care caregivers, teachers and directors include training on child development.

Lastly, consumer education must include provision of information about policies regarding social-emotional behavioral health of children, which may include positive behavioral health intervention and support models for birth to school-age or as age-appropriate, and policies to prevent suspension and expulsion of children birth to age five in child care and other early childhood programs as described in the Plan at § 98.16(ee).

Social-emotional development is fostered through securely attached relationships; and learning, by extension, is fostered through frequent cognitively enriching social interactions within those securely attached relationships. Studies indicate that securely attached children are more advanced in their cognitive and language development, and show greater achievement in school. In 2015, ACF issued an information memorandum detailing research and policy options related to children's social-emotional development. (CCDF–ACF–IM–2015–01, *http://www.acf.hhs.gov/sites/default/files/occ/ccdf_acf_im_2015_01.pdf*). By providing consumer education on social-emotional behavioral health policies, Lead Agencies are helping parents, the general public, and caregivers understand the importance of social-emotional and behavioral health and how the Lead Agency is encouraging the support of children's ability to build healthy and strong relationships.

In conjunction with this consumer education requirement, this rule adds § 98.16(ee) which requires Lead Agencies to provide a description of their policies to prevent suspension, expulsion, and denial of services due to behavior of children birth to age five in child care and other early childhood programs receiving CCDF assistance. Ensuring that parents and providers understand suspension and expulsion policies for children birth to age five is particularly important. Data on suspension and expulsion in early childhood education settings is somewhat limited and focused on rates at publicly-funded prekindergarten programs. One national study that looked at almost 4,000 State-funded prekindergarten classes found that the overall rate of expulsion in State-funded prekindergarten classes was more than three times the national rate of expulsion for students in Kindergarten through Twelfth Grade (Gilliam, W. *Prekindergarteners Left Behind: Expulsion Rates in State Prekindergarten Programs.* Foundation for Child Development, 2005). Data from the U.S. Department of Education showed that more than 8,000 preschool students were reported as suspended at least once during the 2011–2012 school year, with Black children and boys disproportionately being suspended more than once (U.S. Department of Education Office of Civil Rights *Data Snapshot: Early Childhood Education,* March 2014. *http://www2.ed.gov/about/offices/list/ocr/docs/crdc-early-learning-snapshot.pdf*). In 2014, the U.S. Departments of Health and Human Services and Education jointly released a policy statement addressing expulsion and suspension in early learning settings and highlighting the importance of social-emotional and behavioral health (*https://www.acf.hhs.gov/sites/default/files/ecd/expulsion_suspension_final.pdf*). The policy statement affirms the Departments' attention to social-emotional and behavioral health and includes several recommendations to States and early childhood programs, including child care programs, to assist in their efforts. It strongly encourages States to establish statewide policies, applicable across settings, including publicly and privately funded early childhood programs, to promote children's social-emotional and behavioral health and to eliminate or severely limit the use of expulsion, suspension, and other exclusionary discipline practices.

Comment: Commenters were supportive of the additional consumer education information. We received a few comments from national organizations regarding the requirement that Lead Agencies provide information about policies related to suspension and expulsion of children ages birth to five. These commenters requested regulatory language that more specifically either prohibited the use of suspension and expulsion for these age groups or at least discouraged their use. One State commented that a statewide policy prohibiting providers from expelling or suspending children would be very difficult to enforce.

Response: In response to these comments, the regulatory language at § 98.33(b)(1)(v) requires consumer education about policies to *prevent* suspension and expulsion. A similar change was made in the plan section at § 98.16(ee). While we cannot require States to create policies that limit or prohibit suspension and expulsion of young children, we urge States to move in that direction. We received no other comments on § 98.33(b) and have retained the rest of the language as proposed in the NPRM.

Information about developmental screenings. Section 658E(c)(2)(E)(ii) of the Act requires Lead Agencies to provide consumer education about developmental screenings to parents, the general public, and, when applicable, child care providers. Specifically, such information should include (1) information on existing resources and services the Lead Agency can use in conducting developmental screenings and providing referrals to services for children who receive child care assistance; and (2) a description of how a family or eligible child care provider may use those resources and services to obtain developmental screenings for children who receive child care assistance and may be at risk for cognitive or other developmental delays, including social, emotional, physical, or linguistic delays. The information about the resources may include the State or Territory's coordinated use of the Early and Periodic Screening, Diagnosis, and Treatment program under the Medicaid program carried out under title XIX of the Social Security Act (42 U.S.C. 1396 *et seq.*) and developmental screening services available under section 619 and part C of the IDEA (20 U.S.C. 1419, 1431 *et seq.*).

This final rule adds new paragraph (c) at § 98.33, which requires Lead Agencies to provide information on developmental screenings as part of their consumer education efforts during the intake process for families receiving CCDF assistance and to caregivers, teachers, and directors through training and education. Information on developmental screenings, as other consumer education information, should be accessible for individuals with limited English proficiency and individuals with disabilities.

Educating parents and caregivers on what resources are available for developmental screenings, as well as how to access these screenings, is crucial to ensuring that developmental delays or disabilities are identified early. Some children may require a more thorough evaluation by specialists and additional services and supports. Lead Agencies should ensure that all providers are knowledgeable on how to access resources to support developmental and behavioral screening, and make appropriate referrals to specialists, as needed, to ensure that children receive the services and supports they need as early as possible.

Comment: Commenters supported the requirement to provide information about developmental screenings to parents and providers. One advocacy organization recommended that we require that all children receive a developmental screening within 45 days of enrollment in order to align with Head Start standards.

Response: As we do not have the authority to require all children receiving CCDF to have a developmental screening, we declined to add the requirement to this final rule. While we are not requiring that all children receive a developmental screening, we strongly recommend that Lead Agencies develop strategies to ensure all children receive a developmental and behavioral screening within 45 days of enrollment in CCDF, which aligns with Head Start standards. With regular screenings, families, teachers, and other professionals can be assured that young children get the services and supports they need, as early as possible to help them thrive alongside their peers. *Birth to 5: Watch Me Thrive,* a coordinated Federal effort to encourage universal developmental and behavioral screening for children and to support their families and caregivers, has information and resources at *www.acf.hhs.gov/programs/ecd/watch-me-thrive.* In addition to research-based developmental and behavioral screenings, Lead Agencies should encourage parents and child care providers to use the tools and resources developed by the Centers for Disease Control and Prevention as part of their "Learn the Signs. Act Early." campaign. These resources help parents and child care providers to become familiar with and keep track of the developmental milestones of children. These resources are available at *http://www.cdc.gov/ncbddd/actearly/.* The resources provided through this campaign are not a substitute for regular developmental screenings, but help to improve early identification of children with autism and other developmental disabilities so children and families can get the services and support they need as early as possible. We received no other comments on this provision and have retained the language in § 98.33(c) as proposed in the NPRM.

This final rule adds new paragraph (d) to § 98.33, which requires Lead Agencies to provide families receiving CCDF assistance with easily understandable information on the child care provider they choose, including health and safety requirements met by the provider, any licensing or regulatory requirements met by the provider, date the provider was last inspected, any history of violations of these requirements, and any quality standards met by the provider. Lead Agencies also should provide information necessary for parents and providers to understand the components of a comprehensive background check, and whether the child care staff members of their provider have received such a check. The consumer statement must also include information about the hotline for parental complaints about possible health and safety violations and information describing how CCDF assistance is designed to promote equal access to comparable child care in accordance with § 98.45.

If a parent chooses a provider that is legally-exempt from regulatory requirements or exempt from CCDF health and safety requirements (*e.g.,* relatives at the Lead Agency option), the Lead Agency or its designee should explain the exemption to the parent. Lead Agencies that choose to use an alternative monitoring system for in-home providers, as described at § 98.42(b)(2)(v)(B), should describe this process for parents that choose in-home care. When a parent chooses a relative or in-home child care provider, the Lead Agency should explain to the parent the health and safety policies associated with relative or in-home care. The Lead Agency should provide the parents with resources about health and safety trainings should the parent wish for the relative to obtain training regardless of the exemption.

There is a great deal of variation in how Lead Agencies handle intake for parents receiving child care subsidies. Therefore, we allow flexibility for Lead Agencies to implement the consumer statement in the way that best fits both their administrative needs and the needs of the parents. This means that the consumer statement may be presented as a hard copy or electronically. When providing this information, a Lead Agency may provide it by referring to the Web site required by § 98.33(a). In such cases, the Lead Agency should ensure that parents have access to the Internet or provide access on-site in the subsidy office. While we recognize the need for Lead Agency flexibility in this area, we have concerns about relying solely on electronic consumer statements. Parents may not have access to the Internet or may have questions about the consumer statement that need to be answered by a person. If a parent is filing an application online, we encourage the inclusion of a phone number, directed to either the Lead Agency or another organization such as a child care resource and referral agency, to ensure parents can have their questions answered. We also recommend that intake done over the phone should include the offer to either email or mail the consumer statement to the parent; and, that information on consumer statements should be accessible by individuals with limited English proficiency and individuals with disabilities.

We realize, in some cases, a parent has chosen their provider prior to the intake process. If the parent comes in with a provider already chosen, the parent should be given the consumer statement on that provider. When a parent has not chosen a child care provider prior to intake, Lead Agencies should ensure that the parent receives information about available child care providers and general consumer education information required at § 98.33(a), (b), and (c). This information should include a description of health and safety requirements and licensing or regulatory requirements for child care providers, processes for ensuring requirements are met, as well as information about the background check process for child care staff members of providers, and what offenses may preclude a provider from serving children.

We strongly recommend that Lead Agencies provide parents receiving TANF and child care assistance, whether through CCDF or TANF, with the necessary support and consumer education in choosing child care. We strongly encourage social service agencies, child care licensing agencies, child care resource and referral agencies, and other related programs to work closely to ensure that parents receiving TANF are provided with the information and support necessary for them to make informed child care decisions.

Comment: We received mixed comments on the requirement to provide a consumer statement to families receiving child care assistance. Organizations representing child care resource and referral agencies and those representing private child care providers supported the requirement with one commenter saying "This provision of information will further help support the selection of high-quality care for children that promotes their health and safety." We also received several comments from States and national organizations recommending we delete the proposed consumer statement because it is duplicative of the requirements for the consumer education Web site and created additional burdens for the States.

Response: We agree that there is a lot of overlap between the consumer statement and the Web site, as we designed it that way to avoid additional work for Lead Agencies. It seems we were unclear in our description in the proposed rule. We do not expect Lead Agencies to create a whole new document or information item. Rather, the Lead Agency can point parents to the provider's profile on the Web site or print it out for a parent who may be doing intake in person. We also do not expect the consumer statements to be used to try to change the mind of a parent that has already chosen a provider. It is meant to ensure that parents have a comprehensive understanding of the requirements of providers and the health and safety record of their provider. For these reasons, we have retained the proposed rule language related to the consumer statement.

While there is a lot of overlap, the consumer statement provides targeted consumer education to subsidy parents who are specifically clients of the agency, and we have a special interest in helping them select child care, because we know from research that low-income children have the most to gain from high-quality child care and because the care is publicly subsidized. Most Lead Agencies have a direct relationship with families receiving child care subsidies, thus they have an opportunity to provide these parents with the consumer statement and more targeted consumer education.

We encourage Lead Agencies to provide parents receiving CCDF assistance with updated information on their child care provider on a periodic basis, such as by providing an updated consumer statement at the time of the family's next eligibility redetermination. Ties between the CCDF Lead Agency and the licensing agency can help to ensure that families are notified when providers are seriously out-of-compliance with health and safety requirements, and that placement of children and payment of CCDF funds do not continue where children's health and safety may be at-risk.

Linkages to national Web site. Section 658L(b)(2) of the Act requires the Secretary to operate a national Web site and hotline for consumer education and submission of complaints. The Act allows for the national Web site to provide the information either directly or through linkages to State databases. As it is not feasible or sensible for HHS to recreate databases many States have already created, we intend to use electronic transfers between federal, State and local systems to provide information needed by parents to make informed choices about the highest quality early childhood settings available that meet the needs of the families in their communities. In response to this requirement and comments we received on the proposed rule, § 98.33(e) of the final rule adds a requirement for Lead Agencies to provide linkages to databases related to the consumer education requirements at paragraph (a), including a zip-code based list of licensed and license-exempt child care providers, information about the quality of an available child care provider, if available, and health and safety records including monitoring and inspection reports.

Comment: In the proposed rule, we requested comment about the best way to link the required national Web site with the States' consumer education Web sites in order to avoid duplication and maximize coordination. We received a few comments from States about how to link the systems. One State suggested we "simply link all State provider Web sites to the Federal page." A couple States requested clarification about what the linkages might be, with one commenting that "If the national Web site required a data transfer from our State system, we have concerns about the cost and time needed to coordinate implementation of this transfer."

Response: By requiring the opening of linkages to databases, as provided for in the Act, we expect to be able to easily use existing State data to update the national site without creating new requirements or burdens for the Lead Agencies. Creating direct linkages to State and Territory databases gives ACF the ability to pull required child care data, such as available providers and health and safety records, in a way that allows for an effective customer experience and user interface. This requirement is the best way to provide a seamless presentation of the items required in the Act.

The purpose of the national Web site is to provide families with easy to understand resources that help families in locating local child care providers and understanding local licensing and health and safety requirements. We plan to build the Web site around existing databases at the State level. As Web site best practices promote the reduction of redirecting users to multiple Web sites, using database linkages as opposed to linking to State Web sites provides a better user experience for families. In addition, the Act requires the national Web site to be searchable by zip code. Linking to sites would not allow for a search throughout the national Web site, and would not meet the requirements of the statute.

CCDF plan. This final rule includes a technical change at § 98.33(g), as redesignated, to change the reference to a biennial Plan to a *triennial* Plan as established by Section 658E(b) of the Act. We did not receive comments on this provision.

Subpart E—Program Operations (Child Care Services) Lead Agency and Provider Requirements

Subpart E of the regulations describes Lead Agency and provider requirements related to applicable State/Territory and local regulatory and health and safety requirements, monitoring and inspections, and criminal background checks. It addresses training and professional development requirements for caregivers, teachers, and directors working for CCDF providers. It also includes provisions requiring the Lead Agency to ensure that payment rates to providers serving children receiving subsidies ensure equal access to the child care market, to establish a sliding fee scale that provides for affordable cost-sharing for families receiving assistance, and to establish priorities for receipt of child care services.

§ 98.40 Compliance With Applicable State/Territory and Local Regulatory Requirements

Section 658E(c)(2)(F) of the Act maintains the requirement that every Lead Agency has in effect licensing requirements applicable to child care services within its jurisdiction. If any types of CCDF providers are exempt from licensing requirements, the Act now requires Lead Agencies to describe why such licensing exemption does not endanger the health, safety, or development of children who receive services from child care providers who are exempt from such requirements. The final rule includes a corresponding change at § 98.40(a)(2), and provides clarification that the Lead Agency's description must include a demonstration of how these exemptions do not endanger children and that such descriptions and demonstrations must include any exemptions based on provider category, type, or setting; length of day; providers not subject to licensing because the number of children served falls below a Lead Agency-defined threshold; and any other exemption to licensing requirements. This relates to the corresponding CCDF Plan provision at § 98.16(u).

To clarify, this requirement does not compel the Lead Agency to offer exemptions from licensing requirements to providers. Rather, it requires that, if the Lead Agency chooses to do so, it must provide a rationale for that decision. We also note that these exemptions refer to exemptions from licensing requirements, but that license-exempt CCDF providers continue to be subject to the health, safety, and fire standards applicable to all CCDF providers in the Act. The only allowable exception to CCDF health and safety requirements is for providers who care only for their own relatives, which we discuss further below. In response to the NPRM, we received support for the requirement that Lead Agencies describe licensing exemptions and demonstrate that exemptions do not endanger the health, safety, or development of children in their care. We have therefore retained the NPRM language in this final rule.

§ 98.41 Health and Safety Requirements

Section 658E(c)(2)(I)(i) of the Act requires Lead Agencies to have in effect health and safety requirements for providers and caregivers caring for children receiving CCDF assistance that relate to ten health and safety topics: (i) Prevention and control of infectious diseases (including immunization); (ii) prevention of sudden infant death syndrome and use of safe sleeping practices; (iii) administration of medication, consistent with standards for parental consent; (iv) prevention and response to emergencies due to food and allergic reactions; (v) building and physical premises safety, including identification of and protection from hazards that can cause bodily injury such as electrical hazards, bodies of water, and vehicular traffic; (vi) prevention of shaken baby syndrome and abusive head trauma; (vii) emergency preparedness and response planning for emergencies resulting from a natural disaster, or a man-caused event (such as violence at a child care facility); (viii) handling and storage of hazardous materials and the appropriate disposal of biocontaminants; (ix) appropriate precautions in transporting children, if applicable; and (x) first aid and cardiopulmonary resuscitation (CPR). To clarify, biocontaminants include blood, body fluids or excretions that may spread infectious disease.

Section 658E(c)(2)(I)(ii) of the Act says that health and safety topics may include requirements relating to nutrition, access to physical activity, or any other subject area determined by the State to be necessary to promote child development or to protect children's health and safety—which the final rule restates at § 98.41(a)(1)(xii). While these topics are optional in this final rule, we strongly encourage Lead Agencies to include them in basic health and safety requirements. Educating caregivers on appropriate nutrition, including age-appropriate feeding, and physical activity for young children is essential to prevent long-term negative health implications and assist children in reaching developmental milestones. This final rule also adds "caring for children with special needs" as an optional topic on this list.

Lead Agencies are responsible for establishing standards in the above areas for CCDF providers and should require providers to develop policies and procedures that comply with these standards. We encourage Lead Agencies to adopt these standards for all caregivers and providers regardless of whether they currently receive CCDF funds. The Act requires health and safety training on the above topics to be completed pre-service or during an orientation period and on an ongoing basis. This training requirement is discussed in greater detail in § 98.44 on training and professional development.

ACF released *Caring for Our Children Basics (CfoC) Basics, http://www.acf.hhs.gov/programs/ecd/caring-for-our-children-basics*). *CfoC Basics* is a set of recommendations, which is intended to create a common framework to align basic health and safety efforts across all early childhood settings. *CfoC Basics,* represent minimum, baseline standards for health and safety. *CfoC Basics* is based on *Caring for Our Children: National Health and Safety Performance Standards; Guidelines for Early Care and Education Programs, 3rd Edition,* produced with the expertise of researchers, physicians, and practitioners (American Academy of Pediatrics, American Public Health Association, National Resource Center for Health and Safety in Child Care and Early Education. (2011). *Caring for Our children: National health and safety performance standards; Guidelines for early care and education programs. 3rd edition,* American Academy of Pediatrics; Washington, DC: American Public Health Association.)

We recommend that Lead Agencies looking for guidance on establishing health and safety standards consult ACF's *CfoC Basics.* The list of health and safety topics required by the Act is aligned with, but not fully reflective of, health and safety recommendations from both *CfoC Basics* as well as *Caring for Our Children: National Health and Safety Performance Standards.* Lead Agencies can be confident that if their standards are aligned with *CfoC Basics,* they will be considered to have adequate minimum standards. Lead Agencies are encouraged, however, to go beyond these baseline standards to develop a comprehensive and robust set of health and safety standards that cover additional areas related to program design, caregiver safety, and child developmental needs, using the full *Caring for Our Children: National Health and Safety Performance Standards* guidelines.

This final rule reiterates these new health and safety requirements at § 98.41(a) and provides clarifications that include specifying that the health and safety requirements be appropriate to the age of the children served in addition to the provider setting. Lead Agency requirements should reflect necessary content variation, within the required topic areas, depending on the provider's particular circumstances. For example, prevention of sudden infant death syndrome and safe sleep training is only necessary if a caregiver cares for infants. Similarly, if an individual is caring for children of different ages, training in pediatric first-aid and CPR should include elements that take into account that practices differ for infants and older children. For providers that care for school-age children, Lead Agencies may need to develop requirements that are appropriate for that stage of development (*i.e.,* that recognize the greater need for older children's autonomy while maintaining health and safety). In this final rule, we also clarify that, in addition to having these requirements in effect, they must be implemented and enforced, and that these requirements are subject to monitoring pursuant to § 98.42. This is intended to help ensure that requirements are put into practice and that providers are held accountable for meeting them. The required health and safety topics are included at § 98.41(a)(1). Lead Agencies will continue to have flexibility to determine how they will implement requirements and whether additional or more stringent requirements are appropriate for their State. Further, if existing licensing or regulatory requirements for CCDF providers established by the Lead Agency address the areas specified in this rule, then no additional requirements are necessary.

Comment: Although there was some concern regarding cost to implement, we received strong support for the inclusion of health and safety requirements, specific to the age of children served, for providers and caregivers caring for children receiving CCDF. For example, there was support for the inclusion of prevention of shaken baby syndrome and abusive head trauma; building and physical premises safety; emergency preparedness; prevention of sudden infant death syndrome and use of safe sleeping practices; and recognition and reporting of child abuse and neglect. There was also support for the inclusion of optional topics such as nutrition, physical activity, and caring for children with special needs. There was a recommendation to clarify that the first aid and CPR requirement include reference to pediatrics. There were also recommendations to include the prevention of child maltreatment, quality sleep promotion, age-appropriate screen time promotion, and partnership with child care health consultants in the list of required health and safety topics.

While we received support for the requirement that license-exempt providers who receive CCDF must adhere to the health and safety requirements applicable to all CCDF providers in the Act, there was some concern with cost of implementation and barriers due to State statute. However, the federal statute clearly requires these standards apply to license-exempt providers.

Finally, we received a number of comments supporting the reference to *CfoC Basics* to aid in implementation if States so choose. Some commenters made the additional request that the individual health and safety topics in the regulation include specific references to the relevant standards in *CfoC Basics.* A few comments went further and asked that *CfoC Basics* be required for use by all CCDF providers.

Response: We agree that there is value in including child maltreatment to the list of topics, so the final rule amends § 98.41(a)(1)(vi) to include the prevention of child maltreatment to the provision that requires the prevention of shaken baby syndrome and abusive head trauma. We also agree that additional specificity for the type of first aid and CPR training is valuable and so the final rule amends § 98.41(a)(1)(x) to specify that the requirement of first aid and CPR must pertain to pediatrics.

While we do recognize the value in topics related to quality sleep, age-appropriate screen time, and partnership with child care health consultants, we declined to add these to the required list of health and safety topics. The list of health and safety topics is meant to provide a baseline of health and safety for child care, but does not preclude Lead Agencies from adding additional requirements. Lead Agencies should consider whether additional topics, such as those mentioned above and others, are necessary to promote child development or protect health and safety under § 98.41(a)(1)(xii)(D).

While we appreciate the support for *CfoC Basics,* we respectfully disagree with providing references to specific *CfoC Basics* standards within health and safety topics. Providing the complete *CfoC Basics* as reference allows the regulations to stay current as *CfoC Basics* is updated in the future. With respect to the request that *CfoC Basics* be made a requirement, while *CfoC Basics* is a valuable resource for Lead Agencies to utilize, we want to maintain Lead Agency flexibility as they implement these standards.

Immunizations and Tribal programs. This final rule amends the regulatory language at § 98.41(a)(1)(i)(A) regarding immunizations by replacing "States and Territories" with "Lead Agencies" to be inclusive of Tribes. Minimum Tribal health and safety standards under effect currently address immunization in a manner that is consistent with the requirements of this section. As a result, there is no longer a compelling reason to continue to exempt Tribes from this requirement. The final rule makes a corresponding change to the regulations at § 98.83(d) in Subpart I. We discuss this and other changes regarding health and safety requirements as they pertain to Tribes in our discussion of Subpart I.

Immunizations for in-home care and relative care. In the NPRM, we proposed to add "provided there are no other unrelated children who are cared for in the home" to the previously-existing exemption to the immunization requirement for children who receive care in their own homes at § 98.41(a)(1)(i)(B)(*2*). Such children may continue to be exempt from requirements, provided that they are not in care with other unrelated children, which could endanger the health of those children. Commenters on the NPRM were supportive of this proposed requirement, so the final rule retains the provision. The final rule also makes a corresponding change at § 98.41(a)(1)(i)(B)(*1*) to indicate that the pre-existing immunization exemption for children who are cared for by relatives only applies as long as there are no other unrelated children who are cared for in the same setting.

Children experiencing homelessness and children in foster care. Section 98.41(a)(1)(i)(C) of the final rule restates the new statutory requirement at Section 658E(c)(2)(I)(i)(I) that requires Lead Agencies to establish a grace period for children experiencing homelessness and children in foster care. This will allow such children to receive CCDF services while their families (including foster families) are given a reasonable period of time to comply with immunization and other health and safety requirements. The final rule clarifies that any payment for such child during the grace period shall not be considered an error or improper payment under subpart K of this part. At § 98.41(a)(1)(i)(C)(1), the final rule adds a requirement for Lead Agencies to establish grace periods in consultation with the State, Territorial, or Tribal health agency. As well, § 98.41(a)(1)(i)(C)(3) allows Lead Agencies the option of establishing grace periods for other children who are not homeless or in foster care consistent with previously-existing regulations, which allow the establishment of grace periods more broadly. This was included in the 1998 CCDF regulation due to significant feedback that requiring immunizations to be completely up-to-date prior to receiving services could constitute a barrier to working. This provision was added to offer additional State flexibility. Adding a specific grace period provision in the statute was not intended to limit State's abilities to establish these policies but rather to ensure that, at a minimum, this policy existed for children experiencing homelessness and children in foster care.

The intent of this provision was to reduce barriers to enrollment given the uniquely challenging circumstances of homeless and foster children, not to undermine children's health and safety. The intent was not for those children to be permanently exempt from immunization and other health and safety requirements. For that reason, § 98.41(a)(1)(i)(C)(4) requires Lead Agencies to coordinate with licensing agencies and other relevant State/Territorial/Tribal and local agencies to provide referrals and support to help families experiencing homelessness and foster children comply with immunization and other health and safety requirements. This will help children, once enrolled and receiving CCDF services, to obtain necessary services and the proper documentation in a timely fashion. We received support for this proposal, and the final rule retains it.

Comment: There was support for the inclusion of a grace period for children experiencing homelessness and children in foster care in addition to the requirement that Lead Agencies help refer and support those children's families in obtaining immunizations. However, there was concern for the establishment of grace periods without oversight. Concerns were raised that the proposed rule allowed too much flexibility for Lead Agencies to establish grace periods without parameters, possibly negating group immunity protections that vaccinations are intended to provide. Conversely, there was concern that timeframes could be too restrictive and create barriers that the reauthorized Act intended to remove.

Response: In response to comments, we have amended the final rule to include language that now requires Lead Agencies to establish grace periods in consultation with the State, Tribal, or Territorial health agency. This provision is included at § 98.41(a)(1)(i)(C)(1). This will provide some valuable safeguards to health and safety of children in care while also allowing some considerations for the logistical challenges of the most vulnerable children and families.

Emergency preparedness and response. Section 658E(c)(2)(I)(i)(VII) of the Act requires CCDF health and safety requirements to include emergency preparedness and response planning for emergencies resulting from a natural disaster, or a man-caused event (such as violence at a child care facility) as defined under section 602(a)(1) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195a(a)(1)). This final rule includes this provision at § 98.41(a)(1)(vii) as well as additional language drawn from Section 658E(c)(2)(U) of the Act regarding Statewide Disaster Plans. According to the Act, Statewide Disaster Plans should address evacuation, relocation, shelter-in-place, and lock-down procedures; procedures for staff and volunteer emergency preparedness training and practice drills; procedures for communication and reunification with families; continuity of operations; and accommodation of infants and toddlers, children with disabilities, and children with chronic medical conditions. Communication and reunification with families should include procedures that identify entities with responsibility for temporary care of children in instances where the child care provider is unable to contact the parent or legal guardian in the aftermath of a disaster. Accommodation of infants and toddlers, children with disabilities, and children with chronic medical conditions should include plans that address multiple facets, including ensuring adequate supplies (*e.g.,* formula, food, diapers, and other essential items) in the event that sheltering-in-place is necessary. In addition to being addressed in the Statewide Disaster Plan, we require that health and safety requirements for CCDF providers include these topics so that child care providers and staff will be adequately prepared in the event of a disaster.

Guidance in *Caring for Our Children: National Health and Safety Performance Standards and CfoC Basics,* includes recommended standards for written evacuation plans and drills, planning for care for children with special health needs, and emergency procedures related to transportation and emergency contact information for parents. The former National Association of Child Care Resource and Referral Agencies (now Child Care Aware of America) and Save the Children published *Protecting Children in Child Care During Emergencies: Recommended State and National Standards for Family Child Care Homes and Child Care Centers,* that includes recommended State regulatory standards related to emergency preparedness for family child care homes and child care centers.

Comment: There was a recommendation to include mental health crisis training as a requirement in emergency preparedness and response planning.

Response: While we support the inclusion of mental health crisis training, such training is already included under the required emergency preparedness training for staff and volunteers as described under Section 98.41(a)(1)(vii). States have the latitude to include mental health crisis training within that requirement and are encouraged to do so.

Group Size Limits and Child-Staff Ratios. Section 658E(c)(2)(H) of the Act requires Lead Agencies to establish group size limits for age-specific populations and appropriate child-staff ratios that will provide healthy and safe conditions for children receiving CCDF assistance as well as meet children's developmental needs. It also requires Lead Agencies to address required qualifications for caregivers, teachers, and directors, which is discussed at § 98.44. Consistent with these requirements, § 98.41(d) of this final rule requires the Lead Agency to establish standards for CCDF child care services that strengthen the relationship between caregivers and children as well as provide for the safety and developmental needs of the children served, given the type of child care setting. This is a minor change from the proposed language in the NPRM, which required Lead Agencies to establish standards that "promote" the caregiver and child relationship. We changed "promote" to "strengthen" in this final rule to more accurately describe the intent of this provision, which is to ensure a strong, meaningful relationship between the child and the adult providing care.

Ratio and group size standards are necessary to ensure that the environment is conducive to safety and learning. Child-staff ratios should be set such that caregivers can demonstrate the capacity to meet health and safety requirements and evaluate the needs of children in their care in a timely manner. A low child-staff ratio allows for stronger relationships between a child and their caregiver, which is a key component of quality child care. Studies of high-quality early childhood programs found that group size and ratios mattered to the safety and the quality of children's experiences, as well as to children's health. (*13 Indicators of Quality Child Care: Research Update, presented to Office of the Assistant Secretary for Planning and*

Evaluation and Health Resources and Services Administration/Maternal and Child Health Bureau U.S. Department of Health and Human Services, 2002 and *National Institute of Child Health and Human Development (NICHD). 2006. The NICHD study of early child care and youth development: Findings for children up to age 4 1/2 years. Rockville, MD: NICHD.).*

While States have flexibility in setting group size and child-staff ratios, these standards are often inter-related. For example, using square footage per child by itself does not ensure an appropriate determination of group size. While we are not establishing a Federal requirement for group size and child-staff ratios, there are resources that Lead Agencies can use when developing their standards. *CfoC Basics* recommends:

> Appropriate ratios should be kept during all hours of program operation. Children with special health care needs or who require more attention due to certain disabilities may require additional staff on-site, depending on their special needs and the extent of their disabilities. In center-based care, child-staff ratios should be determined by the age of the majority of children and the needs of children present. For children 23 months and younger, a ratio of four children to one child care provider should be maintained. For children 24 to 35 months, a ratio of four to six children per provider should be maintained. For children who are three years old, a maximum ratio of 9:1 should be preserved. If all children in care are four to five years of age, a maximum ratio of 10:1 should be maintained.
>
> In family child care homes, the caregivers' children as well as any other children in the home temporarily requiring supervision should be included in the child-staff ratio. In family child care settings where there are mixed age groups that include infants and toddlers, a maximum ratio of 6:1 should be maintained and no more than two of these children should be 24 months or younger. If all children in care are under 36 months, a maximum ratio of 4:1 should be maintained and no more than two of these children should be 18 months or younger. If all children in care are three years old, a maximum ratio of 7:1 should be preserved. If all children in care are four to five years of age, a maximum ratio of 8:1 should be maintained.

As stated earlier, these represent baseline recommendations and Lead Agencies should not feel limited by them. ACF also encourages Lead Agencies to consider the group size and child-staff ratios outlined in *Caring for Our Children: National Health and Safety Performance Standards* and the Head Start and Early Head Start standards for child-staff ratios, especially in light of partnerships between Head Start and child care. The Head Start program performance standards set forth ratios and group size requirements for the center-based-and family child care options for Head Start and Early Head Start providers. Early Head Start requires a ratio of one teacher for every four infants and toddlers in center based programs with a maximum group size of eight, or a maximum group size of nine if there are three teachers.

A Head Start family child care provider working alone may have a maximum group size of six, with no more than two children under two years old. A family child care provider may care for up to four children under three years old with a maximum group size of four, with no more than of two children under 18 months of age. When there is a teacher and an assistant, the maximum group size is 12 children, with no more than four children under two years old. Head Start requires a ratio two teachers in center-based programs with a maximum group size of 17 children for three year olds and 20 children for four year olds.

Another resource for determining appropriate child-staff ratios and group sizes is *NFPA 101: Life Safety Code* from The National Fire Protection Association (NFPA), which recommends that small family child care homes with one caregiver serve no more than two children incapable of self-preservation. For large family child care homes, the NFPA recommends that no more than three children younger than 2 years of age be cared for where two caregivers are caring for up to 12 children (National Fire Protection Association, *NFPA 101: Life Safety Code,* 2009).

In response to the NPRM, commenters were supportive of giving Lead Agencies the latitude to establish their own requirements for child-staff ratios and group size specific to setting type and age of children served. For example, one comment stated that they "appreciate ACF's acknowledgement of the role provider-child ratios and group size standards play in ensuring an environment conducive to safety and learning, and the role of low ratios in stronger relationships with caregivers, a key element of quality. While ACF does not have the statutory authority to set specific ratios and size limits, we appreciate that ACF highlighted the examples in *CFOC Basics,* as well as Head Start, as examples for consideration."

Compliance with Child Abuse Reporting Requirements. Section 658E(c)(2)(L) of the Act requires Lead Agencies to certify in its Plan that child care providers comply with procedures for reporting child abuse and neglect as required by section 106(b)(2)(B)(i) of the Child Abuse Prevention and Treatment Act (CAPTA) (42 U.S.C. 5106a(b)(2)(B)(i)). That provision of CAPTA requires that the State has in effect and is enforcing a State law, or has in effect and is operating a statewide program, relating to child abuse and neglect that includes provisions or procedures for an individual to report known and suspected instances of child abuse and neglect, including a State law for mandatory reporting by individuals required to report such instances. Thus, Lead Agencies must certify that caregivers, teachers, and directors of child care providers will be required to report child abuse and neglect as individuals or mandatory reporters, whether or not the State explicitly identifies these persons as mandatory reporters.

Because the CAPTA requirement above is not applicable to Tribes or, in some circumstances, to Territories, the final rule expands upon this provision at § 98.41(e) by requiring Lead Agencies to certify that caregivers, teachers, and directors of child care providers within the State (or service area) will comply with the State's, Territory's or Tribe's child abuse reporting requirements as required by section 106(b)(2)(B)(i) of CAPTA, if applicable, or other child abuse reporting procedures and laws in the service area. Territories and Tribes may have their own reporting procedures and mandated reporter laws. Also, some Tribes may work with States to use the State's reporting procedures. Further, the Federal Indian Child Protection and Family Violence Prevention Act requires mandated reporters to report child abuse occurring in Indian country to local child protective services agency or a local law enforcement agency (18 U.S.C. 1169). While State, Territory, and Tribal laws about when and to whom they report vary, child care providers and staff are often considered mandatory reporters of child abuse and neglect and responsible for notifying the proper authorities in accordance with applicable laws and procedures. Regardless, the provision is intended for the Lead Agency to ensure that caregivers, teachers, and directors follow all relevant child abuse and neglect reporting procedures and laws, regardless of whether a child care caregiver or provider is considered a mandatory reporter under existing child abuse and neglect laws. We note that this requirement applies to caregivers, teachers, and directors of all child care providers, regardless of whether they receive CCDF funds. We did not receive comments on this provision and have made no changes to the proposed rule language.

To support this statutory requirement, we have added recognition and reporting of child abuse and neglect to the list of health and safety topics at § 98.41(a)(1)(xi) to ensure that caregivers, teachers, and directors are properly trained to be able to recognize the manifestations of child maltreatment. According to the FY 2016–2018 CCDF Plans, 49 States and Territories have a pre-service training requirement on mandatory reporting of suspected abuse or neglect for staff in child care centers and 25 States and Territories require pre-service training in this area for family child care.

Comment: As mentioned earlier, we received support for the inclusion of the recognition and reporting of child abuse and neglect in the list of required health and safety topics.

Response: We have retained this provision in accordance with Section 658E(c)(2)(L) of the Act. Child abuse and neglect training can be used to educate and establish child abuse and neglect prevention and recognition measures for children, parents, and caregivers. While caregivers, teaches, and directors are not expected to investigate child abuse and neglect, it is important that all of these individuals are aware of common physical and emotional signs and symptoms of child maltreatment.

§ 98.42 Enforcement of Licensing and Health and Safety Requirements

The majority of the language we proposed in section 98.42 is new, based on requirements added in the CCDBG Act of 2014. States receiving CCDF funds are required to have child care licensing systems in place and must ensure child care providers serving children receiving subsidies meet certain health and safety requirements.

Procedures to ensure compliance with licensing and health and safety requirements. Previous regulations required that the Lead Agency must have procedures in effect to ensure that child care providers of CCDF services within the service area served by the Lead Agency, comply with all applicable State, local, or Tribal requirements. This final rule retains the proposed rule language and clarifies at § 98.42(a) that these requirements must include the health and safety requirements described in § 98.41. We received no comments on this section.

Monitoring requirements. Section 658E(c)(2)(K) of the Act requires that Lead Agencies conduct monitoring visits for all child care providers receiving CCDF funds, including license-exempt providers (except, at Lead Agency option, those that only serve relatives). The Act requires Lead Agencies to certify that licensed CCDF providers receive one pre-licensure inspection for compliance with health, safety, and fire standards and at least one, annual, unannounced licensing inspection for compliance with licensing standards, including health, safety, and fire standards. License-exempt CCDF providers (except, at Lead Agency option, those serving relatives) must receive at least one annual inspection for compliance with health, safety, and fire standards at a time determined by the Lead Agency. The final rule restates these requirements at § 98.42(b). For existing licensed providers already serving CCDF children, we will consider the Lead Agency to have met the pre-licensure requirement through completion of the first, annual on-site inspection.

Section 98.42(b)(2) of the final rule clarifies that annual inspections for both licensed and license-exempt CCDF providers includes, but is not be limited to, those health and safety requirements described in § 98.41. The final rule also clarifies that Tribes are subject to the monitoring requirements, unless a Tribal Lead Agency requests an alternative monitoring methodology in its Plan and provides adequate justification, subject to ACF approval, pursuant to § 98.83(d)(2).

Pre-licensure inspections. The vast majority of States and Territories already require inspections for all child care providers prior to licensure, which we strongly encourage. Only one State does not require pre-licensure inspections for child care centers, and seven States do not require pre-licensure inspections for family child care. This final rule interprets the pre-licensure inspection requirement as an indication that an on-site inspection is necessary for licensed child care providers prior to providing CCDF-funded child care. Therefore, any licensed provider that did not previously receive a pre-licensure inspection must be inspected prior to caring for a child receiving CCDF.

Comment: We received strong support for pre-licensure inspections as a condition for licensure as well as meeting the pre-licensure inspection requirement through the first annual on-site inspection for existing licensed CCDF providers and those in States that do not currently require pre-licensure visits. However, there was concern that the first annual inspection of existing licensed providers who provide CCDF-funded care would not take place in a timely manner and families would not receive needed care.

Response: Because monitoring of licensing and regulatory requirements does not go into effect until November 19, 2016, per Section 658E(c)(2), we expect existing CCDF providers to have received their annual on-site inspection before phase in of the pre-licensure inspection requirement. This visit will meet the pre-licensure inspection requirement and allow for providers to continue serving CCDF children without interruption.

The Act and this final rule require annual inspections of licensed child care providers receiving CCDF funds. Research supports the use of regular, unannounced inspections for monitoring compliance with health and safety standards and protecting children. A recent series of Department of Health and Human Services' (HHS) Office of Inspector General (OIG) audits identified deficiencies with health and safety protections for children in child care with CCDF providers in several States, including in Arizona, Connecticut, Florida, Louisiana, Maine, Michigan, Minnesota, Pennsylvania, Puerto Rico, and South Carolina. For example, an OIG audit in one State examined the monitoring of 20 family child care home providers that participate in the CCDF program and found 17 in violation of at least one licensing requirement, including four providers who did not comply with background check requirements. Another audit found 19 out of 20 licensed family child care home CCDF providers in violation of at least one State licensing requirement related to the health and safety of children. Unfortunately, the oversight and monitoring problems highlighted in recent reports were similar to those first identified 23 years ago. (HHS OIG, *Some Arizona Child Day Care Centers Did Not Always Comply with State Health and Safety Licensing Requirements.* (A–09–13–01008). January 2015; HHS OIG, *Some Connecticut Child Day Centers Did Not Always Comply with State Health and Safety Licensing Requirements,* (A–01–13–02506). April 2014; HHS, OIG, *Some Florida Child Care Centers Did Not Always Comply with State Health and Safety Licensing Requirements,* (A–04–14–08033), March 2016; HHS, OIG, *Some Louisiana Child Day Centers Did Not Always Comply with State Health and Safety Licensing Requirements,* (A–06–13–00036). August 2014; HHS, OIG, *Some Maine Child Day Centers Did Not Always Comply with State Health and Safety Licensing Requirements,* (A–01–13–02503) August 2014; HHS, OIG, *Some*

Minnesota Child Care Centers Did Not Always Comply with State Health and Safety Licensing Requirements, (A–05–14–00022) March 2015; HHS, OIG, *Some Pennsylvania Child Day Centers Did Not Always Comply with State Health and Safety Licensing Requirements,* (A–03–14–00251). September 2015; HHS, OIG, *Some South Carolina Child Care Centers Did Not Always Comply with State Health and Safety Licensing Requirements,* (A–04–14–08032) November 2015; HHS, OIG, *Review of Health and Safety Standards at Child Care Facilities in North Carolina,* (A–12–92–00044) March 23, 1993; HHS, OIG, *Audit of Health and Safety Standards at Child Care Facilities in Nevada,* (A–09–92–00103) September 1993. HHS, OIG, *Nationwide Review of Health and Safety Standards at Child Care Facilities* (A–04–94–00071) December 1994).

In the proposed rule, we specifically solicited comments about expanding the requirement for unannounced, annual inspections to all licensed child care providers, regardless of whether or not they currently receive CCDF funds. While we received many supportive comments, this final rule does not extend the requirements to providers not receiving CCDF and keeps the regulatory language at § 98.42(b) as proposed. However, we strongly encourage Lead Agencies to conduct annual, unannounced visits of all licensed child care providers, including those not serving children receiving child care subsidies.

Comment: The majority of commenters supported the goal of extending unannounced, annual inspections to all licensed providers. However, several commenters, including States and a municipality, expressed concerns about the high costs related to the proposal, especially considering the other costs associated with the monitoring requirements included in the Act. One State said it "understands the concern ACF poses regarding not inspecting all providers on the same inspection frequency; however, cost is a legitimate and real barrier to implementing a rule that would require annual inspection of all providers in States where this is not already in practice." Comments also reflected concerns about the logistics of implementing the proposed requirement. Child care providers, national/State/local organizations, child care worker organizations, and advocates supported unannounced, annual inspections for all licensed providers. Commenters agreed with ACF's concerns that requiring inspections only of licensed CCDF providers, and not all licensed providers, could result in a bifurcated system in which children receiving CCDF do not have access to the full range of licensed child care providers.

Response: In light of the significant number of concerns related to the cost of broader coverage, the final rule keeps § 98.42(b) as proposed and does not require the expansion of annual inspections to licensed child care providers not serving children receiving CCDF. However, ACF continues to be concerned that if all licensed child care providers are not subject to at least annual inspections, CCDF families would be restricted from accessing a portion of the provider population (those that have not been inspected annually), effectively denying children access to some providers, limiting parental choice, and resulting in a bifurcated system. Therefore, we strongly encourage Lead Agencies to use annual inspections as a means for monitoring all licensed child care providers.

Annual inspections of license-exempt providers. This provision is addressed in section 98.42(b)(2)(ii) of this final rule, which clarifies that the annual monitoring applies to license-exempt providers that are eligible to provide CCDF services. The Act does not require that inspections for license-exempt CCDF providers be unannounced, but ACF strongly encourages some use of unannounced visits, as they have been found effective in promoting compliance with health and safety requirements among providers who have a history of low compliance with State child care regulations. (R. Fiene, *Unannounced vs. announced licensing inspections in monitoring child care programs,* Pennsylvania Office of Children, Youth and Families, 1996; American Academy of Pediatrics, American Public Health Association, National Resource Center for Health and Safety in Child Care and Early Education; *Caring for Our Children: National health and safety performance standards; Guidelines for early care and education programs. 3rd edition.*) However, there may be situations in which a Lead Agency cannot be sure that a provider and children will be present (*e.g.,* when a provider is caring for a child whose parent has a variable work schedule). In such situations, advance notification of a visit may be necessary. The Lead Agency may also choose to inform providers before monitoring staff depart for unannounced visits that involve significant travel time, such as those in rural areas, to avoid staff visits when the provider or children are not present. Lead Agencies are encouraged to make reasonable efforts to conduct visits during the hours providers are caring for children and ensure that providers who care for children on the evenings and weekends are monitored so that the supply of non-traditional hour care is not reduced. ACF intends to provide technical assistance to CCDF Lead Agencies on best practices for monitoring license-exempt providers, including the use of unannounced inspections.

Comment: We received comments from a few States that indicated concerns for requiring inspections of license-exempt programs due to cost and conflicts with State statute. One commenter stated that "conducting monitoring visits to license-exempt programs will be challenging for our licensing staff since we will not have jurisdiction over these programs."

Response: The annual inspection of license-exempt providers who receive CCDF for compliance with health, safety, and fire standards is required by the Act. In cases where there is a conflict with State statute, the State will need to take legislative action in order to comply. If additional time is necessary to make this change, this final rule includes a waiver provision at § 98.19(b) that allows the Lead Agency to apply for a temporary extension that provides transitional relief from conflicting or duplicative requirements preventing implementation, or an extended period of time in order for a State, territorial, or tribal legislature to enact legislation to implement the provisions of this subchapter.

Process for responding to complaints. Section 658E(c)(2)(C) of the Act requires Lead Agencies to maintain a record of substantiated parental complaints, and § 98.32 of the final rule requires Lead Agencies to establish a reporting process for parental complaints. A logical extension of these requirements is for Lead Agencies to respond to complaints, including monitoring where appropriate, in particular those of greatest concern to children's health and safety. Unannounced inspections allow for an investigation of the situation and, if the threat is substantiated, may prevent future incidences. In the NPRM, we had not proposed a requirement for monitoring in response to complaints but sought comments on whether this final rule should include a requirement for Lead Agencies to conduct unannounced inspections in response to complaints and whether this requirement should apply to providers receiving CCDF funds or additional providers.

Comment: In general, there was support from national organizations for States to conduct inspections in response to complaints received about incidents in child care that impact children's health and safety. For example, one submission recommended that this final rule "include a requirement for States to conduct inspections in response to complaints received about incidents in child care that impact children's health and safety. Inclusion of such a requirement is a logical step given that States are required to have a hotline in place for the public to report complaints. States should have in place a system to determine those complaints that indicate a risk to children's health and safety and investigate accordingly."

However, there was also concern from national, State and local organizations; child care resource and referral agencies; and States about conducting unannounced inspections for *all* complaints and recommended that unannounced visits be conducted in response to complaints of imminent danger to children, as defined by the State. Many felt that States should have the ability to develop State-specific procedures for monitoring in response to complaints, including the triggers for unannounced visits.

Response: Consistent with the NPRM, we decline to require monitoring inspections in response to complaints. However, this final rule at § 98.32(d)(1) requires Lead Agencies to describe in their CCDF Plans how they respond to and substantiate complaints, including whether or not the State uses monitoring in its process of responding to complaints for both CCDF and non-CCDF providers. This requirement corresponds to the Plan question included at § 98.16(s).

Coordination of monitoring. Section 98.42(b)(2)(iii) of the final rule requires Lead Agencies to coordinate, to the extent practicable, with other Federal, State/Territory, and local entities that conduct similar on-site monitoring. Possible partners include licensing, QRIS, Head Start, and the Child and Adult Care Food Program (CACFP).

Coordinating with other monitoring agencies can be beneficial to both agencies as they prevent duplication of services. As an example of current interagency coordination, one State holds monthly meetings with representation from its licensing division, CCDF Lead Agency, CACFP, and other public agencies with child care monitoring responsibilities. These divisions and agencies identify areas of overlap in monitoring and coordinate accordingly to leverage combined resources and minimize duplication of efforts. It is important that any shared costs be properly allocated between the organizations participating and benefiting from the partnership.

To the extent that other agencies provide an on-site monitoring component that may satisfy or partially satisfy the new monitoring requirement under the Act and this final rule, the Lead Agency is encouraged to pursue collaboration, which may include sharing information and data as well as coordinating resources. However, the Lead Agency is ultimately responsible for meeting these requirements and ensuring that any collaborative monitoring efforts satisfy all CCDF requirements. In response to the NPRM, there was strong support for coordination of monitoring across programs with other Federal, State/Territory, and local entities that conduct similar on-site monitoring; therefore, we have retained this provision in this final rule.

Differential monitoring. Section 98.42(b)(2)(iv)(A) of the final rule gives Lead Agencies the option of using differential monitoring, or a risk-based monitoring approach, provided that the monitoring visit is representative of the full complement of health and safety standards and is conducted for all applicable providers annually, as required in statute.

A white paper developed by HHS's Office of the Assistant Secretary for Planning and Evaluation, found the following:

> Many States are using differential monitoring to make monitoring more efficient. As opposed to 'one size fits all' systems of monitoring, differential monitoring determines the frequency and depth of needed monitoring from an assessment of the provider's history of compliance with standards and regulations. Providers who maintain strong records of compliance are inspected less frequently, while providers with a history of non-compliance may be subject to more announced and unannounced inspections. In some States, more frequent inspections are conducted for providers who are on a corrective action plan, or after a particularly egregious violation. (Trivedi, P.A. (2015). *Innovation in monitoring in early care and education: Options for states. Washington, DC: Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services*)

Differential monitoring often involves monitoring programs using monitoring tools or protocols that investigate a subset of requirements to determine compliance. There are two methods used to identify rules for differential monitoring:

- *Key Indicators:* An approach that focuses on identifying and monitoring those rules that statistically predict compliance with all the rules; and
- *Risk Assessment:* An approach that focuses on identifying and monitoring those rules that place children at greater risk of mortality or morbidity if violations or citations occur.

The key indicators approach is often used to determine the rules to include in an abbreviated inspection. A risk assessment approach is often used to classify or categorize rule violations and can be used to identify rules where violations pose a greater risk to children, distinguish levels of regulatory compliance, or determine enforcement actions based on categories of violations. Note that monitoring strategies that rely on sampling of providers or allow for a monitoring frequency of less than once per year for providers are not allowable as every child care provider must receive at least one inspection annually, in accordance with the Act. However, differential monitoring key indicator approaches can be used in annual monitoring visits, provided that the content covered during each visit is representative of the full complement of health and safety requirements.

ACF encourages Lead Agencies to consider the use of differential monitoring as a method for determining the scheduling and priority for unannounced monitoring visits. This may be based on an assessment of the child care provider's past level of compliance with health and safety requirements, information received that could indicate violations, or the occurrence of a monitoring visit from another program. Differential monitoring allows Lead Agencies to prioritize monitoring of providers that have previously been found out of compliance or the subject of parental complaints or that have not been monitored through other programs.

Lead Agencies should use data to make necessary adjustments to differential monitoring or the frequency of monitoring visits over time. For example, if widespread or significant compliance issues are found under existing monitoring protocols, the Lead Agency could consider increasing the frequency of monitoring visits. As discussed in *Innovations in Monitoring,* Lead Agencies should be intentional and cautious in their use of differential monitoring and not replace routine inspection of all licensed providers, including those with good compliance records. We encourage Lead Agencies to follow the recommendations below when implementing key indicators and/or risk-based approaches:

- Assess resources available in the federal TA system that can assist with undertaking a key indicator or statistical/risk-based approach;
- Conduct comprehensive unabbreviated inspections of all facilities at least every three years;
- Have a monitoring protocol/instrument in use and at least one year's worth of data from monitoring visits in place prior to determining key indicators;
- Combine a key indicator system with a risk-based approach, to ensure that resources are well-targeted to the providers that are out of compliance in the most crucial areas for the protection of children;
- Continue to do full inspections with providers that (1) have not maintained a regular license for the past two consecutive years, (2) have had recent changes in their director, (3) have had complaints that have been substantiated in the past 12 months, (4) have recently experienced sanctions, and (5) have a past history of repeated violations;
- Conduct validation studies by comparing compliance data from comprehensive reviews to compliance data from key indicator reviews;
- Consider and develop a different set of key indicators for different types of child care settings (*e.g.,* center-based versus family child care).

As there was strong support for the use of differential monitoring as a method for annual inspections, we are retaining this provision in this final rule.

Monitoring in-home care. At § 98.42(b)(2)(v)(B), this final rule requires that that Lead Agencies have the option to develop alternate monitoring requirements for care provided in the child's home that are appropriate to the setting. A child's home may not meet the same standards as other child care facilities and this provision gives Lead Agencies flexibility in conducting more streamlined and targeted inspections. For example, Lead Agencies may choose to monitor in-home providers on basic health and safety requirements such as training and background checks. Lead Agencies could choose to focus on health and safety risks that pose imminent danger to children in care. This flexibility cannot be used to bypass the monitoring requirement altogether. States should develop procedures for notifying parents of monitoring protocols and consider whether it would be appropriate to obtain parental permission prior to entering the home for inspection purposes.

Comment: In response to the NPRM, there was support from States and national organizations for Lead Agencies to have the option to develop alternative monitoring requirements for in-home care. Some felt that, when care is provided in the child's home, certain aspects of health and safety are the responsibility of the parents and not under the child care provider's control. One comment said that "the fact that there are public dollars being invested does indicate that the Lead Agency should be empowered to do what is necessary to ensure that the child care experience that is being funded is developmentally appropriate, safe, clean and is equal to what a family not eligible for CCDF funding might expect."

However, a number of comments believed care provided in a child's home should be exempt from on-site monitoring. In-home monitoring raises privacy concerns for families, as well as the potential for unintended consequences. They believed that imposing monitoring requirements on in-home care may lead States to further restrict the use of in-home care by families receiving assistance (as permitted by § 98.16(i)(2)), including among those who need it. The few families that use care in the child's own home may do so because of circumstances that severely limit their access to other options—circumstances such as a child's serious disability or a parent's work schedule that requires overnight care. Lead Agencies should be permitted to exempt in-home child care providers from health and safety and on-site monitoring requirements, just as relative providers may be exempt.

Response: While we are sensitive to concerns in this area, we do not have the statutory authority to exempt in-home providers from monitoring requirements. However, by allowing Lead Agencies to develop alternative methodologies for meeting this requirement, this final rule grants significant flexibility to States in how they choose to fulfill this requirement. We encourage Lead Agencies to use an approach that emphasizes training and technical assistance that focuses on assisting families in making their homes safe for their children. For example, some Lead Agencies provide parents with health and safety checklists that allow them to assess critical elements of their home environment. Additionally, instead of inspectors who monitor for compliance with licensing requirements, Lead Agencies should consider whether other entities, such as resource and referral agencies or other community organizations, are better positioned to monitor and provide supports for care provided in an in-home setting.

Licensing inspector qualifications. Section 658E(c)(2)(K)(i)(I) of the Act requires Lead Agencies to ensure that individuals who are hired as licensing inspectors in the State are qualified to inspect those child care providers and facilities and have received training in related health and safety requirements, and are trained in all aspects of the State's licensure requirements. This final rule re-states this statutory requirement at § 98.42(b)(1) and clarifies that such training should include, at a minimum, the areas listed in § 98.41 as well as all aspects of State, Territory, or Tribal licensure requirements. As inspectors must monitor the health and safety requirements in § 98.41, it follows that the training of inspectors should include these standards.

The final rule also clarifies that inspectors be trained in health and safety requirements appropriate to provider setting and age of children served. Inspecting care for children of different ages, and in different settings, may require specialized training in order to understand differences in care. We encourage Lead Agencies to consider the cultural and linguistic diversity of caregivers when addressing inspector competencies and training. *Caring for Our Children: National Health and Safety Performance Standards* recommends that licensing inspectors have "pre-qualified" education and experience about the types of child care they will be assigned to inspect and in the concepts and principles of licensing and inspections. When hired, the standards recommend at least 50 clock hours of competency-based orientation training and 24 annual clock hours of competency-based continuing education. There was significant support for specialized training of licensing inspectors in health and safety in early care and education settings, as well as the consideration of cultural and linguistic diversity of caregivers when addressing competencies and trainings, which we have retained in this final rule.

Licensing inspector-provider ratios. Section 658E(c)(2)(K)(i)(III) of the Act requires Lead Agencies to have policies in place to ensure the ratio of inspectors to providers is sufficient to ensure visits occur in accordance with Federal, State, and local law. The final rule expands on this requirement at § 98.42(b)(3) to ensure applicability with Federal, State, Territory, Tribal, and local law. The public comment process showed that there was support for this requirement. Large caseloads make it difficult for inspectors to conduct valid and reliable inspections. While the Act does not require a specific ratio, Lead Agencies can refer to the National Association of Regulatory Agencies (NARA) recommendation of a maximum workload for inspectors of 50–60 facilities. (*NARA and Amie Lapp-Payne. (May 2011). Strong Licensing: The Foundation for a Quality Early Care and Education System: Preliminary Principles and Suggestions to Strengthen Requirements and Enforcement for Licensed Child Care.*)

Reporting of serious injuries and deaths. At § 98.42(b)(4), this final rule requires that Lead Agencies require child care providers to report to a designated State, Territorial, or Tribal entity any serious injuries or deaths of children occurring in child care. This complements § 98.53(f)(4), which requires States and Territories to submit a report describing any changes to regulations, enforcement mechanisms, or other policies addressing health and safety based on an annual review and assessment of serious child injuries and any deaths occurring in child care programs serving CCDF children and, to the extent possible, other regulated and unregulated child care settings. States, Territories, and Tribes are required to apply this reporting requirement to all child care providers, regardless of subsidy receipt, to report incidents of serious child injuries or death to a designated agency. This is also consistent with the statutory requirement at Section 658E(c)(2)(D), which requires Lead Agencies to collect and disseminate aggregate number of deaths, serious injuries, and instances of substantiated child abuse that occurred in child care settings each year, for eligible providers.

The Lead Agency must identify the "designated entity" in its Plan as required at § 98.16(ff). If there are existing structures in place that look at child morbidity, the Lead Agency may work within that structure to establish a designated entity. The reporting mechanism can be tailored to fit with existing policies and procedures. Our purpose is the reporting of incidents so that the Lead Agency and other responsible entities can make the appropriate response, publicly report prevalence data, and make any appropriate changes to health and safety policies.

Comment: There was support for the requirement of reporting serious injuries and deaths of children occurring in child care settings. However, concern was raised that the NPRM failed to provide specific direction as to how Lead Agencies should respond to reports of serious injuries and deaths, who should bear responsibility of investigating and responding to allegations, and what rights parents and defendants have to information during and following the investigation.

Response: As mentioned above, § 98.32(d)(1) requires Lead Agencies to report in their State Plans how they respond to and substantiate complaints, including whether the process includes monitoring of child care providers. We have chosen not to establish further parameters around this requirement to give Lead Agencies flexibility to design a system that best works for their program.

Exemption for relative providers. Previous regulations at § 98.41(e) allowed Lead Agencies to exempt relative caregivers, including grandparents, great-grandparents, siblings (if such providers live in a separate residence), and aunts or uncles from health and safety and monitoring requirements described in this section. In the final rule, this relative exemption remains at § 98.42(c), which includes language that requires Lead Agencies, if they choose to exclude such providers from any of these requirements, to provide a description and justification in the CCDF Plan, pursuant to § 98.16(l), of requirements, if any, that apply to these providers. Asking Lead Agencies to describe and justify relative exemptions from health and safety requirements and monitoring provides accountability that any exemptions are issued in a thoughtful manner that does not endanger children.

Comment: We received a request for clarification on whether or not relative providers are exempt from requirements for ratios, group size, and caregiver qualifications. We also received one comment that reflected concern for the lack of health and safety requirements on guidance and training for relative providers. We also received one comment requesting that the types of relatives who may be exempt from requirements be expanded to include additional types of relatives.

Response: A Lead Agency may choose to exclude relative providers from any health and safety and monitoring requirements if a description and justification is provided in the CCDF Plan. This may include requirements for ratios, group size, and caregiver qualifications.

We should clarify that while the federal statute gave the option to exempt relatives from health and safety requirements, it is not required. Also, Lead Agencies have the option to exempt relatives from certain, but not all health and safety requirements. They have the ability to determine the scope of an exemption and if there are certain health and safety requirements that the Lead Agency believes are important to apply to a relative provider, they have the ability to do so. Technical assistance will be available to support the promotion of health, safety, and child development in all early care and education settings.

The Act defines relatives and, therefore, we are unable to expand the scope of who may be considered for exemption due to statutory language. However, as there is an option in the final rule to develop alternative monitoring requirements for in-home providers at § 98.42(b)(2)(v), Lead Agencies may choose to explore this flexibility when care is provided in the child's home by individuals who are not included in the list for exemption but the Lead Agency believes merit special considerations.

§ 98.43 Criminal Background Checks

The reauthorization added Section 658H on requirements for comprehensive criminal background checks, which are a basic safeguard essential to protect the safety of children in child care and reduce children's risk of harm. Parents have the right to be confident that their children's caregivers, and others who come into contact with their children, do not have a record of violent offenses, sex offenses, child abuse or neglect, or other behaviors that would disqualify them from caring for children. A GAO report found several cases in which individuals convicted of serious sex offenses had access to children in child care facilities as employees, because they were not subject to a criminal history check prior to employment (*Overview of Relevant Employment Laws and Cases of Sex Offenders at Child Care Facilities, GAO–11–757,* GAO, 2011).

Comprehensive background checks have been a long-standing ACF policy priority. According to an analysis of the FY 2016–2018 CCDF Plans, all States and Territories require that child care center staff undergo at least one type of criminal background check, and approximately 45 require an FBI fingerprint check for centers. Fifty-five States and Territories require family child care providers to have a criminal background check, and approximately 45 require an FBI fingerprint check. For some States and Territories, these requirements are currently limited to licensed providers, rather than all providers that serve children receiving CCDF subsidies.

Background check effective dates. The Act requires that States and Territories shall meet the requirements for the provision of criminal background checks for child care staff members not later than the last day of the second full fiscal year after the date of enactment of the Child Care and Development Block Grant Act of 2014. This delayed effective date requires States and Territories to come into compliance with the background check requirements by September 30, 2017.

Comment: Several States requested clarifying language be added to the preamble around the statutory effective dates for the background check requirements.

Response: A State must have policies and procedures in place that meet the background check requirements not later than September 30, 2017. In addition, in accordance with Section 658H(d)(2), staff members who were employed prior to the enactment of the CCDBG Act of 2014 must have submitted requests for background checks that meet all the requirements by September 30, 2017. Section 658H(d)(4), the Act provides that a provider need not submit a new request for a child care staff member if the staff member received a background check meeting all the required components under the Act within the past five years while employed by, or seeking employment by, a child care provider within the State. If a staff member employed prior to the CCDBG Act of 2014 satisfies all of those requirements, then it is not necessary for a provider to submit a new request until five years following the background check completion. It will be important to evaluate the current background check requirements to ensure that all new requirements are satisfied, including the disqualification factors. If the current background check requirements do not satisfy the new requirements or results of the current background checks are not maintained, then new background checks would need to be conducted.

We strongly encourage States to establish policies and procedures well in advance of the September 30, 2017, effective date, in order to allow sufficient time to clear the backlog of existing providers and staff members that must be checked prior to the deadline. It is also important to note that the HHS Secretary may grant the State an extension of up to one year to complete the background check requirements, as long as the State demonstrates a good faith effort to comply. This extension is separate from the transitional waiver described earlier in the preamble. States applying for an extension must be able to describe their current implementation efforts and present a timeline for compliance within one year, by September 30, 2018. ACF will release specific guidance to States interested in an extension. In addition, the reauthorized Act establishes a penalty for noncompliance. For any year that a State fails to substantially comply, ACF shall withhold up to 5 percent of the State's CCDF funds for each year until coming into compliance.

Background check implementation. Section 658H(a) of the Act requires that States shall have in effect requirements, policies, and procedures to require and conduct criminal background checks for child care staff members (including prospective child care staff members) of child care providers. Having procedures in place to conduct background checks on child care staff members will require coordination across public agencies. The CCDF Lead Agency must work with other agencies, such as the Child Welfare office and the State Identification Bureau, to ensure the checks are conducted in accordance with the Act. In recognition of this effort, § 98.43(a)(1) clarifies that these requirements involve multiple State, Territorial, or Tribal agencies. We discuss the comments we received on this provision further below.

Tribes and background checks. In the final rule, Tribal Lead Agencies are also subject to the background check requirements described in this section, with some flexibility as discussed later in Subpart I.

Applicability of background checks requirements. The statutory language identifying which providers must conduct background checks on child care staff members is unclear. It is our interpretation of the Act that all licensed, regulated, and registered child care providers and all child care providers eligible to deliver CCDF services (with the exception of those individuals who are related to all children for whom child care services are provided) are subject to the Act's background check requirements. Section 98.43(a)(1)(i) of the final rules applies this requirement to all licensed, regulated, or registered providers, regardless of whether they receive CCDF funds and all license-exempt CCDF providers (with the exception of individuals who are related, as defined in the definition of *eligible child care provider,* to all children for whom child care services are provided).

Comment: Overall, the comments, from national organizations and multiple States, supported broadly applying the background check requirements to all licensed, regulated, or registered child care providers and all child care providers eligible to deliver CCDF services. One State and one Territory submitted comments disagreeing with our interpretation.

Response: ACF was pleased by the support for broad applicability of the background check requirements. We acknowledge that the statutory language is not clear about the universe of staff and providers subject to the background check requirement; however, our interpretation aligns with the general intent of the statute to improve the overall safety of child care services and programs. Furthermore, there is justification for applying this requirement in the broadest terms for two important reasons. First, all parents using child care deserve this basic protection of having confidence that those who are trusted with the care of their children do not have criminal backgrounds that may endanger the well-being of their children. Second, limiting those child care providers who are subject to background checks has the potential to severely restrict parental choice and equal access for CCDF children, two fundamental tenets of CCDF. If not all child care providers are subject to comprehensive background checks, providers could opt to not serve CCDF children, thereby restricting access. Creating a bifurcated system in which CCDF children have access to only a portion of child care providers who meet applicable standards would be incongruous with the purposes of the Act and would not serve to advance the important goal of serving more low-income children in high-quality care.

Comment: One comment suggested adding regulatory language to capture all State definitions of provider groups. The comment stated, "Some States may use words, such as 'certified' or 'listed care' that should not be exempt from a comprehensive check merely because the words 'licensed, regulated, or registered' are not used. For example, legislation is currently pending in at least one State that would eliminate the category of care called 'voluntarily registered' and replace it with a voluntary 'list.' "

Response: It is not necessary to insert additional regulatory language to address other State definitions of provider groups. As described earlier, the background check requirements apply to licensed, regulated, or registered providers, regardless of whether they receive CCDF funds as well as all providers eligible to deliver CCDF services. Our interpretation of the law applies these requirements broadly and includes providers who are "certified" or "listed."

Definition of child care staff member. Section 658H(i) of the Act defines a child care staff member as someone (other than an individual who is related to all children for whom child care services are provided) who is employed by the child care provider for compensation or whose activities involve unsupervised access to children who are cared for by the child care provider. Section 98.43(a)(2)(ii) of the final rule includes contract and self-employed individuals in the definition of child care staff members, as they may have direct contact with children. In addition, we require individuals, age 18 or older, residing in a family child care home to be defined as child care staff members and, therefore, subject to background checks, as well as the disqualifying crimes and appeals processes.

Comment: In the NPRM, at § 98.43(a)(2)(ii), we defined child care staff member to mean "an individual age 18 and older . . ." We received a letter from Senator Alexander and Congressman Kline asking us to revise this regulatory language to reflect current State practice. The letter stated, "The NPRM defines those staff required to receive a background check as individuals 18 and older, yet a number of State laws allow individuals younger than 18 to be employed by providers. To ensure the maximum amount of safety while still respecting individual States' employment laws, we request the Department provide information or assistance to States on conducting background checks for both staff aged 18 and older, and those younger than 18 to ensure all States are able to comply with the background checks required in the Act."

Response: ACF agreed with the concerns described in the letter. The reference to "age 18 or older" is removed from the final rule. This change better aligns with the original statutory language and removes the unintentional limitation placed on the definition of child care staff member. The original statutory language requires any individual, regardless of age, who is employed by a child care provider for compensation to complete comprehensive background checks.

Comment: Several comments continued to ask for clarification on who is included in the definition of child care staff member. A letter from Senator Alexander and Congressman Kline advised, "The scope of the NPRM's definition of 'child care staff member' for the purposes of a required background check is unclear. We ask for clarity for providers so they may know definitively if an individual who receives 'compensation, including contract employees or self-employed individuals' is required to automatically receive a background check, or if such individuals should additionally have duties listed under subparagraph (B). As written, the definition is unclear if these requirements are mutually exclusive and would trigger a background check on their own regard or if a 'child care staff member' would need to fit both such requirements. We ask you also to review the administrative burden this definition could place on providers. While retaining the highest safety measures for children, we urge the Department to review this requirement and listen to comments from centers and providers to ensure their obligation captures individuals who may have unsupervised access to children but is not duplicative of State requirements or overly burdensome."

Response: The Act states that a child care staff member means an individual (other than an individual who is related to all children for whom child care services are provided) who is employed by a child care provider for compensation; *or* whose activities involve the care or supervision of children for a child care provider or unsupervised access to children who are cared for or supervised by a child care provider. This definition, like the definition of child care provider, is broad. It encompasses not only caregivers, teachers, or directors, but also janitors, cooks, and other employees of a child care provider who may not regularly engage with children, but whose placement at the facility gives them the opportunity for unsupervised access. Given that these individuals are employed by a child care provider, they are included in the statute's definition. Therefore, it is important that they also complete a comprehensive background check in order to ensure and protect children's safety.

The final rule adds the terms "contract employees" and "self-employed individuals" to the definition of "child care staff member." These terms are meant to clarify the definition, particularly for family child care providers. Many family child care providers are self-employed individuals who own their own businesses. The final rule specifically requires any individual residing in a family child care home age 18 or older to complete a background check. We discuss this requirement in greater detail below. These individuals may also have unsupervised access to children, so completing a background check is a necessary safeguard to protect the children in care. The definition of child care staff member generally covers any individual who is employed by the child care provider and any individual who may have unsupervised access to children in care.

Comment: The comments were mixed on whether other adults in a family child care home should be subject to the background checks requirements. Several national organizations and States wrote in support, while child care worker organizations, a few national organizations, and one State did not support the provision. One State wrote, "We currently require background reviews on all household members 18 years or older and have found multiple individuals whose presence could place children at risk."

Response: As illustrated by the State's comment, requiring other adults in family child care homes to complete background checks is vital to ensuring children's health and safety. A majority of States already require other adults in family child care homes to receive background checks. Forty-three States require some type of background check of family members 18 years of age or older that reside in the family child care home (*Leaving Child Care to Chance: NACCRRA's Ranking of State Standards and Oversight for Small Family Child Care Homes,* National Association of Child Care Resource and Referral Agencies, 2012).

Although these individuals may not be directly responsible for caring for children, they have ample opportunity for unsupervised access to children. For this reason, as proposed in the NPRM, we are specifically requiring other adults in family child care homes to complete the background check requirements. Because these individuals are included in the definition of child care staff member, they are subject to the same disqualifications and appeals processes described in the Act and the regulations. We strongly discourage States from identifying any additional disqualifying crimes for residents of family child care homes, and encourage them to consider that casting too wide a net could have adverse effects on the supply of family child care providers and other consequences for individuals returning from incarceration. As described later in the preamble, we also strongly encourage States to implement a waiver review process that meets the recommendations of the U.S. Equal Employment Opportunity Commission for any additional disqualifying crimes (U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on* *the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf*).

Comment: In the NPRM, ACF asked for comment on whether additional individuals in the family child care homes should be subject to the background check requirements. There was only lukewarm support for requiring background checks for minors in family child care homes. Several States recommended checking individuals over ages 12, 13, or 16 to mirror current State policy and practice.

Response: ACF is declining to require background checks for individuals under age 18 in family child care homes. However, States that check individuals younger than age 18 may continue checking all background check components permitted by State law. The Adam Walsh Child Protection and Safety Act of 2006 (42 U.S.C. 16901) requires States to include in their sex offender registries juveniles convicted as adults and juveniles who are convicted of an offense similar or more serious than aggravated sexual abuse. We allow States the flexibility to follow current State laws and registry policies to check those individuals younger than 18 in family child care homes; however, we strongly encourage States to implement a waiver process that meets the recommendations of the U.S. Equal Employment Opportunity Commission for any additional disqualifying crimes (U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf*).

Comment: A few comments asked for clarification around volunteers. One State wrote, "In many circumstances, a parent volunteer (for activities such as field trips) would fit into the definition of child care staff member ('activities involve the care or supervision of children' and they may be unsupervised for periods of time) and therefore [would] require them to meet all background check requirements. This requirement could prevent some parents from involvement in enrichment activities, particularly because of the cost associated with the background checks."

Response: Volunteers who provide infrequent and irregular service that is supervised or parent volunteers who are supervised do not meet the definition of child care staff member. Volunteers who come into a child care facility to help with a classroom party, read to students, or assist with recess are not caring for or supervising children for a child care provider. Rather, volunteers in the situations described above are providing additional assistance under supervision of the primary caregiver.

Volunteers are not specifically included in the Act, nor have we specifically included them in the regulation. We are allowing States the discretion to create their own policies and screening processes for volunteers. However, it is ACF's view that volunteers who have not had background checks may not be left with children unsupervised. Volunteers who have unsupervised access to children must have background checks that comply with the statute. These volunteers will be subject to the same disqualifications and appeals process as described in the Act and regulations. As with other adults in the household, we strongly discourage States from adding additional disqualifications outside the Act. We also encourage Lead Agencies to require that volunteers who have not had background checks be easily identified by children and parents, for example through visible name tags or clothing.

Components of a criminal background check. The Act outlines five components of a criminal background check: (1) A search of the State criminal and sex offender registry in the State where the staff member resides and each State where the staff member has resided for the past five years; (2) A search of the State child abuse and neglect registry in the State where the staff member resides and each State where the staff member has resided for the past five years; (3) A search of the National Crime Information Center; (4) A Federal Bureau of Investigation (FBI) fingerprint check using the Integrated Automated Fingerprint Identification System; and (5) A search of the National Sex Offender Registry.

After extensive consultation with the FBI and other subject-matter experts, we made technical changes to address duplication among these components. In the final rule, we are consolidating the list of required components in the regulations at § 98.43(b) to:

(1) A Federal Bureau of Investigation fingerprint check using Next Generation Identification;

(2) A search of the National Crime Information Center's National Sex Offender Registry; and

(3) A search of the following registries, repositories, or databases in the State where the child care staff member resides and each State where such staff member resided during the preceding 5 years:

i. State criminal registry or repository, with the use of fingerprints being required in the State where the staff member resides, and optional in other States;

ii. State sex offender registry or repository; and

iii. State-based child abuse and neglect registry and database.

It is our understanding that there is some duplication among the National Crime Information Center's (NCIC) National Sex Offender Registry (NSOR), the FBI fingerprint searches, and the searches of State criminal, sex offender, and child abuse and neglect registries. An FBI fingerprint check provides access to national criminal history record information across State lines on people arrested for felonies and some misdemeanors under State, Federal, or Tribal law. However, there are instances where information is contained in State databases, but not in the FBI database. A search of the State criminal records and a FBI fingerprint check returns the most complete record and better addresses instances where individuals are not forthcoming regarding their past residences or committed crimes in a State in which they did not reside.

In addition to gaps in the FBI fingerprint and the State criminal records, there are a number of instances in which an individual may be listed in the State sex offender registry and not in NSOR, and vice versa. For example, some States have statutes that disallow the removal of offenders, regardless of offender status, while in the NSOR, the agency owning the record is required to remove the offender from active status once his/her sentencing is completed. In addition, federal, juvenile, and international sex offender records may be included in the NSOR; whereas, State laws may prohibit the use of this information in the State sex offender registry. Because of these discrepancies, it is important to check the State sex offender registries in addition to an FBI fingerprint check and a check of the NCIC's NSOR. It is our belief that the Act requires such thorough background check to ensure that offenders do not slip through the cracks to be given access to children.

Comment: Commenters, including several national organizations, child care worker organizations, and a couple of States, argued that an FBI fingerprint check should be considered a sufficient check of the National Crime Information Center (NCIC) and the National Sex Offender Registry (NSOR) because it checks the fingerprint records of several NCIC files, including the NSOR.

Response: Based on consultation with the FBI, we understand that the comments are partially correct. The FBI fingerprint check using Next Generation Identification (NGI) (formerly the Integrated Automated Fingerprint Identification System—IAFIS) will provide a person's criminal history record information which will incorporate data from three NCIC person files, including the NSOR, provided certain identifying information has been entered into the NSOR record. The change in the language from IAFIS to NGI is a technical change and should not impact Lead Agency background check processes. The NGI is the biometric identification system that has now replaced the older IAFIS.

There is significant overlap between the FBI fingerprint check and the NSOR check (via the NCIC), yet there are a number of individuals in the NSOR who are not identified by solely conducting an FBI fingerprint search. The FBI links fingerprint records to the NSOR records via a Universal Control Number, but a small percentage of cases are missing the fingerprints. In some cases, individuals were not fingerprinted at the time of arrest, or the prints were rejected by the FBI for poor quality. This small percentage of records can be accessed through a name-based search of the NCIC. A number of those individuals may also be identified by a search of the State sex offender registries, but it is impossible to know whether there is complete overlap. In the absence of verification of complete duplication of records, it is important to require separate searches of an FBI fingerprint check and a name-based search of the NCIC's NSOR. Because Congress included each of these searches in the Act, it is our belief that the intent is for the background check to be as comprehensive and thorough as possible.

Comment: In the NPRM, we requested comments on the feasibility of a search of the NCIC and the level of burden required by the Lead Agency. We received comments from 12 States and two State police departments that all emphasized that without further guidance from the FBI, name-based searches of the NCIC and NSOR will be extremely difficult because these databases are limited to law enforcement purposes only.

Response: The comments are correct. The NCIC is a law enforcement tool consisting of 21 files, including the NSOR. The 21 files contain seven property files that help track missing property and 14 person files with information relevant to law enforcement (*e.g.*, missing persons or wanted persons). State criminal records are not stored in the NCIC. The only file with information that would aid in determining whether an individual could be hired as a child care employee is the NSOR. The other files do not contain information on the disqualifying crimes listed in the Act. Further, the FBI has advised that a general search of the NCIC database will return records that cannot be made privy to individuals outside of law enforcement (*i.e.*, the Known or Appropriately Suspected Terrorist File). Therefore, we are clarifying that a check of the NCIC will only need to search the NSOR file.

The comments call out a number of potential challenges, also identified by ACF, in requiring an NCIC check. It is our understanding that an NCIC check has not been included in any other non-criminal background check law applicable to States to date, and so, resolving these challenges is in many ways unchartered territory.

First, access to the NCIC, including, in some cases, physical access to computers capable of searching the NCIC, is limited, and it is primarily available to law enforcement agencies. Therefore, to conduct this check, Lead Agencies will have to partner with a State, Tribal, or local law enforcement agency. Because the NCIC has not been used this way, we do not know of examples of other State agencies partnering in this way or what such partnerships would entail. We also do not know the implications for Lead Agencies that use third-party vendors to conduct background checks. Third-party vendors do not have authorized access to conduct name-based checks of the NCIC for noncriminal justice purposes.

Secondly, the NCIC is a name-based check, rather than fingerprint based. Hit verification of name-based checks may be labor intensive, especially when searching for individuals with common names. While we are concerned about the burden on Lead Agencies to conduct this check, we recognize that the NCIC was included in the statute, and we are concerned about the potential for missing sex offenders by not conducting a comprehensive search.

Because of the challenges identified by both the commenters and ACF, we will not begin to determine compliance with the requirement to search the NCIC's NSOR until after guidance is issued by ACF and the FBI. ACF has been working closely with the FBI to find solutions for State access. We plan to release guidance that will be shared with both State Lead Agencies and State Identification Bureaus. We expect that Lead Agencies will be required to partner with local law enforcement to perform NCIC checks of the NSOR. This guidance will give States further instruction in how to search the NCIC's NSOR and how to utilize the results. We understand that States may not be able to begin implementing the check of the NCIC's NSOR until the specific guidance is released. ACF will address implementation timeframes for this particular search in the future guidance. Lead Agencies should begin to form partnerships with local law enforcement and State Identification Bureaus in order to meet the requirement to check the NCIC's NSOR database.

Comment: Several commenters, including States and a State police department, suggested requiring a search of the National Sex Offender Public Web site (NSOPW) instead of a search of the NSOR.

Response: A search of the NSOPW does not satisfy the statutory requirement for a search of the NSOR, and therefore, we declined to make any changes in the final rule. ACF does encourage an additional search of the NSOPW at *www.nsopw.gov*, although it is not required. The NSOPW acts as a pointer for each State, Territory, and Tribally-run sex offender registry. The registries are updated and kept in real time and may be searched by name, but other identifying information may be limited in these records.

Comment: In the NPRM, we proposed to require that the search of the State criminal records would include a fingerprint check in the State where the individual resides and the States the individual has resided for the past five years. However, State commenters, including State police departments, recommended removing the requirement to search other States' criminal repositories using fingerprints. The comments emphasized that the technology does not exist to allow States to send fingerprints electronically to check other States' repositories. A law enforcement representative wrote, "For State Identification Bureaus that are the ones sending the prints on to the FBI, it could be easy; however, requests coming from other States would be a very manual process—hard copy cards, scanned in, and mailed responses back. We have no way of disseminating results back to every other State via an automated means."

Response: ACF is removing the proposal to check other States' criminal repositories using fingerprints. It was not our intent to create an additional burden for States. Instead, in the final rule, we are requiring States to do a fingerprint-based check of the criminal repository only in the State where the individual resides. Use of fingerprints is optional in other States where the individual resided within the past five years. Fingerprint searches reduce instances of false positives and also help capture records filed under aliases. We do not believe that a fingerprint search of the State repository is an additional burden. States can use the same set of fingerprints to check both the State criminal history check and the FBI fingerprint check. When conducting searches of other States' criminal repositories, the State may utilize a name-based search, instead of a fingerprint.

Comment: The Act requires States to check the State criminal registry or repository; sex offender registry or repository; and child abuse and neglect registry and database for every State where a child care staff member has lived in for the past five years. Based on our preliminary conversations with States, the requirement to conduct cross-State background checks of the three different repositories is another unexplored area for Lead Agencies. In the NPRM, we asked for comments on whether States have any best practices or strategies to share and how ACF can support Lead Agencies in meeting the cross-State background check requirements.

Comments we received from national organizations and States reinforced that these cross-State checks are indeed new territory for Lead Agencies. These comments offered a variety of suggestions of how ACF can support States in meeting the cross-State background check requirements, including introducing an electronic information exchange system, drafting a standard Memorandum of Understanding, maintaining a national contacts list, and studying the viability of cross-State background checks at the regional level.

Response: ACF is continuing to work closely alongside our technical assistance partners to learn how we can support and help facilitate these cross-State checks. In the months since the CCDBG Act of 2014 was enacted and the NPRM was published, we have been engaged in Regional level calls with States to understand supports needed to overcome barriers to the required cross-State checks. We have also been reaching out to other Federal partners to explore existing systems and opportunities to collaborate. We have not found an existing system that would support States in conducting all of the cross-State checks.

We appreciate the suggestions from the commenters and have already begun work toward bringing some of them to fruition. We know States want tools and guidance to complete these checks. ACF has recently announced a pilot project to develop a National Interstate Background Check Clearinghouse to support Lead agencies in meeting the cross-State background check requirements. The goal of this system is to enable Lead Agencies to exchange background check information securely with other State, Territory, and Tribal Lead Agencies. ACF is also working on developing a national CCDF information sharing agreement as part of this project. We ask that States continue to make a good faith effort toward complying with these checks and that States work to build partnerships across State lines.

While ACF is still working to understand how we can support cross-State background checks, this rule also requires a couple of provisions to help create transparency around the process. At § 98.43(a)(1)(iii), Lead Agencies are required to have requirements, policies, and procedures in place to respond as expeditiously as possible to other States', Territories', and Tribes' requests for background check results in order to accommodate the 45 day timeframe. The final rule also requires Lead Agencies to include the process by which another Lead Agency may submit a background check request on the Lead Agency's consumer education Web site, along with all of the other background check policies and procedures. In addition, this final rule requires, at § 98.16(o), that Lead Agencies describe in their Plans the procedures in place to respond to other State, Territory, or Tribal requests for background check results within the 45 day timeframe. ACF will use this question in the Plan to help ensure compliance with the background check requirements in the Act. These provisions are intended to minimize confusion about the correct contact information for background check requests and to ensure that there are processes in place for timely responses. Having policies and procedures in place to respond to outside background check requests is a first step toward an effective cross-State background check system.

Comment: We heard from a number of States that are closed-record States, which means they cannot release an individual's background check records or information to other States. One State explained that it is, "a closed record State and does not release criminal history information to any out-of-state entity for civil purposes, one of which is determining employment eligibility. This is a fundamental tenant of being a closed record State. However, there is a process by which an individual residing in another State may obtain his/her fingerprint-based personal criminal background history from [the State's] Bureau of Criminal Identification and Information (Bureau) within the Office of State Police and provide it to a Lead Agency in another State."

Response: States need to have a methodology in place to respond to other States' requests for background check results. ACF does not expect to penalize States that have made a good faith effort to request information from other States. For States with closed-record laws or policies, we understand that this requirement may be in direct opposition with State law. States will need to either change their laws to allow for the exchange of background check information for child care staff members or create other solutions. Although the Act requires States to be in compliance by September 30, 2017, States (including closed-record States) may request an extension of up to one year in order to make the necessary legislative or other changes to share background check information across State lines. ACF is currently working with our technical assistance partners to understand the impact of closed-record laws.

Although ACF discourages this practice, a closed-record State may utilize a process similar to what the State commenter describes above. The closed-record State may give the background check results directly to the individual to relay to the requesting State. States are required to respond to other States' requests for background check requests, and when a State is giving the results directly to an individual, that State must have a process in place to inform the requesting State. This practice increases the potential for fraud relating to the results and also places the burden on the individual. States should carefully consider these factors and the impact they could have on the supply of child care providers. ACF encourages States to find other solutions, whenever possible.

We encourage State partnerships and agreements, whenever possible, in order to meet the requirements of the Act. One potential solution may be for the closed-record States to determine whether the individual is eligible or ineligible for employment given the State background check results. The closed-record State could disclose this determination with the requesting State, without revealing the background check information. We do recognize that this is an imperfect solution, since States use different definitions and criteria for disqualification, particularly in the case of child abuse and neglect findings.

However, States may use this solution to comply with the statutory requirements, as long as States also comply with the requirements related to the appeals process.

If the individual is deemed ineligible by a closed-record State, then the closed-record State is also responsible for notifying the individual and following the requirements at § 98.43(e)(2)(ii). The closed-record State must provide information related to each disqualifying crime in a report to the individual. The closed-record State must also send information on the opportunity to appeal and adhere to the appeals process described at § 98.43(e)(3).

Comment: Comments from States and national organizations asked ACF to provide clarity around what to do if a State does not respond to another State's request for results from the State's criminal repository, sex offender registry, and child abuse and neglect registry.

Response: As discussed later in the preamble, we are allowing States the flexibility to make employment decisions in the event that not all background check components are completed within 45 days. ACF does not expect to penalize States that have made a good faith effort to request information from other States.

Comment: Before publishing our NPRM, we heard particular concern about the statutory requirement for cross-State checks of the child abuse and neglect registries. We understand that States have developed their own requirements for submitting requests, and there is not a uniform method of responding. Therefore, in the NPRM, we solicited comments on how States will meet this requirement and respond to other State requests.

Comments from national organizations and child care worker organizations suggested new regulatory language that would only require a search of the State-based child abuse and neglect registries "if one exists and such a search is allowable for such purposes under State law and practice." Other comments emphasized the importance of cross-State child abuse and neglect registries. A letter co-signed by several child care resource and referral agencies, asserted, "We do not support language that would circumvent the concept of checking against a State child abuse registry or listing or whatever such a registry may be called in a State. States have the systems, although they may be called different names. It is time to have effective cross-checks in place to promote the safety of children."

Response: ACF is declining to add the suggested regulatory language. The Act includes, as the final component of a comprehensive background check, the search of the State child abuse and neglect registries in the State where the individual lives and the States where the individual has resided for the past five years. States, including those that do not have formal child abuse and neglect registries, are expected to comply with this requirement. We recognize that implementation of this critically important component of protecting children will vary across States. Every State has procedures for maintaining records of child abuse and neglect, but only 41 States, the District of Columbia, American Samoa, Guam, and Puerto Rico require central registries by statute. The type of information contained in central registries and department records differ from State to State. Some States maintain all investigated reports of abuse and neglect in the central registry, while others maintain only substantiated or indicated reports. The length of time the information is held and the conditions for expunction also vary. Access to information maintained in registries also varies by State, and some States may need to make internal changes to meet the requirement for a search of the State's own child abuse and neglect registry. Approximately 31 States and the District of Columbia allow or require a check of the central registry or department records for individuals applying to be child or youth care providers. (*Establishment and Maintenance of Central Child Abuse Registries,* Children's Bureau, July 2014).

Comment: We received a number of requests for guidance on what information from child abuse and neglect registries States need to make employment decisions and how to interpret that information. Simply being part of a State-based child abuse and neglect registry is not a disqualification under the Act, so just knowing that an individual is on the registry is not enough information to make a determination. States need to know what types of information they need and how to interpret that information in order to make employment eligibility determinations for child care staff members.

Response: The commenters are correct that the Act only requires that the child abuse and neglect registries be checked and did not require an individual be disqualified because of child abuse and neglect findings. Because many child abuse and neglect registries use name-based searches, States may need to take additional steps to verify that the individual is the same person as is listed on a registry. There is so much variation in the information maintained in each registry, so we are allowing Lead Agency flexibility in how to handle findings on the child abuse and neglect registries. ACF does suggest that the Lead Agency not necessarily immediately disqualify an individual, depending on the finding and evaluate any findings carefully, on a case by case basis.

The definitions of child abuse and neglect, what is considered substantiated or indicated child abuse and neglect, and other legal terminology associated with child abuse and neglect registries varies from State to State. In addition, some registries may contain unsubstantiated complaints or incidences. Lead Agencies should be cautious when using unsubstantiated allegations of child abuse and neglect in determining an individual's employment eligibility.

Based on consultation with the Children's Bureau at ACF, we understand that State Child Welfare agencies or State Child Protective Services agencies already have policies and procedures in place to make determinations about the suitability of substitute care providers using child abuse and neglect findings. We are working to ensure that child welfare agencies are also aware of the requirements in the Act for a search of the State child abuse and neglect registry in the State where the individual lives and the States where the individual has resided for the past five years. Lead Agencies should partner closely with the relevant State agencies to seek guidance in making employment decisions.

Comment: We received several comments from States that do not conduct due process when placing an individual on their child abuse and neglect registry. One State wrote, "In the course of abuse/neglect investigations in our State, we do not offer up-front due process for findings made against an individual. If a background check is requested on the individual in the course of employment in child care in [the State] or as part of a foster care/adoption application in [the State], our agency uses that opportunity to offer a hearing in front of an administrative law judge through the State Office of Administrative Hearings. If an individual chooses to contest the finding(s), the process can be lengthy. It requires our agency to schedule and prepare for a hearing, including contacting appropriate witnesses and providing opposing council (if one exists) with redacted case files.''

Response: We understand the issue the commenters are raising relates to procedures that some State child welfare agencies have on due process for individuals in state child abuse and neglect registries that may delay the Lead Agency in providing information about an individual who is seeking employment with a child care provider. The Act requires States to carry out background checks requests, including searches of State-based child abuse and neglect registries, as quickly as possible, in not less than 45 days. States that have a due process approach as described by the commenters may not be able to meet the 45 day timeframe for providing the registry information for child care employment purposes. As such, we encourage the Lead Agencies to work with their child welfare agencies to assist them in understanding the statutory requirements to meet the 45 day timeframe. ACF is working on joint guidance to be released by the Children's Bureau and the Office of Child Care to ensure that both the State Lead Agencies and State child welfare agencies are aware of their roles in the background check process.

Comment: In the NPRM, ACF requested comment from States about whether cross-State background check systems for foster or adoptive parents could be used to support cross-State background checks for prospective child care staff members as well. Comments varied. Two States believe that their foster and adoptive parent systems would be able to support cross-State background checks for child care staff members. However, the national association of State child care administrators expressed concern about this suggestion: ''Administrators understand that these data are housed in the child welfare agency and use of and compliance with this proposal would vary.''

Response: The cross-State background check requirement has similarities to language at Section 152(a)(1)(C) of the Adam Walsh Child Protection and Safety Act of 2006 (42 U.S.C. 671(a)(1)(C)) for foster or adoptive parents. That law requires a State to check any child abuse and neglect registry maintained by the State for information on any prospective foster or adoptive parent and on any other adult living in the home of such a prospective parent, and request any other State in which any such prospective parent or other adult has resided in the preceding five years, to enable the State to check any child abuse and neglect registry maintained by such State for such information, before the prospective foster or adoptive parent may be finally approved for placement of a child. We encourage Lead Agencies to reach out to the State Child Welfare or Protective Services to explore whether the process in place for foster or adoptive parents could also be used to support a process for child care staff members.

Disqualifications. The Act specifies a list of disqualifications for child care providers and staff members who are serving children receiving CCDF assistance. Unlike the other requirements in the background check section, the Act only applies the restriction against employing ineligible child care staff members to child care providers receiving CCDF assistance. These employment disqualifications specifically do not apply to child care staff members of licensed providers who do not serve children receiving CCDF subsidies. This gives Lead Agencies the flexibility to impose similar restrictions upon child care providers who are licensed, regulated, or registered and do not receive CCDF funds.

The list of disqualifications from the Act includes a list of felonies and misdemeanors that disqualify an individual from being employed as a child care staff member. We understand that States define crimes differently, but our expectation is that States will match the equivalent crimes to those on this list. These disqualification requirements appear at § 98.43(a)(1)(ii) and § 98.43(c). We are not adding any additional disqualifications to the final rule.

Even though the Act includes a specific list of disqualifications, it also allows Lead Agencies to prohibit individuals' employment as child care staff members based on their convictions for other crimes that may impact their ability to care for children. If a Lead Agency does disqualify an individual's employment, they must, at a minimum, give the child care staff members or prospective staff members the same rights and remedies described in § 98.43(e). This language from Section 658H(h) of the Act is restated in the final rule at § 98.43(h). In the final rule, we also added language to link this paragraph to the list of disqualifications at § 98.43(c)(1).

We strongly encourage Lead Agencies that chose to consider other crimes as disqualifying crimes for employment to ensure that a robust waiver and appeals process is in place. As discussed later, a waiver and appeals process should conform to the recommendations of the U.S. Equal Employment Opportunity Commission, including the ability to waive findings based on factors as inaccurate information, certificate of rehabilitation, age when offense was committed, time since offense, and whether the nature of offense is a threat to children. (U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf*). Moreover, we strongly discourage Lead Agencies from considering additional disqualifying crimes. Casting too wide a net could have adverse effects on the supply of family child care providers and other consequences for individuals returning from incarceration. The disqualifications described in the Act are appropriate to determine whether an individual should be able to care for children.

Comment: A couple of States requested clarification on the length of time an individual would be ineligible if convicted of one of the disqualifying crimes listed in the Act. One State said, ''[the State's] Supreme Court rendered a decision that precludes the State from imposing lifetime employment bans. Enforcing the regulation as proposed will require the program office to challenge that decision. Additionally the proposed regulation appears to go beyond what the statute provides and encroaches on the State's police powers to decide who can be licensed in the State.''

Response: ACF is not requiring any additional disqualifications or parameters around disqualifications that are not already required by the Act. The Act includes a list of disqualifications at Section 658H(c), with a list of disqualifying crimes at Sections 658H(c)(1)(D) and (E). With the exception of a felony conviction of a drug-related offense committed during the preceding five years, all of the felony and violent misdemeanor convictions listed by the Act are lifetime bans against employment by a child care provider delivering CCDF services. The Act does not allow any flexibility to grandfather in current child care staff members who have been convicted of one of the crimes described in the Act. States do have the option to individually review drug-related felony convictions that were committed during the preceding five years. As discussed later in the preamble, we encourage States to conduct these reviews in accordance with guidance from the U.S. Equal Employment Opportunity Commission.

Comment: Several comments from national organizations and child care worker organizations urged ACF to redact self-disclosure language that originally appeared in the preamble of the NPRM. A letter co-signed by 80 national organizations, wrote, "Given the complexity of the background checks as prescribed and the specific disqualifying crimes established in Act, we recommend that ACF not encourage self-disclosure as it could prevent employment of a qualified child care staff member or prospective staff member. Individuals with a criminal history completely unrelated to their ability to care for and have responsibility for the safety and well-being of children, as well as those with no record whatsoever who might be intimidated, could inaccurately assume that they would not be eligible for employment. It could also violate a child care staff member's right to privacy with his or her employer."

Response: We agreed with the commenters and have removed the self-disclosure language from the preamble.

Frequency of Background Checks. Section 658H(d) of the Act requires child care providers to submit requests for background checks for each staff member. The requests must be submitted prior to when the individual becomes a staff member and must be completed at least once every five years. These requirements are included in the regulations at § 98.43(d)(1) and (2). For staff members employed prior to the enactment of the CCDBG Act of 2014, the provider must request a background check prior to September 30, 2017 (the last day of the second full fiscal year after the date of enactment) and at least once every five years.

Although not a requirement, we encourage Lead Agencies to enroll child care staff members in rap back programs. A rap back program works as a subscription notification service. An individual is enrolled in the program, and the State Identification Bureau receives a notification if that individual is arrested or convicted of a crime. States can specify which events trigger a notification. Rap back programs provide authorizing agencies with notification of subsequent criminal and, in limited cases, civil activity of enrolled child care staff members so that background check information is not out of date. However, unless the rap back program includes all the components of a comprehensive background check under the Act, the Lead Agency is responsible for ensuring that child care staff members complete all other components at least once every five years.

Section 658H(d)(4) of the Act specifies instances in which a child care provider is *not* required to submit a background check for a staff member. Staff members do not need background check requests if they satisfy three requirements: (1) The staff member received a background check that included all of the required parts within the past five years while employed by, or seeking employment by, another child care provider in the State; (2) the State gave a qualifying result to the first provider for the staff member; and (3) the staff member is employed by a child care provider within the State or has been separated from employment from a child care provider for less than 180 days. These requirements are included in the final rule at § 98.43(d)(3). Lead Agencies should consider how to facilitate tracking this type of information and maintaining records of individual providers so that unnecessary checks are not repeated.

Comment: We received several comments from States asking whether staff members' background checks could be re-assessed when they seek employment by another child care provider in the State. One State wrote, "We allow a child care staff to carry forward his or her fingerprint-based background check from one child care operation to another, as long as the person maintains a name-based recheck every 24 months. However, our agency also has a process where we re-assess an individual with certain criminal or abuse/neglect history for each child care operation in which he/she would like to work. [The State] looks at a variety of factors, including details about the role the individual will be working in and the compliance history of the specific child care operation, and makes a determination of overall risk given the results of the background check."

Response: If a staff member meets the three requirements described in the Act, then the child care provider does not need to submit a background check request. However, States do have the option of creating more stringent requirements, such as requiring background to be performed with greater frequency or when a staff member changes the place of employment. Where possible, ACF encourages States to keep processes in place, like the one described by the State, that allow them to make nuanced decisions about individuals' employment eligibility and that carefully consider extenuating circumstances relating to the individual's background check records.

Provisional Employment. The Act requires child care providers to submit a request for background check results prior to a staff member's employment but does not describe instances of provisional employment while waiting for the results of the background check. We received many comments on this issue in the 2013 NPRM, with commenters expressing concern that the background check requirements could prevent parents from accessing the provider of their choice, if the provider's staff has not already received a background check. Parents often need to access child care immediately, for example, as they start new jobs, and commenters were worried that this could lead to delays in accessing care.

In recognition of the possible logistical constraints and barriers to parents accessing the care they need, § 98.43(d)(4) of the final rule allows prospective staff members to provide services to children while under supervision and on a provisional basis, after completing either the FBI fingerprint check or the search of the State criminal repository, using fingerprints in the State where the staff member resides.

Comment: In the NPRM, we proposed that a prospective staff member could begin work for a child care provider after the background check request was submitted, as long as that staff member was continually supervised by someone who had already completed the background check requirements. Although several commenters supported the idea of provisional employment, others were concerned that the provision as proposed did not protect children's health and safety.

Response: We agreed with the commenters. The final rule allows a prospective staff member to begin work while under supervision after completing the FBI fingerprint check or the search of the State criminal repository using fingerprints in the State where the staff member resides. Until all the background check components have been completed, the prospective staff member must be supervised at all times by someone who has already received a qualifying result on a background check within the past five years. States may pose additional requirements beyond this minimum. We note that the new regulatory language aligns with the requirements in the Head Start Performance Standards and hope the language allows for better partnerships between the two programs.

In addition, we encourage Lead Agencies to require child care providers to inform parents about background check policies and any provisional hires they may have. Allowing provisional hiring does offer more flexibility, but it is also important that Lead Agencies ensure that any provisional status is limited in scope and implemented with transparency.

Comment: Several commenters asked ACF to clarify what should happen to provisional employees if all of the required background check components are not completed by the end of the statutory 45 day timeframe.

Response: A State must process, at the very least, either the FBI fingerprint check or the search of the State criminal repository, using fingerprints in the State where the staff member resides, before a child care staff member may begin work. As described in further detail later in the preamble, we expect all of the checks to be completed in the timeframe established by the Act. However, the final rule gives Lead Agencies the discretion to make decisions in the limited cases in which not all of the required components are completed.

Completion of Background Checks. Once a child care provider submits a background check request, Section 658H(e)(1) of the Act requires the Lead Agency to carry out the request as quickly as possible. The process must not take more than 45 days after the request was submitted. These requirements are included in the final rule at § 98.43(e)(1).

Comment: Many comments from State continue to be concerned with being able to meet the statutory 45-day timeframe, especially for cross-State checks. Several comments asked ACF for an exception to the 45-day timeframe in those cases.

Response: The Act does not give ACF the authority to grant States exceptions to the 45-day timeframe. While we expect checks to be completed in the timeframe established by the Act, we will allow Lead Agencies to create their own procedures in the event that all of the components of a background check are not complete within the required 45 days. As described earlier in the preamble, prospective child care staff members are required to complete either the FBI fingerprint check or the search of the State criminal repository, using fingerprints in the State where the staff member resides, before they begin work.

Lead Agencies must work together with the relevant State/Territory entities to minimize delays. After the FBI receives electronic copies of fingerprints, they typically process background check results within 24 hours. There can be delays when the submitted fingerprint image quality is poor. Some States use hard copy fingerprints that must be made electronic for submission to the FBI, which can lead to delays. We encourage Lead Agencies to adopt electronic fingerprinting, which allows for background check results to be processed more quickly.

We encourage Lead Agencies to leverage existing resources to build and automate their background check systems. One potential resource for States is the National Background Check Program (NBCP), as established by Section 6201 of the Patient Protection and Affordable Care Act, which aims to create a nationwide system for conducting comprehensive background checks on applicants for employment in the long-term care (LTC) industry. The NBCP is an open-ended funding opportunity that can award up to $3 million dollars (with a $1 million dollar State match) to each State to support building State background check infrastructure. The Centers for Medicare & Medicaid Services (CMS) administers the NBCP and since 2010, has awarded over $63 million in grant funds to participating States to design, implement, and operate background check programs that meet CMS's criteria.

Privacy of results. Section 658H(e)(2) of the Act requires the Lead Agency to make determinations regarding a child care staff member's eligibility for employment. The Lead Agency must provide the results of the background check to the child care provider in a statement that indicates only whether the staff member is eligible or ineligible, without revealing specific disqualifying information. If the staff member is ineligible, the Lead Agency must provide information about each specific disqualifying crime to the staff member, as well as information on how to appeal the results of the background check to challenge the accuracy and completeness. In the final rule, we clarify the language at § 98.43(e)(2)(ii) to specifically require that when an individual is sent the information on the disqualifying crimes, the State must, at the same time, provide information on the opportunity to appeal. This change is discussed in greater detail below.

In order for a Lead Agency to conduct FBI fingerprint checks, it must have statutory authority to authorize the checks. The Act may be used an authority to conduct FBI background checks, but Lead Agencies may continue to use other statutes as authorities to conduct FBI background checks on child care staff as well. Most Lead Agencies currently use Public Law 92–544 or the National Child Protection Act/Volunteers for Children Act (NCPA/VCA) (42 U.S.C. 5119a) as the authority to conduct FBI background checks. Public Law 92–544, enacted in 1972, gave the FBI authority to conduct background checks for employment and licensing purposes. The majority of States are using Public Law 92–544 as authority to conduct background checks, but a few States use the NCPA/VCA.

Public Law 92–544 is similar to the Act and only allows the State to notify the provider whether an individual is eligible or ineligible for employment. Similarly, the NCPA/VCA requires dissemination of the results to a governmental agency, unless the State has implemented a Volunteer and Employee Criminal History System (VECHS) program. Thus, a major difference between the Act and the NCPA/VCA with a VECHS program is in the protection of privacy of results. Through the NCPA/VCA VECHS program, Lead Agencies may share an individual's specific background check results with the child care provider, provided the individual has given consent. Lead Agencies have the flexibility to continue to use these statutes as authority to complete the FBI fingerprint check, as long as the employment determination process required by the Act is followed. That is, Lead Agencies must make employment eligibility determinations in accordance with the requirements in the Act, but they also may exercise the flexibility allowed through the NCPA/VCA VECHS program to share results of background checks with child care providers. Comments from States that utilize differing statutes were supportive of this flexibility.

Appeals and review process. Section 658H(e)(3) of the Act requires Lead Agencies to have a process for child care staff members (including prospective staff members) to appeal the results of a background check by challenging the accuracy or completeness of the information contained in their criminal background report. An appeals process is an important aspect of ensuring due process for staff members and allows them to challenge the accuracy of the background check results. According to the Act, each child care staff member should be given notice of the opportunity to appeal and receive instructions about how to complete the appeals process if the child care staff member wishes to challenge the accuracy or completeness of their background report. The Lead Agency must complete the appeals process in a timely manner. The Lead Agency must work with other agencies that are in charge of background check information and results, such as the Child Welfare office and the State Identification Bureau, to ensure the appeals process is conducted in accordance with the Act.

The appeals requirements appear at § 98.43(e)(3) of the final rule.

Section 658H(e)(4) of the Act allows for a review process specifically for staff members convicted of drug-related felonies committed during the previous five years. States may use this review process, also known as a waiver process, to determine those staff members convicted of drug-related felonies committed during the previous five years to be eligible for employment by a CCDF provider. The review process is different from the appeals process because it allows the Lead Agency to consider extenuating circumstances on a case-by-case basis. The Act's review process requirements appear at § 98.43(e)(4) of the final rule.

Comment: A comment, co-signed by several national organizations, wrote advocating for more protections governing the appeals process for individuals who challenge inaccurate background checks. The letter advised, "[T]he regulations fail to include adequate standards governing appeals that seek to demonstrate that the background check information relied upon was inaccurate or incomplete. Given the CCDF program's reliance on the FBI background check system, which routinely generate[s] faulty information, ACF should adopt more robust appeals rights to protect those workers—mostly workers of color—who, through no fault of their own, often have inaccurate records in the federal and State criminal history information systems. Thus, the following key features of a fair and effective appeal process should be incorporated into the ACF regulations:

1. In response to an appeal filed by a worker challenging the accuracy of the background check report, the State should immediately make the background check report available in order for the worker to validate the State's information and properly prepare an appeal.

2. The burden should be on the State to make a genuine effort to track down missing disposition information related to disqualifying offenses, not on the worker. Often, the worker is not in a position to locate information on an arrest that may have occurred in another State or may no longer be readily accessible in court or law enforcement systems due to the age of the offense.

3. The worker should be provided at least 60 days to prepare the appeal, and a longer period of time (up to 120 days) if the State requires the individual to produce official documentation of a record. The State should also allow for a 'good cause' extension of time to file the appeal or supporting material.

4. Once the State has received the appeal information from the worker, it should issue a written decision within a specific period of time (not to exceed 30 days).

5. In the case of a negative determination, the decision should indicate the State's efforts to verify the accuracy of the information challenged by the worker. The decision should also indicate any additional appeal rights available to the worker, as well as information on how the individual can correct the federal or State records at issue in the case.

6. The State should collect and periodically report data on the number of appeals filed, the outcome of the appeals, and the State's decision processing times."

Response: ACF strongly agrees with the worker protections described in this comment. While background checks are a necessary safeguard to protect children in child care, we are also mindful of the disproportionate impact that they can have on low-income individuals of color. A robust and effective appeals process, that incorporates the elements described above, is critical to protect prospective child care staff members who have inaccurate or incomplete background check records. As such, we made changes to the regulatory language at § 98.43(e)(2)(ii) and § 98.43(e)(3) to incorporate many of these protections, while still preserving some State flexibility.

At § 98.43(e)(2)(ii), the final rule requires that when a staff member receives a disqualifying result from the State, that information should be accompanied by information on the opportunity to appeal. The State must provide information about each specific disqualifying crime to the staff member, and that information should allow the staff member to decide whether to challenge the accuracy and completeness of the background checks results. Each child care staff member will be given clear instructions about how to complete the appeals process. The instructions should include the process for appeals, with clear steps individuals may take to appeal and the timeline for each of these steps. Although we are not requiring a specific timeframe, we do recommend that States allow staff members a reasonable amount of time of at least 60 days to prepare the appeal.

If the staff member chooses to file an appeal, then, at § 98.43(e)(3)(iii), the final rule requires the State to attempt to verify the accuracy of the information challenged by the child care staff member, including making an effort to locate any missing disposition information related to the disqualifying crime. As the comment notes, child care staff members may not be able to access court or law enforcement records, so the burden should be on the State to recover them.

The Act requires that the appeals process must be completed in a timely manner. Although the final rule does not require a specific timeframe, we recommend that States issue a decision within 30 days of the appeal. The final rule, at § 98.43(e)(3)(v), requires that every staff member who submits an appeal will receive a written decision from the State. In the case of a negative determination, the decision should indicate the State's efforts to verify the accuracy of information challenged by the child care staff member, as well as any additional appeals rights available to the child care staff member. The final rule does not require that States collect and report data on the number of appeals filed, the outcome of the appeals, or the State's decision processing times. However, States should consider tracking and publishing this information. This information can be used to gage the speed and effectiveness of the appeals process, and States may be able to use it to make improvements to their appeals process over time.

Comment: A letter from Senator Alexander and Congressman Kline asked ACF to provide guidance on the obligations of a child care provider during the appeals process: "The NPRM strongly encourages Lead Agencies that choose to consider crimes other than those listed in the Act as disqualifying crimes for employment to ensure a robust waiver and appeals process is in place; however, it is unclear what the obligations of a provider are during the appeals process timeframe. We support the highest level of safety assurances for parents and children, as well as legal assurances for providers, and again we ask the Department to carefully consider the comments from providers and centers to ensure these provisions are easy to follow without causing great disruption to the delivery of care for children."

Response: The Act does not address the obligations of child care providers while staff members or prospective staff members are engaged in the appeals process. In addition, ACF did not receive any comments from child care providers addressing this issue. Therefore, ACF opts not to include additional regulatory language in order to allow States to make decisions that will continue to protect children's health and safety without causing great disruption to the delivery of care for children. States are responsible for determining the most appropriate obligations for providers during the appeals process, and must inform providers about those obligations during an appeals process. States have the option of allowing child care providers to employ staff members or prospective staff members while they are involved in the appeals process. We encourage States to consult the U.S. Equal Employment Opportunity Commission's guidance (U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf*). In addition, we note Section 658H(e)(5) of the Act, which is reiterated at § 98.43(e)(5), requires that nothing in this section shall be construed to create a private right of action if a provider has acted in accordance with this section. If a child care provider acts in accordance with the requirements of the Act, private parties may not bring a lawsuit.

Comment: Comments from national organizations and child care worker organizations urged ACF to include new regulatory language requiring the individualized review for drug-related felonies described at § 98.43(e)(4) to follow the U.S. Equal Employment Opportunity Commission's (EEOC) guidelines. A letter co-signed by several national organizations stated, "Communities of color, and women of color in particular, have suffered immeasurably as a result of the collateral consequences of an arrest or conviction for a drug offense. Indeed, women now represent the fastest growing segment of the criminal justice system, due largely to drug offenses, not violent crime. In fact, 24 percent of all incarcerated women were convicted of drug offenses, compared to just 16 percent of men. As the ACLU concluded in their analysis of the issue, '[w]omen of all races use drugs at approximately the same rate, but women of color are arrested and imprisoned at much higher rates.' [W]e urge ACF to emphasize in the preamble that the States should adopt robust waivers procedure as applied to disqualifying drug offenses. In addition, ACF should specifically incorporate the EEOC guidelines in the regulations (Section 98.43(e)(4)), which would provide specific direction to the States beyond simply referencing Title VII."

Response: Section 658H(e)(4) of the Act, which is reiterated at § 98.43(e)(4) of the final rule, allows Lead Agencies to conduct a review process through which the Lead Agency may determine that a child care staff member (including a prospective child care staff member) convicted of a disqualifying felony drug-related offense, committed during the preceding five years, may be eligible for employment by a provider receiving CCDF funds. The law also requires that the review process must be consistent with Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), which prohibits employment discrimination based on race, color, religion, sex and national origin. ACF interprets the statutory reference to Title VII of the Civil Rights Act to mean that Lead Agencies must conduct the review processes in accordance with the EEOC's current guidance on the use of criminal background checks in employment decisions, which requires individualized consideration of the nature of the conviction, age at the time of the conviction, length of time since the conviction, and relationship of the conviction to the ability to care for children, or other extenuating circumstances.

Lead Agencies should consult the EEOC's current guidance on the consideration of criminal records in employment decisions to ensure compliance with Title VII's prohibition against employment discrimination (U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf*). As described in the comment, members of low-income communities of color are disproportionately charged and convicted of drug-related offenses. Establishing a robust process for an individualized review that follows EEOC guidance is important to protect these individuals. This process allows Lead Agencies to consider extenuating circumstances and to make nuanced decisions to deem an individual to be eligible for employment.

Comment: A letter co-signed by several national organizations also asked ACF to require an individualized review that complies with the EEOC guidance for any other disqualifying crimes added by the Lead Agency. The letter wrote, "This 'individualized assessment' of mitigating factors is a critical component of a fair background check process, as detailed in the EEOC guidance. It simply provides an opportunity for a prospective hire to explain why she is qualified for the position and does not pose a risk to child safety and well-being, even if she may have an otherwise disqualifying offense on her record. Individualized assessments are also particularly important for victims of domestic violence, who are often charged and convicted of a broad range of offenses, many of which are directly related to the abuse they experience. Accordingly, we urge ACF to incorporate the language of the EEOC guidance into Section 98.43(h)(1) of the CCDF regulations, thus mandating that the States take into account the individual's work history, evidence of rehabilitation, and other compelling factors that mitigate against disqualifying the individual from child care employment based on a conviction record."

Response: As described above, ACF interprets consistency with Title VII of the Civil Rights Act to mean that Lead Agencies must follow the EEOC guidelines. As such, we strongly encourage Lead Agencies to follow recommendations to implement an individualized assessment and waiver process in particular for any other disqualifying crimes not listed in the Act. In addition to challenging the record for accuracy and completeness, an individualized review allows the Lead Agency to consider other relevant information, and to provide waivers where appropriate. The EEOC recommends reviewing the following evidence: "the facts or circumstances surrounding the offense or conduct; the number of offenses for which the individual was convicted; older age at the time of conviction, or release from prison; evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct; the length and consistency of employment history before and after the offense or conduct; rehabilitation efforts (*e.g.*, education/training); employment or character references and any other information regarding fitness for the particular position; and whether the individual is bonded under a federal, State, or local bonding program" (U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf*).

Background check fees. Lead Agencies have the flexibility to determine who pays for background checks (*e.g.*, the provider, the applicant, or the Lead Agency) but Section 658H(f) of the Act requires that the fees charged for completing a background check may not exceed the actual cost of processing and administration. The cost of conducting background checks varies across States and Territories. The current FBI fee is $14.75 to conduct a national fingerprint check (subject to change). According to FY 2014–2015 CCDF State Plan data, most Lead Agencies report low costs to check State registries.

ACF recognizes the important role that fees play in sustaining a background check system. While States and Territories cannot profit from background check fees, we do not want to prevent fees that support the necessary infrastructure. Fees cannot exceed costs and result in return to State general funds, but they can be used to build and maintain background check infrastructure. Further, we expect that Lead Agencies using third party contractors to conduct background checks will ensure that these contractors are not charging excessive fees that would result in huge profits. ACF does not want background check fees to be a barrier or burden for entry into the child care workforce.

Comment: Comments from national organizations and child care worker organizations asked ACF to clarify whether CCDF funds could be used to cover the costs of background checks. One child care worker organization wrote, "We urge ACF to additionally clarify that States are permitted to use CCDBG funding to cover the cost of the background checks for legally exempt and family child care providers, and their household members, so that the cost of the background checks is not a barrier for these providers."

Response: We agree with the comments. The intent of the Act is not to create additional burdens for certain provider groups. At Lead Agency discretion, CCDF funds may be used to pay the costs of background checks, including legally exempt and family child care providers, and their household members.

Consumer education Web site. The Act requires States and Territories to ensure that their background check policies and procedures are published on their Web sites. We require that States and Territories also include information on the process by which a child care provider or other State or Territory may submit a background check request in order to increase transparency about the process. Comments on this provision, located at § 98.43(g) of the final rule, were largely supportive. These background check policies and procedures should be included on the consumer education Web site discussed in detail in Subpart D at § 98.33(a).

§ 98.44 Training and Professional Development

Section 658E(c)(2)(G) of the Act requires Lead Agencies to describe in their CCDF Plan their training and professional development requirements designed to enable child care providers to promote the social, emotional, physical and cognitive development of children and to improve the knowledge and skills of caregivers, teachers, and directors in working with children and their families, which are applicable to child care providers receiving CCDF assistance. At § 98.44 we create a cohesive approach to the Act's provisions for training and professional development at Section 658E(c)(2)(G), provider training on health and safety at Section 658E(c)(2)(I)(i)(XI), and provider qualifications at Section 658E(c)(2)(H)(i)(III). This rule builds on the pioneering work of States on professional development and reflects current State policies.

We received comments from States concerned about the resources needed to meet these requirements and the capacity of professional development providers to fulfill the demand. We recognize that the Act and the rule require more attention to training and professional development; however, the knowledge and skill of caregivers, teachers, and directors is at the heart of quality experiences for children.

Caregiver, teacher and director. As discussed earlier, we have added definitions for "teacher" and "director" to § 98.2. Adding these terms promotes professional recognition for early childhood and school-age care teachers and directors and aligns with terms used in the field. The Act uses the terms "caregiver" and "provider" and we maintain the use of those terms throughout this section as appropriate. We also use the terms "teacher" and "director" to recognize the different professional roles and their differentiated needs for training and professional development. For example, teachers provide direct services to children and need knowledge of curricula and health, safety, and developmentally appropriate practices. In addition, directors need skills to manage and support staff and perform other administrative duties. For simplicity sake, we have included teacher assistants or aides in the same term as teacher. Training and professional development should be tailored to the role or job responsibilities but all caregivers, teachers, and directors need the foundational knowledge of health, safety, and child development.

Collaboration. The Act requires the Lead Agency to consult with the State Early Care and Education Advisory Committee on this section of the Plan. We encourage Lead Agencies to collaborate as well with entities that set State teacher standards and certificates, entities that award early childhood education credentials, institutions of higher education, child care providers and early childhood education professional associations.

Framework and progression of professional development. At § 98.44(a), we require that Lead Agencies describe in their CCDF Plan the State or Territory framework for training, professional development and postsecondary education based on statutory language at Section 658E(c)(2)(G)(i). The Act requires the framework to be developed in consultation with the State Advisory Council on Early Childhood Education and Care (SAC). We received many comments supporting our outline of the six framework components.

The final rule at § 98.44(a)(3) describes the components of a professional development framework. We deleted language in the NPRM that proposed these components be addressed in the framework "to the extent practicable" since each State's framework should address these components to some extent— but we recognize that each State may be in a different stage of development of implementation. We received many comments supporting our identification of six components of a framework, described below. These are based on recommendations by the National Child Care Information Center and the National Center on Child Care Professional Development Systems and Workforce Initiatives (former technical assistance projects of the Office of Child Care), and national early childhood professional associations, including the National Association for the Education of Young Children. The recent report of the National Academies of Sciences' expert panel on the early childhood workforce speaks to the intentional and multifaceted system of supports that will be needed to ensure that every caregiver, teacher, and director can provide high-quality development and learning to the diversity of children in child care and early childhood programs. (Institute of Medicine and National Research Council, 2015. Transforming the workforce for children birth through age 8: A unifying foundation. Washington, DC: The National Academies Press) The six components are: Professional standards and competencies, career pathways, advisory structures, articulation, workforce information, and financing. These components are discussed below. In the CCDF Plans, the majority of States and Territories indicated that they have implemented the same components of a professional development framework system. We provide for flexibility on the strategies, breadth and depth with which States and Territories will develop and implement a framework that includes these components. A comment from a national organization said, "The proposed rule's focus on professional development, including its specification of six components for Lead Agencies' professional development frameworks (based on the National Academies of Sciences expert panel report on the early childhood workforce), is a critical advance toward the professionalization of the early childhood workforce. This, in sum, is a key ingredient for quality."

1. Core knowledge and competencies. Caregivers, teachers, and directors need a set of knowledge and skills to be able to provide high-quality child care and school-age care. The foundational core knowledge—what all early childhood professionals should know and be able to do—should be supplemented with specialized competencies and professional development that recognizes different professional roles, ages of children being served, and special needs of children. According to the FY 2016–2018 CCDF Plans, 44 States and Territories have fully implemented core knowledge and competencies aligned to professional standards.

2. Career pathways. Section 658E(c)(2)(G)(ii)(I) of the Act requires Lead Agencies to create a progression of professional development, which may include encouraging postsecondary education. This progression is in essence a career pathway, also known as a career lattice or career ladder. The National Academies of Sciences' report, Transforming the Early Childhood Workforce: A Unifying Framework, calls for States to implement "phased, multiyear pathways to transition to a minimum bachelor's degree requirement with specialized knowledge and competencies" for all early childhood teachers working with children from birth through age eight. (Institute of Medicine (IOM) and National Research Council (NRC). 2015. Transforming the workforce for children birth through age 8: A unifying foundation. Washington, DC: The National Academies Press). According to the FY 2016–2018 CCDF Plans, nearly all States and Territories have developed a career pathway that includes qualifications, specializations, and credentials by professional role. Although we do not require that States set any particular credential as a licensing qualification or a point on the career pathway, the pathway should form a transparent, efficient sequence of stackable, and portable credentials from entry level that can build to more advanced professional competency recognition, and at each step, aligned to improved compensation. One model of professional development is the Registered Apprenticeship, providing job-embedded professional development and coursework that leads to a Child Development Associate (CDA) credential. In many apprenticeships, this is done through an agreement with the community college to carry credit toward an Associate degree. The costs of tuition, books, and the CDA evaluation fee are covered by the apprenticeship. The CDA is often a first professional step on an early childhood education career ladder that can lead to better compensation and a pathway to higher levels of education.

3. Advisory structures. Because professional development and training opportunities and advancement may cut across multiple agencies, it is important to have a formal communication and coordination effort. For example, professional development resources for individuals providing special education services for preschools and infants and toddlers may not be administered by the CCDF Lead Agency. The State higher education board or board of education generally makes policies for higher education institutions. Many States use the SACs as an advisory body for professional development systems policy and coordination. (Administration for Children and Families, U.S. Department of Health and Human Services, Early Childhood State Advisory Councils Final Report, 2015) We encourage the advisory body to include representatives of different types of professional development providers (such as higher education, entities that grant teacher certification, certificates and credentials in early childhood education, child care resource and referral, QRIS coaches and technical assistance providers) as well as CCDF providers through membership on the advisory or participation in subcommittees or advisory groups.

4. Articulation. Articulation of coursework, when one higher education institution matches its courses or coursework requirements with other institutions, prevents students from repeating coursework when changing institutions or advancing toward a higher degree. Transfer agreements, another type of articulation, allow the credit earned for an associate degree to count toward credits for a baccalaureate degree. States and Territories can encourage articulation and transfer agreements between two- and four-year higher education degree programs, as well as articulation with other credentials and demonstrated competencies specifically as it pertains to early childhood education degree programs. We require that, to the extent practicable, professional development and training awards continuing education units or is credit-bearing. We encourage professional development that is credit-bearing where these credits readily transfer to a degree or certificate program. In their FY 2016–2018 Plans, 52 States and Territories reported having articulation agreements in place across and within institutions of higher education and 47 States and Territories reported having articulation agreements that translate training and/or technical assistance into higher education credit.

5. Workforce information. It is important to collect and evaluate data to identify gaps in professional development accessibility, affordability, and quality. Information may be gathered from different sources, such as child care resource and referral agencies, scholarship granting entities, higher education institutions, Head Start Program Information Report data, and early childhood workforce registries. Information about the characteristics of the workforce, access to and availability of different types of training and professional development, compensation, and turnover can help the advisory body and other stakeholders make policy and financing decisions.

6. Financing. Financing of the framework and of individuals to access training and professional development, including postsecondary education, is critical. Many Lead Agencies use CCDF funds to finance the professional development infrastructure and the costs of training and professional development, including postsecondary education, for caregivers, teachers, and directors. States and Territories report using their SAC grants and Race to the Top-Early Learning Challenge grants to leverage and expand CCDF funds for workforce improvement and retention. Twenty-eight States/Territories reported that they used SAC grants to complete a workforce study; 29 States/Territories used SAC grants to create or enhance their Core Knowledge and Competencies framework; and 18 States/Territories used SAC grants to develop or enhance their workforce registries. We encourage Lead Agencies

to leverage CCDF funds with other public and private resources to accelerate professional development efforts.

We received multiple comments from national and State organizations that they were pleased to see the framework and its description in the preamble. We received comments from a national organization and early childhood worker organizations to add language to the preamble to expand the description of some of the components, and we have adopted some of these modifications in the preamble.

Section 658E(c)(2)(G)(ii)(II) of the Act allows the Lead Agency to engage training providers in aligning training opportunities with the State's training framework, which the rule restates at § 98.44(a)(2). The rule adds professional development providers, including higher education and education as well as training opportunities to ensure that all appropriate types of professional development, including formal education that is needed for career progression, are included. We encourage the participation of the full range of training and professional development providers, including higher education and entities that grant teacher certification, certificates and credentials in early childhood education, to align with the framework. Training and professional development may be provided through institutions of higher education, child care resource and referral agencies, worker organizations, early childhood professional associations, and other entities. This alignment may lead to a more coherent and accessible sequence of professional development for individuals to meet Lead Agency requirements and progress in their professional development and to maximize the use of professional development resources.

Qualifications. Section 658E(c)(2)(H)(i)(III) of the Act requires Lead Agencies to set qualifications for CCDF providers. The final rule reiterates that requirement at § 98.44(a)(4) and clarifies that such qualifications should be designed to enable caregivers, teachers, and directors to promote the full range of children's development: Social, emotional, physical, and cognitive development. States and Territories currently set minimum qualifications for teacher assistants, teachers, directors, and other roles in centers, family child care, and school-age care settings in their licensing standards. We encourage Lead Agencies to consider the linkage between these minimum qualifications and higher qualifications in the progression of professional development or career pathways. According to Section 658E(c)(2)(G)(ii)(I) of the Act, professional development should be conducted on an ongoing basis, provide for a progression of professional development (which may include encouraging the pursuit of postsecondary education), and reflect current research and best practices relating to the skills necessary for the caregivers, teachers, and directors to meet the developmental needs of participating children and engage families. These requirements are in paragraphs (5) and (6) of § 98.44(a).

Comment: One comment asked for specific language that the State framework and qualifications require at least basic training or coursework on early childhood care and education.

Response: The Act gives Lead Agencies the flexibility to determine qualifications. The final rule adds child development to the health and safety topical areas that must be addressed during the pre-service or orientation period. These we see as the foundation of the progression of professional development, and with the requirement for ongoing annual professional development, aligned to the State framework (particularly the component on career pathways) urge Lead Agencies to ensure opportunities for caregivers, teachers and directors to deepen their understanding and application of best practices to support children's development and learning. We note that our addition of child development to the topics in the pre-service or orientation training should be understood to give at minimum a basic overview and grounding in child development. The Act and this rule identify a variety of topics in child development for ongoing professional development, which should not be considered an exhaustive list.

Quality, diversity, stability and retention of the workforce. Section 658E(c)(2)(G)(ii)(I) of the Act also requires assurances in the Plan that training and professional development will improve the quality of, and stability within, the child care workforce. Section 98.44(a)(7) requires that the training and professional development requirements must also improve the quality and diversity of caregivers, teachers, and directors. Maintaining diverse and qualified caregivers, teachers, and directors is a benefit to serving children of all backgrounds. The final rule also provides that such requirements improve the retention (including financial incentives) of caregivers, teachers, and directors within the child care workforce, based on the high turnover rate in child care that can disrupt continuity of care for children. In order for children to benefit from high-quality child care, it is important to retain caregivers, teachers, and directors who have the knowledge and skills to provide high-quality experiences. In 2012, the average annual turnover rate of classroom staff was 13 percent, and the turnover rate among centers (child care, Head Start and schools) that experienced any turnover was 25 percent. (Whitebook, M., Phillips, D. & Howes, C. (2014.)) Worthy work, STILL unlivable wages: The early childhood workforce 25 years after the National Child Care Staffing Study. Berkeley, CA: Center for the Study of Child Care Employment, University of California, Berkeley)

Comment: One State raised concerns that it does not have a way to track outcomes for whether there were improvements in the quality, diversity, stability and retention of the workforce.

Response: The rule requires the Lead agency to describe in its plan how it will improve the quality, diversity, stability and retention of caregivers, teachers, and directors. We do not specify how a Lead Agency will evaluate or document changes in the child care workforce. A majority of States have established registries where early childhood caregivers, teachers, and directors can document their professional development. These registries also help provide information on the characteristics of the early childhood workforce in the State. There are a number of other sources of workforce information available to Lead Agencies, such as participants in State-provided trainings, scholarship programs for early childhood teachers for postsecondary education, quality rating and improvement systems, and workforce surveys. A minimum best practice should be that caregivers, teachers, and directors document training and professional development in the personnel files of the facility.

Comment: We received comments from multiple national and state organizations, including organizations representing child care workers, asking us to explicitly include higher compensation as an example of a retention strategy.

Response*:* We strongly agree that retaining caregivers, teachers, and directors who attain more professional knowledge and skill is important to raising the quality of children's experiences in child care and school-age care settings. The final rule adds compensation improvements as an example along with financial incentives at § 98.44(a)(7). There are examples of States that implement compensation improvements that connect higher compensation with increasing levels of education in their career pathways, and that explicitly build such improvements into their quality rating and improvement systems. We urge States and Territories to implement strategies to raise the compensation of caregivers, teachers, and directors as they raise qualification standards. Given the amount of public and private investment in professional development and the length of time individuals are working in child care, it is important to retain the caregivers, teachers, and directors who have benefitted from those professional investments in order to create continuity of high-quality teaching and care for children.

Aligning training and professional development with the professional development framework. Section 98.44(b) of the final rule requires Lead Agencies to describe in the Plan their requirements for training and professional development for caregivers, teachers, and directors of CCDF providers that, to the extent practicable, align with the State or Territory's training and professional development framework required by § 98.44(a). There is a continuum of professional development from pre-service and orientation training through increasing levels of knowledge and skill.

Pre-service or orientation health and safety training. Section 658E(c)(2)(I)(i)(XI) of the Act requires Lead Agencies to set minimum health and safety training, to be completed pre-service or during an orientation period in addition to ongoing training, appropriate to the provider setting involved that addresses the specific topic areas listed in the final rule at § 98.41(a)(1). All caregivers, teachers, and directors in programs receiving CCDF funds must receive this training. Many States and Territories already have pre-service and orientation training requirements for licensed providers. We have placed this requirement in the professional development section of the rule because we see preliminary health and safety training requirements as a part of a continuum of professional development. We require that pre-service or orientation training include the major domains of child development in addition to the Act's requirement for health and safety training. Understanding child development is integral to providing high-quality child care.

The Act allows an orientation period during which staff can fulfill the training requirement. Lead Agencies will have broad flexibility to determine what training is required "pre-service" and what training may be completed during an "orientation" period. We require pre-service or orientation training be completed within three months of caring for children as recommended by CfoC Basics. During those three months, caregivers and teachers who provide direct care for children must be supervised until training is completed in pediatric first aid and CPR, safe sleep practices, standards precautions to prevent communicable disease, poison prevention, and shaken baby syndrome/abuse head trauma.

We encourage providers to document completion of the pre-service or orientation training so that caregivers, teachers, and directors do not need to repeat foundational training when they change employment. This documentation can be useful for the State's or Territory's licensing agency and career pathway.

We expect variability in how Lead Agencies will implement this provision. There are a number of low- or no-cost resources available, including online resources, which cover many of these trainings. Several of these are available at ACF's Web site, Early Educator Central at *https://earlyeducatorcentral.acf.hhs.gov/coursework*. We do not advocate the exclusive use of online trainings. A mixed delivery training system that includes both online and in-person trainings can meet the varied needs of child care caregivers, teachers, and directors. We encourage Lead Agencies to permit individuals to use certificates and credentials that include a demonstration of competence in any or all of the health, safety, and child development topics to fulfill, partially or in full, the training requirements.

Comment: Many comments supported the increased attention to training and professional development as a key component of quality child care. However, several States also noted that currently they do not require pre-service or orientation in all of the required health and safety topics, and that resources to pay for and provide the training is a challenge. One comment asked for additional clarification regarding whether the pediatric First Aid and CPR requirement applies to all child care personnel or to the provider itself (*e.g.*, ensuring at least one provider personnel is certified and on premises at any given time). Another comment expressed concern that training in pediatric CPR and First Aid without certification could potentially lead to liability issues in the event that First Aid is provided or CPR is administered by personnel who have been trained in these areas but not certified.

Response: We recognize that there is a need for resources to offset the costs of training and for building capacity to deliver it. However, licensing requirements for health and safety must go hand in hand with training to ensure that all caregivers, teachers, and directors understand how to preserve the health and safety of children in their care. As stated in the preamble, States and Territories have flexibility in how they will provide the training and comply with this provision. The Administration for Children and Families has provided several no-cost or low-cost trainings at the Web site *http://eclkc.ohs.acf.hhs.gov/hslc/tta-system/health/ccdbg/ccdbg-required-health-safety-training.html.*

With regard to flexibility and demonstrating competence, we recognize that some training for pre-service or orientation will not result in certification and others that will, such as pediatric First Aid and CPR. We remind States and Territories that they must set requirements for ongoing, annual professional development and must address certain topics beyond health and safety as outlined in the Act. All of these trainings and professional development opportunities should be aligned with the State's training and professional development framework, contribute to a progression of professional learning, and reflect current research and best practices to promote the social, emotional, physical and cognitive development of children.

Comment: One comment focused on infants and toddlers and the need to ensure that caregivers, teachers and directors are supervised until they have training in critical areas of health and safety. The comment cautioned that "babies and toddlers and other young children cannot wait three months to be in safe care."

Response: Because SIDS and other training are so important to health and safety, § 98.44(b)(1)(i) of the final rule requires supervision during the pre-service or orientation period.

Comment: We received a comment requesting more references to school-age caregivers.

Response: The final rules adds specific references to school-age care at § 98.44(a) and § 98.44(a)(4). The definitions of the terms caregiver, teacher, and director as defined in the final rule include school-age care. CCDF serves children from birth to age 13 years and we expect States to apply these training and professional development provisions to the caregivers, teachers, and directors serving children in that age span. The final rule also promotes training and professional development that is appropriate to the setting and the age of children served.

Comment: We received support for a three-month period for pre-service or orientation from a number of national and State organizations. A State and an organization representing child care workers asked for a sixth-month period for pre-service or orientation training citing concerns about the resources to provide training and the capacity of training providers to meet the demand.

Response: We have maintained at § 98.44(b) the three-month window and encourage Lead Agencies to consider how credentials and certificates earned by caregivers, teachers, and directors prior to caring for children can fulfill these requirements. The Act requires specific health and safety protections in licensing, and for these to be implemented, caregivers, teachers, and directors should have foundation training in them. We added child development, but did not specify the depth and breadth of training in this area for the pre-service or orientation period and note that there is a requirement for ongoing, annual professional development as well. The combination of online and in-person resources in these topics, and that this is pre-service or orientation level training, should allow caregivers, teachers and directors to fulfill this requirement in this time frame. As we describe elsewhere in the preamble, ACF's Web site provides free or low-cost online resources on many of these topics.

Comment: We received a few comments asking from national organizations to add topics for pre-service or orientation training, such as violence/trauma, nutrition and physical activity, mathematics, arts, and behavior management. National disabilities groups requested the addition of communication to the early learning and development domains. We received comments from faith-based and private providers requesting language in several places that training and professional development would accommodate distinctive approaches, and specified certain methods, curricula, and philosophies.

Response: The Act and this final rule require pre-service or orientation training in health and safety and we have added child development. The Act and this rule also specify areas for ongoing professional development, outlining, at a minimum, knowledge and application of the State's early learning and developmental guidelines (where applicable), the State's health and safety standards, and social-emotional behavior intervention models, which may include positive behavior intervention and support models. We provide States with the flexibility in how to meet these requirements and promote ongoing professional learning in these more specific areas. Further, the final rule does not limit the type of training provider or the approach to teaching except that it should be research-based. Further, we encourage Lead Agencies to reach out to the full range of the types of providers when developing this section of the Plan and in aligning the professional development opportunities to the State's professional development framework and the progression of professional development or career pathway.

Comment: We received comments from representatives of family child care providers and child care workers organizations requesting language that the training be appropriate to the setting as well as the age of children served.

Response: All caregivers, teachers, and directors should have the foundational health, safety and child development training, as well as ongoing professional development that help them advance on an early childhood career pathway. We agree that training should also be meaningful for the setting in which the care is provided, and have added language to the final rule at § 98.44(b)(1) and § 98.44(b)(2) that training and professional development should be appropriate to the setting and age of children served, recognizing that family child care providers may benefit from training and professional development that reflects a different type of care than center-based programs, such as mixed age grouping and health and safety in a home environment.

Comment: We received comments asking for training and professional development in cultural and linguistic appropriate practices to support the diversity of children in child care.

Response: Section 98.44(a)(6) of the final rules provides that the training must reflect current research and best practices, including culturally and linguistically appropriate practices. We also note that the Act and this final rule encourage professional development related to different ages and populations of children, including English language learners.

Ongoing professional development. Section 658E(c)(2)(G)(ii)(I) of the Act requires the Plan to include assurances that training and professional development will be conducted on an ongoing basis, which the final rule restates at § 98.44(b)(2) with a number of parameters. Section 98.44(b)(2)(i) requires that ongoing training maintain and update the health and safety training standards described at § 98.41(a)(1).

Section 658E(c)(2)(G)(iii) of the Act requires each Lead Agency's Plan to include the number of hours of training for eligible providers and caregivers to engage in annually, as determined by the Lead Agency. Section § 98.44(b)(2) of the final rule reiterates this by requiring Lead Agencies to establish the minimum annual requirement for hours of training and professional development for caregivers, teachers and directors of CCDF providers. While Lead Agencies have flexibility to set the number of hours, Caring for Our Children recommends that teachers and caregivers receive at least 30 clock hours of pre-service training and a minimum of 24 clock hours of ongoing training annually. (American Academy of Pediatrics, American Public Health Association, National Resource Center for Health and Safety in Child Care and Early Education. 2011. *Caring for our children: National health and safety performance standards; Guidelines for early care and education programs. 3rd edition.* Elk Grove Village, IL: American Academy of Pediatrics; Washington, DC: American Public Health Association.)

The Act also specifies that the ongoing professional development must: Incorporate knowledge and application of the Lead Agency's early learning and developmental guidelines (where applicable) and the Lead Agency's health and safety standards; incorporate social-emotional behavior intervention models, which may include positive behavior intervention and support models; be accessible to providers supported by Tribal organizations or Indian Tribes that receive CCDF assistance; and be appropriate for different populations of children, to the extent practicable, including different ages of children, English learners, and children with disabilities.

Continuing education units and credit-bearing professional development. The final rule requires Lead Agencies to describe in the Plan the requirements for ongoing, accessible professional development aligned to a progression of professional development that, to the extent practicable, awards continuing education units or is credit-bearing. While we encourage credit-bearing professional development that readily transfers to a degree program or certificate, we also acknowledge that there remains work in States and

Territories to create transfer and articulations agreements.

Comment: We received comments relating to cultural linguistic diversity of the workforce and best practices with children and families.

Response: The final rule includes a provision that the States and Territories address in their framework improving the quality, diversity, stability and retention of caregivers, teachers, and directors. We urge States and Territories to examine and address diversity of the workforce at each step of the career pathway. Ensuring the diversity of the workforce—at all levels of the career pathway—should be interpreted broadly, such as demographic characteristics of race, gender, age, native language, among other characteristics.

Comment: There were a large number of comments from national and State organizations and child care worker organizations requesting an explicit reference to higher compensation throughout this section.

Response: We strongly agree that the compensation of many child care staff and program leaders is not reflective of the importance of the work. As required qualifications rise, there needs to be commensurate increases in compensation in order to retain a workforce with the specialized knowledge and skills to support children's positive development, health, and safety. Many States have initiatives that support child care providers with financial support as well as academic advisement to gain more formal education and credentials, with some compensation improvement. Thus, the final rule at § 98.44(a)(7) provides that improving the quality, stability, diversity and retention of the child care workforce includes financial incentives and compensation improvements. Section 98.53(a)(1)(vii) regarding the uses of the quality set-aside includes the ability to use those resources for these financial incentives and compensation improvements.

Comment: We received a comment from a national early childhood organization asking for additional language that would emphasize that the credit-bearing professional development readily transfers to a degree or certificate program.

Response: We require the Plan to address a State framework that includes career pathways and articulation agreements. We encourage the promotion of credit-bearing professional development that is readily transferable, but also recognize that there remains work to be done to implement transfer agreements. Some caregivers, teachers, and directors may already have a degree and a certificate and do not need transferable credit-bearing coursework, but as professionals, should be required to have appropriate ongoing, accessible professional development to deepen their knowledge and skills.

§ 98.45 Equal Access

Consistent with Section 658E(c)(4) of the Act, § 98.45 of this final rule requires the Lead Agency to: (1) Certify in its CCDF Plan that payment rates for CCDF subsidies are sufficient to ensure equal access for eligible children to child care services that are comparable to child care services provided to children whose parents are not eligible to receive child care assistance; and (2) provide a summary of the facts the Lead Agency used to determine that payment rates are sufficient to ensure equal access. This final rule modifies the key elements in the previous regulation used to determine that a CCDF program provides equal access for eligible families, and includes additional elements consistent with statutory provisions on equal access and rate setting at Section 658E(c)(4) of the Act and payment practices at Section 658E(c)(2)(S).

Under § 98.45(b) of this final rule, the summary of data and facts now includes: (1) Choice of the full range of providers, including the extent to which child care providers participate in the CCDF subsidy system; (2) adequate payment rates, based on the most recent market rate survey or alternative methodology; (3) base payment rates that enable child care providers to meet the health, safety, quality, and staffing requirements in the rule; (4) the cost of higher-quality child care, including how payment rates for higher-quality care relate to the estimated cost of that care; (5) affordable co-payments, a rationale for the Lead Agency's policy on whether child care providers may charge additional amounts to families above the required family co-payment (informed by data collected by the State and with regard to a working family's ability to pay such mandatory fees without restricting access to care they would otherwise access taking into consideration the family co-payment, payment rate for the provider, and the cost of care), and the extent to which CCDF providers charge such amounts; (6) payment practices that support equal access to a range of providers; (7) how and on what factors the Lead Agency differentiates payment rates; and (8) any additional facts considered by the Lead Agency. All of these changes are discussed further below.

Based on Section 658E(c)(4)(B) of the Act, § 98.45(c) of this final rule requires Lead Agencies to conduct, no earlier than two years before the submission of their CCDF Plan, a statistically valid and reliable market rate survey or an alternative methodology, such as a cost estimation model.

Statistically Valid and Reliable Market Rate Survey. A market rate survey is an examination of prices, and Lead Agencies have flexibility to use data collection methodologies other than a survey (*e.g.,* administrative data from resource and referral agencies or other sources) so long as the approach is statistically valid and reliable. ACF is not defining *statistically valid and reliable* within the regulatory language but is establishing a set of benchmarks, largely based on CCDF-funded research to identify the components of a valid and reliable market rate survey. (Grobe, D., Weber, R., Davis, E., Kreader, L., and Pratt, C., *Study of Market Prices: Validating Child Care Market Rate Surveys,* Oregon Child Care Research Partnership, 2008)

ACF will consider a market rate survey to be statistically valid and reliable if it meets the following benchmarks:

- Includes the priced child care market. The survey includes child care providers within the priced market (*i.e.,* providers that charge parents a price established through an arm's length transaction). In an arm's length transaction, the parent and the provider do not have a prior relationship that is likely to affect the price charged. For this reason, some unregulated, license-exempt providers, particularly providers who are relatives or friends of the child's family, are generally not considered part of the priced child care market and therefore are not included in a market rate survey. These providers typically do not have an established price that they charge the public for services, and the amount that the provider charges is often affected by the relationship between the family and the provider. In addition, from a practical standpoint, many Lead Agencies are unable to identify a comprehensive universe of license-exempt providers because individuals frequently are not included on lists maintained by licensing agencies, resource and referral agencies, or other sources. In the absence of findings from a market rate survey, Lead Agencies often use other facts to establish payment rates for providers outside of the priced market (*e.g.,* license-exempt providers); for example, many Lead Agencies set these payment rates as a percentage of the rates for providers in the priced market.

- Provides complete and current data. The survey uses data sources (or combinations of sources) that fully capture the universe of providers in the priced child care market. The survey should use lists or databases from multiple sources, including licensing, resource and referral, and the subsidy program, if necessary, for completeness. In addition, the survey should reflect up-to-date information for a specific time period (*e.g.,* all of the prices in the survey are collected within a three-month time period).
- Represents geographic variation. The survey includes providers from all geographic parts of the State, Territory, or Tribal service area. It also should collect and analyze data in a manner that links prices to local geographic areas.
- Uses rigorous data collection procedures. The survey uses good data collection procedures, regardless of the method (mail, telephone, or web-based survey; administrative data). This includes a response from a high percentage of providers (generally, 65 percent or higher is desirable and below 50 percent is suspect). Some research suggests that relatively low response rates in certain circumstances may be as valid as higher response rates. (Curtin R., Presser S., Singer E., *The Effects of Response Rate Changes on the Index of Consumer Sentiment,* Public Opinion Quarterly, 2000; Keeter S., Kennedy C., Dimock M., Best J., Craighill P., *Gauging the Impact of Growing Nonresponse on Estimates from a National RDD Telephone Survey,* Public Opinion Quarterly, 2006) Therefore, in addition to looking at the response rate, it is necessary to implement strong sample designs and conduct analyses of potential response bias to ensure that the full universe of providers in the child care market is adequately represented in the data and findings. Lead Agencies should consider surveying in languages in addition to English based on the languages used by child care providers, and other strategies to ensure adequate responses from key populations.
- Analyzes data in a manner that captures market differences. The survey should examine the price per child care slot, recognizing that all child care facilities should not be weighted equally because some serve more children than others. This approach best reflects the experience of families who are searching for child care. When analyzing data from a sample of providers, as opposed to the complete universe, the sample should be appropriately weighted so that the sample slots are treated proportionally to the overall sample frame. The survey should collect and analyze price data separately for each age group and category of care to reflect market differences.

The purpose of the market rate survey is to guide Lead Agencies in setting payment rates within the context of market conditions so that rates are sufficient to provide equal access to the full range of child care services, including high-quality child care. However, the child care market itself often does not reflect the actual costs of providing child care and especially of providing high-quality child care designed to promote healthy child development. Financial constraints of parents prevent child care providers from setting their prices to cover the full cost of high-quality care, which is unaffordable for many families. As a result, a market rate survey may not provide sufficient information to assess the actual cost of quality care. Therefore, it's often important to consider a range of data, including, but not limited to, market rates, to understand prices in the child care market.

Comment: One national organization recommended requiring that surveys be conducted by a neutral third party.

Response: We have not added this requirement because we do not want to hamper Lead Agencies' ability to administer the survey according to the available processes that work best for their jurisdiction. Many States currently administer the survey through a partner with expertise in survey design and implementation—such as a postsecondary educational institution or research firm. Some States, however, have an in-house unit with the necessary expertise. Regardless of the approach, the survey must meet the benchmarks for validity and reliability outlined above, and must be conducted in a manner that provides transparency—including the required pre-survey consultation with stakeholders and the preparation and dissemination of the detailed report containing results.

Alternative Methodology. The reauthorized Act allows a Lead Agency to base payment rates on an alternative methodology, such as a cost estimation model, in lieu of a market rate survey. The final rule at § 98.45(c)(2) requires that any alternative methodology be approved in advance by ACF. ACF plans to issue uniform procedures and timeframes regarding approval of alternative methodologies. A cost estimation model is one such alternative approach in which a Lead Agency can estimate the cost of providing care at varying levels of quality based on resources a provider needs to remain financially solvent. The Provider Cost of Quality Calculator (*https://www.ecequalitycalculator.com/Login.aspx*) is a publicly available web-based tool that calculates the cost of quality-based on site-level provider data for any jurisdiction. Many States, working with the Alliance for Early Childhood Finance and Augenblick, Palaich and Associates (APA), contributed to the development of the cost calculator methodology that preceded the online tool, and was funded by the Office of Child Care through the technical assistance network. The tool helps policymakers understand the costs associated with delivering high-quality child care and can inform payment rate setting.

Comment: National organizations and child care worker organizations supported the proposal to require ACF advance approval of alternative methodologies.

Response: The final rule maintains this provision, recognizing that alternative methodologies are a new, unproven approach (in comparison to the long-standing use of market rate surveys). To obtain ACF approval, the Lead Agency must demonstrate how the alternative methodology provides a sound basis for setting payment rates that promote equal access and support a basic level of health, safety, quality, and staffing, as discussed below. Advance ACF approval is only necessary if the Lead Agency plans to *replace* the market rate survey with an alternative methodology. Advance approval is not required if the Lead Agency plans to implement both a market rate survey and an alternative methodology. ACF will provide non-regulatory guidance to Lead Agencies regarding the process for proposing an alternative methodology, including criteria and a timeline for approval. We will also consider whether to provide a list of recommended methodologies, which may include modeling and other approaches. The Act specifically mentions cost estimation models, and we anticipate that such models would account for key factors that impact the cost of providing care—such as: Staff salaries and benefits, training and professional development, curricula and supplies, group size and ratios, enrollment levels, facility size, and other costs.

Additional Facts Demonstrating Equal Access. Section 98.45(d) of the final rule requires that the market rate survey or alternative methodology reflect variations by geographic location, category of provider, and child's age.

Section 658E(c)(4)(B)(i) of the Act applies this requirement to market rate surveys, but the final rule extends it to alternative methodologies as well. Lead Agencies must include in their Plans how and why they differentiate their rates based on these factors. The final rule also requires Lead Agencies to track through the market rate survey or alternative methodology, or through a separate source, information on the extent to which: (1) Child care providers are participating in the CCDF subsidy program and any barriers to participation, including barriers related to payment rates and practices; and (2) CCDF child care providers charge amounts to families more than the required family co-payment, including data on the size and frequency of any such amounts. Under § 98.45(b), this information must be included as part of the Lead Agency's summary of data and facts in the Plan that demonstrate equal access.

Comment: The NPRM had proposed that the market rate survey include information on the extent to which child care providers are participating in the CCDF subsidy program and any barriers to participation, including barriers related to payment rates and practices. National organizations and child care worker organizations supported the proposal and recommended that that the information be required of all States, whether conducting a market rate survey or alternative methodology. Two States shared concerns about the associated administrative burden and cost, but one of the States said the information would be useful.

Response: In response to comments, the final rule requires that all Lead Agencies track information on the extent of provider participation in CCDF and barriers to participation. Low payment rates as well as late or delayed payments and other obstacles may force some providers to stop serving or limit the number of children receiving subsidies in their care. Other providers may choose to not serve CCDF children at all. (Adams, G., Rohacek, M., and Snyder, K., *Child Care Voucher Programs: Provider Experiences in Five Counties,* 2008). The final rule allows flexibility for States to track this information through the most efficient process—whether through the market rate survey, alternative methodology, or another source. As suggested by commenters, we recommend that States track not only the number of providers participating in CCDF, but also the number/portion of children (served by each provider) who receive subsidizes, and whether the provider places any limits on the number.

Public Consultation and Input. Based on Section 658E(c)(4)((B)(i) of the Act, § 98.45(e) requires the Lead Agency to consult with the State's Early Childhood Advisory Council or similar coordinating body, child care directors, local child care resource and referral agencies, and other appropriate entities prior to conducting a market rate survey or alternative methodology. Under the rule, Lead Agencies must also consult with organizations representing child care caregivers, teachers, and directors. Under § 98.45(f)(2)(iv), when setting payment rates, Lead Agencies must take into consideration the views and comments of the public obtained through required consultation (under paragraph (e)) and other means determined by the Lead Agency.

Comment: Child care worker organizations supported the proposal in the NPRM providing for consultation with organizations representing child care caregivers, teachers, and directors, but requested additional provisions to ensure an adequate voice for child care workers in the process for setting payment rates. One national child care worker organization and its member affiliates recommended a separate public hearing specifically focused on rate setting and worker compensation levels.

Response: The final rule retains the provision at § 98.45(e) requiring consultation with worker organizations prior to the market rate survey or alternative methodology. We are not requiring a separate public hearing to allow Lead Agency flexibility to determine the best mechanism for obtaining public input; some Lead Agencies may be able to address rate setting through the public hearing already required at § 98.14(c). In response to comments, however, § 98.45(f)(2)(iv) requires Lead Agencies to take into consideration the views and comments of the public when setting rates. The final rule also requires the Lead Agency to respond to stakeholder comments in its detailed report (discussed below).

Detailed Report. Section 98.45(f)(1) of the final rule reflects the statutory requirement for a Lead Agency to prepare and make widely available a detailed report containing results of its survey or alternative methodology. Section 658E(c)(4)(B)(ii) of the Act requires this report be available 30 days after completion of the survey or alternative methodology. Because we consider analysis and preparation of the report to be part of completing a survey, the rule indicates that Lead Agencies have 30 days from completion of the report to make the information available. ACF expects Lead Agencies to complete this report well in advance of the Plan submission deadline in order to allow enough time to for review and input by stakeholders and the public.

In addition to the results of the market rate survey or alternative methodology, a Lead Agency must indicate in its report the estimated cost of care necessary to support child care providers' implementation of the health, safety, quality, and staffing requirements at §§ 98.41, 98.42, 98.43, and 98.44, including any relevant variation by geographic location, category of provider, or age of child. As part of the summary of data and facts demonstrating equal access, we will ask Lead Agencies in their Plans to indicate the estimated cost of care necessary to support child care providers' implementation of these health, safety, quality, and staffing requirements.

Under § 98.45(f)(1), a Lead Agency's report must also include the estimated cost of care necessary to support higher-quality child care, as defined by the Lead Agency using a quality rating and improvement system or other system of quality indicators, at each level of quality. Under § 98.45(b), this information must be included as part of the Lead Agency's summary of data and facts in the Plan that demonstrate equal access. The report must also include the Lead Agency's response to stakeholder views and comments.

Comment: One State indicated that the 30-day timeframe for making the report public would be difficult to meet due to the time needed to complete a rigorous analysis of the data and provide a meaningful report.

Response: Under the rule, the 30-day timeframe for posting the report on the Internet begins after the report is completed.

Setting Payment Rates. Section § 98.45(f)(2) establishes the parameters for setting payment rates based on the market rate survey or alternative methodology and on other factors. Paragraph (f)(2)(i) requires the Lead Agency to set rates in accordance with the most recent market rate survey or alternative methodology.

Comment: National organizations, child care worker organizations, child care providers, and one State supported the proposal to require use of the current survey or methodology to set rates. Six States opposed the proposal or expressed concerns. They said that, without increased Federal resources, this is an unfunded mandate, and increased rates will lead to serving fewer children due to significant costs.

Response: The final rule retains this provision at § 98.45(f)(2)(i) because the Act requires the use of the most recent survey or methodology. Section 658E(c)(4)(B)(iii) of the Act requires Lead Agencies to set payment rates in accordance with the results of the market rate survey or alternative methodology, which must be conducted every three years. We interpret this statutory provision to mean that Lead Agencies must use results of the most recent market rate survey or alternative methodology. The intent of the new statutory requirement to conduct a market rate survey or alternative methodology every three years is that it be used to set payment rates, not treated as an obligatory paperwork exercise.

Payment rates should reflect the current child care market. Setting payment rates based on older market rate surveys or alternative methodologies that reflect outdated prices or costs results in insufficient payment rates that do not reflect current market conditions and undermine the statutory requirement of equal access. This final rule effectively requires Lead Agencies to reevaluate their payment rates *at least* every three years. This process will vary based on State laws and rules. In a number of States, action by the State legislature is necessary to change payment rates; however, it is unclear whether State legislatures are adequately engaged in reviewing current market rate survey results. A hearing in the State legislature at least every three years based on the results of the most current survey/methodology, or other similar process, may be necessary in these States to meet this requirement. Where updated data from a market rate survey or alternative methodology indicates that prices or costs have increased, Lead Agencies must raise their rates as a result. Moreover, we encourage Lead Agencies to consider annual increases in rates that keep pace with regular increases in the costs of providing child care.

Comment: The preamble to the NPRM indicated that the 75th percentile remains an important benchmark for gauging equal access. National organizations, child care worker organizations, and child care providers strongly supported retaining the 75th percentile as a benchmark. One large multi-State child care provider said that "current rates set by Lead Agencies do not promote quality and equal access" and "a business offering a similar discount on services isn't staying in business long, is covering costs through another program, or is providing an inferior service." Six States opposed the benchmark or had concerns. They said that, without increased funding, expectations for the 75th percentile would result in major reductions in the number of children served. Some commenters questioned the use of the 75th percentile as a universal standard, saying that other factors, such as quality, should be considered.

Response: We restate the continued importance of the 75th percentile as a benchmark for gauging equal access by Lead Agencies conducting a market rate survey. Established as a benchmark for CCDF by the preamble to the 1998 Final Rule (63 FR 39959), Lead Agencies and other stakeholders are familiar with this rate as a proxy for equal access. To establish payments at the 75th percentile, rates within categories from the market rate survey are arranged from lowest to highest. The 75th percentile is the number separating the 75 percent of lowest rates from the 25 percent that are highest. Setting rates at the 75th percentile demonstrates that CCDF families have access to at least three-quarters of all available child care. Retaining this benchmark also allows for accountability and comparability across States using a market rate survey approach, which can be useful in gauging equal access and monitoring trends in rates and access to quality care over time.

Currently, nearly all Lead Agencies set rate ceilings that are below the 75th percentile and, in many cases, significantly below that benchmark. This is of great concern to ACF both because inadequate rates may violate the statutory requirement for equal access and because CCDF is serving a large number of vulnerable children who would benefit from access to high-quality care and for whom payment rates even higher than the 75th percentile may be necessary to afford access to such care. Low rates simply do not provide sufficient resources to cover costs associated with the provision of high-quality care or to attract and retain qualified caregivers, teachers, and directors. Low rates may also impact the willingness of child care providers to serve CCDF children thereby restricting access. Currently, even in States and Territories that pay higher rates for higher-quality care, base rates are so inadequate that even the highest payment levels are often below the 75th percentile. While rates vary by category of care, locality, and other factors, nine States include rates that are set below the 25th percentile and five States have not adjusted their rates in over five years according to the FY2016–2018 CCDF Plans, This means that CCDF families are unable to access a significant portion of the child care market.

We agree with commenters that rates must consider a range of factors, and we anticipate that payment rates will differ by types of care, ages of children and geographic location, among other factors. Regardless, we expect that Lead Agencies will ensure that rates for all provider categories and age groups similarly provide equal access for children served by CCDF. Consideration of quality factors is discussed further below.

We understand the States' concern about potential caseload decline; however, the Act mandates that payment rates support equal access. While we are not requiring that Lead Agencies pay providers at the 75th percentile, we strongly discourage Lead Agencies from paying providers less than the 75th percentile. ACF intends to enhance its monitoring of rates through the CCDF Plan approval process. Lead Agencies that set their base rates at the 75th percentile of the most recent market rate survey will be assured approval by ACF that rates provide equal access (assuming that the Lead Agency also demonstrates compliance with the other equal access components, including how the rates enable child care providers to meet health, safety, quality, and staffing requirements in accordance with § 98.45(f)(2)(ii)). ACF will apply scrutiny in its review to rates set below that threshold, as well as to rates that appear to be below a level to meet minimum quality standards based on alternate methodologies. Finally, any alternative methodology or market rate survey that results in stagnant or reduced payment rates will result in further increased scrutiny by ACF in its review, and the Lead Agency will need to provide a justification for how such rates result in improving access to higher-quality child care.

Comment: The NPRM proposed to require that payment rates must provide access to care that is of comparable quality to care with incomes above 85 percent of State median income (SMI). The preamble to the NPRM added that Lead Agencies with rates below the 75th percentile would be required to demonstrate that their rates allow CCDF families to purchase care of comparable quality to care that is available to families with incomes above 85 percent of SMI; this would include data on the quality of care that CCDF families can purchase and that is available to families above 85 percent of SMI. We received a letter from Senator Alexander and Congressman Kline objecting that this proposal was an unfunded mandate that would create a large paperwork and administrative burden. National organizations and child care worker organizations said that this data comparison would not be meaningful enough to justify burdening States. They also indicated that little evidence exists that families above 85 percent of SMI are accessing care of higher quality compared to families below 85 percent of SMI.

Response: In light of the significant and widespread concerns, we have not included this provision in the final rule. However, the final rule includes additional provisions to strengthen the consideration of quality of care as an important factor in ensuring equal access (discussed further below).

Supporting Providers' Implementation of Health, Safety, Quality, and Staffing Requirements. Section 98.45(f)(2)(ii) requires Lead Agencies to set base payment rates, *at a minimum,* at levels sufficient for child care providers to meet health, safety, quality, and staffing requirements as described in the rule—consistent with the Lead Agency's summary of data and facts in the Plan under § 98.45(b)(3) and information included in its detailed report under § 98.45(f)(1)(ii)(A).

Comment: Numerous commenters supported the proposal, including national organizations, child care worker organizations, child care resource and referral agencies, and child care providers. Some child care worker organizations wanted to go further and also require a separate analysis related to adequate compensation for child care workers, including for home-based providers. Two commenters supported the proposal, but wanted to clarify that this provision does not stand on its own, but must be considered along with the other equal access components at § 98.45.

Response: We are retaining the provision, with revisions in response to comments. Base payment rates, *at a minimum,* should be sufficient to ensure compliance with applicable licensing and regulatory requirements, health and safety standards, training and professional development standards, and appropriate child to staff ratio, group size limits, and caregiver qualification requirements (that Lead Agencies define) as required by the Act. In light of the requirements for child to staff ratio, group size limits, and caregiver qualifications, we have added "staffing" to the regulatory language to reflect that base payment rates should be sufficient for providers to meet health, safety, quality, and *staffing* requirements. We are not requiring a separate calculation of rates that would be sufficient to support adequate compensation of child care workers, but strongly agree that worker compensation should be considered as part of the broader analysis of the cost of meeting health, safety, quality, and staffing requirements in order to attract skilled, trained, and adequately-compensated caregivers, teachers, and directors for the provision of CCDF-funded care. We also agree with commenters that Lead Agencies must demonstrate equal access through all components included in § 98.45.

Comment: Four States opposed or expressed concerns about this proposal, objecting to the additional administrative burden on States and providers of conducting the analysis necessary to determine if base rates are sufficient to support health, safety, quality, and staffing requirements—particularly in light of the vast variation across providers and communities. One State noted that price and cost are significantly different concepts, and conflating them creates confusion about the expectation. The State said that "base" payment rate was not defined in the Act or regulations, and objected to raising base rates rather than raising rates for higher-quality providers. Another State said the proposal was a back-door way to essentially require a cost estimation model rather than a market rate survey.

Response: OCC plans to provide technical assistance to help Lead Agencies conduct this analysis, and the free, web-based Provider Cost of Quality Calculator is available. While the NPRM referred to both cost and price in this provision, we agree that cost and price are two different concepts and, for purposes of clarity, have eliminated the reference to price in the final rule. Lead Agencies should ensure that base payment rates are sufficient to support the *cost* to the provider (rather than price) of health, safety, quality and, staffing requirements. Base rates are the lowest, foundational rates before any differentials are added (*e.g.,* for higher quality or other purposes). Lead Agencies that choose to conduct a market rate survey (rather than an alternative methodology) are still required to comply with this provision, but may conduct an analysis that is more narrowly focused on ensuring that base payment rates are adequate to cover the cost of health, safety, quality, and staffing—rather than a full alternative methodology (*e.g.,* cost estimation model) that would need to look more broadly at costs. We also agree with commenters that, beyond base rates, it is important to raise rates for higher-quality providers (discussed further below).

Cost of Higher Quality. The final rule includes § 98.45(f)(2)(iii) in accordance with the statutory requirement at Section 658E(c)(4)(B)(iii)(II) of the Act to take into consideration the cost of providing higher-quality care than was provided prior to the reauthorization when setting payment rates. Under the rule, a Lead Agency may define higher-quality care using a quality rating improvement system or other system of quality indicators. The Lead Agency must consider how payment rates compare to the estimated cost of care at each level of higher quality—consistent with the summary of data and facts in the Plan at § 98.45(b)(4) and information in the Lead Agency's detailed report at § 98.45(f)(1)(ii)(B). Within these parameters, Lead Agencies may take different approaches to setting rates for higher-quality care, including increasing base payment rates, using pay differentials or higher rates for higher-quality care, or other strategies, such as direct grants or contracts that pay higher rates for child care services that meet higher-quality standards. ACF acknowledges that rates above the benchmark of 75th percentile may be required to support the costs associated with high-quality care. In order for providers to offer high-quality care that meets the needs of children from low-income families, they need sufficient funds to be able to recruit and retain qualified staff, use intentional approaches to promoting learning and development using curriculum and engaging families, and provide safe and enriching physical environments.

Comment: One commenter, a national expert on child care financing, suggested some options to demonstrate equal access, such as requiring Lead Agencies to document the gap between the market rate and the estimated cost of services at each level of a Quality Rating and Improvement System or other quality measure, and implementing steps, over time, to close the gap at higher-cost programs (such as high-quality programs for infants and toddlers).

Response: We agree with the commenter's recommended approach, which is consistent with the statutory requirement at section 658E(c)(4)(B)(iii)(II) for Lead Agencies to take into consideration the cost of providing higher-quality child care services when setting payment rates. This approach is also an important companion to the provision requiring that base rates support the basic health, safety, quality, and staffing provisions required by the Act and this rule, as it is important to also consider how rates support higher-quality care.

Therefore, § 98.45(b)(4) of the final rule requires the Lead Agency's summary of data and facts in the CCDF Plan to include how its payment rates that apply to higher-quality care, as defined by the Lead Agency using a quality rating and improvement system or other system of quality indicators, relate to the estimated cost of care at each level of quality. To ensure transparency, the Lead Agency's detailed report required under § 98.45(f)(1), like the market rate survey or alternative methodology results, must also include the estimated cost of higher-quality care at each level of quality, as defined by the Lead Agency using a quality rating and improvement system or other system of quality indicators (and including any relevant variation by geographic location, category of provider, or age of child). Finally, when setting payment rates, § 98.45(f)(2)(iii) of the final rule requires the Lead Agency to take into consideration the cost of providing higher-quality child care services, including consideration of the estimated cost at each level of higher quality. ACF intends to provide technical assistance to help Lead Agencies conduct the analysis necessary to comply with these provisions, and, as previously mentioned, the Provider Cost of Quality Calculator is available as a tool.

Comment: The preamble to the 1998 Final Rule reminded Lead Agencies of the general principle that Federal subsidy funds cannot pay more for services than is charged to the public for the same service (63 FR 39959). In the 2015 NPRM, we clarified that, while this principle remains in effect, Lead Agencies may pay amounts above the provider's private-pay rate to support quality. A number of commenters supported this clarification. National organizations and child care worker organizations suggested going further to clarify that States must set base payment rates at a level sufficient to support implementation of health, safety, quality, and staffing requirements even if such rates are higher than private-pay rates (which is important for poor communities with depressed child care markets).

Response: In this final rule, we maintain the clarification that Lead Agencies may pay amounts above the provider's private pay rate to support quality. A Lead Agency also may peg a higher payment rate to the provider's cost of doing business at a given level of quality. For example, an analysis of the cost of providing high-quality care (*i.e.,* at the top levels of a QRIS) using a cost estimation model or other method could show the cost of providing the service is greater than the price charged in the market. Recognizing that private pay rates are often not sufficient to support high-quality, many Lead Agencies have already implemented tiered subsidy payments that support quality. Payments may exceed private pay rates if they are designed to pay providers for additional costs associated with offering higher-quality care or types of care that are not produced in sufficient amounts by the market (*e.g.,* non-standard hour care, care for children with disabilities or special health care needs, etc.).

We also agree with commenters that, as required by § 98.45(f)(2)(ii), Lead Agencies must set base payment rates at a level sufficient to support implementation of health, safety, and quality requirements even if such rates are higher than private-pay rates.

Comment: One commenter, an organization that operates child care programs, requested clarification that child care providers can charge reduced prices or give scholarships to non-CCDF children without impacting the private-pay level used to determine the subsidy amount.

Response: We agree that child care providers may receive CCDF payment for an eligible child at the level of the full private-pay price, even if some private-pay children receive scholarships or reduced prices. For example, if a provider's private-pay price is $200 per week and some private-pay children receive a scholarship of $50 per week, the families receiving scholarships would pay $150 per week (*i.e.,* the difference between the private-pay price and the scholarship). The provider, however, would still be eligible for CCDF subsidy reimbursement up to $200 per week under Federal rules as long as such scholarships are bona fide.

Tribes. In accordance with §§ 98.81(b)(6) and 98.83(d)(1), we exempt Tribal grantees from the requirement to conduct a market rate survey or alternative methodology and related rate-setting requirements. However, in their CCDF Plans, Tribes must still describe their payment rates, how they are established, and how they support health, safety, quality, and staffing requirements and, where applicable, cultural and linguistic appropriateness. Tribes, at their option, may still conduct a market rate survey or alternative methodology or use the State's market rate survey or alternative methodology when setting payment rates.

Other Provisions. The rule at § 98.45(f)(2)(v) reflects language at Section 658E(c)(4)(B)(iii)(III) of the Act, which requires Lead Agencies to set payment rates without reducing the number of families receiving assistance, to the extent practicable. ACF recognizes the limitations of Lead Agencies' abilities to increase rates under resource constraints and that Lead Agencies must balance competing priorities. We recognize that greater budgetary resources are needed to serve all children eligible for CCDF. While we do not want to see a reduction in children served, it is our belief that current payment rates for CCDF-funded care in many cases do not support equal access to a minimum level of quality for CCDF children and should be increased.

The final rule at § 98.45(g) re-designates and revises former § 98.43(c). The previous regulations prohibited Lead Agencies from differentiating payment rates based on a family's eligibility status or circumstance. This provision was intended to prevent Lead Agencies from establishing different payment rates for child care for low-income working families as payments for children from TANF families or families in education or training. Such a prohibition remains relevant; differentiating payment rates based on an eligibility status (such as receiving TANF or participation in education or training) would violate the equal access provision. In order to clarify that this prohibition does not conflict with the ability of Lead Agencies to differentiate payments based on the needs of particular children, for example, paying higher rates for higher-quality care for children experiencing homelessness, this final rule removes the word "circumstance" in paragraph (g) so that this provision only refers to the conditions of eligibility and not the needs or circumstance of children. Setting lower payment rates based on the eligibility status of the child is not consistent with Congress' intent to allow for differentiation of rates. Further, establishing different payment rates for low-income families and TANF families does not further the goals of the Act or support access to high-quality care for low-income children. Commenters on the NPRM supported this provision.

The rule at § 98.45(i) re-designates and revises the former § 98.43(e) to add "if the Lead Agency acts in accordance with" this regulation, to the pre-existing language that nothing in this section shall be construed to create a private right of action in accordance with statutory language.

Based on Section 658E(c)(4)(C) of the Act, § 98.45(j) states that Lead Agencies may not be prevented from differentiating payment rates based on geographic location of child care providers, age or particular needs of children (such as children with disabilities and children served by child protective services), whether child care providers provide services during weekend or other non-traditional hours; or a Lead Agency's determination that differential payment rates may enable a parent to choose high-quality child care. Section 98.45(j)(2) adds children experiencing homelessness to the statute's list of children with particular needs; this addition was supported by homeless advocates who commented on the NPRM. Paying higher rates for higher-quality care is an important strategy as it provides resources necessary to cover the costs of quality improvements in child care programs. Lead Agencies should also consider differentiating rates for care that is in low supply, such as infant-toddler care and care during nontraditional hours, as an incentive for providers.

Parent fees. Section 658E(c)(5) requires Lead Agencies to establish and periodically revise a sliding fee scale that provides for cost-sharing for families receiving CCDF funds. The reauthorization added language that cost-sharing should not be a barrier to families receiving CCDF assistance. In this final rule, we have moved the regulatory language on sliding fee scales (previously § 98.42) under the equal access section (§ 98.45), recognizing affordable co-payments as an important aspect of equal access.

The final rule amends the previous regulatory language, now § 98.45(k), by adding language that the cost-sharing should not be a barrier to families receiving assistance. Further, the final rule provides that Lead Agencies may not use the cost, price of care, or subsidy payment rate as a factor in setting co-payment amounts. In addition to allowing Lead Agencies to waive co-payments for families below poverty and children that receive or need to receive protective services (as allowed under prior regulation), the final rule also allows Lead Agencies to waive contributions from families that meet other criteria established by the Lead Agency.

Comment: The NPRM proposed a new Federal benchmark for affordable parent fees of seven percent of family income. National organizations and advocates wrote in support of the proposal. Seven States and one municipal agency objected or expressed concerns, arguing that implementation would be costly and result in fewer children served. Two of the States said that co-payments higher than seven percent were reasonable for some families to allow for gradual transitioning to the full cost of care.

Response: We retain the seven percent benchmark in this final rule. Lead Agencies have flexibility in establishing their sliding fee scales and determining what constitutes a cost barrier for families, but the seven percent level is a recommended benchmark. This new Federal benchmark revises the prior benchmark, created in the preamble to the 1998 Final Rule, of 10 percent of family income as an affordable co-payment. As in the past, we are declining from defining affordable in regulation but we are revising this established benchmark through this preamble. It is our view that a fee that is no more than seven percent of a family's income is a better measure of affordability. According to the U.S. Census Bureau, the percent of monthly income families spend on child care on average has stayed constant between 1997 and 2011 (most recent data available), at around seven percent. Poor families on average spend approximately four times the share of their income on child care compared to higher income families. (*Who's Minding the Kids? Child Care Arrangements: Spring 2011*, U.S. Census Bureau, 2013.) As CCDF assistance is intended to offset the disproportionately high share of income that low-income families spend on child care in order to support parents in achieving economic stability, it is our belief that CCDF families should not be expected to pay a greater share of their income on child care than reflects the national average. For the majority of CCDF families receiving assistance, this new Federal benchmark would not result in a change in the amount of copay charged. The average percentage of family income spent on CCDF co-payments, among families with a co-payment, is seven percent.

Under § 98.21(a)(3), Lead Agencies cannot increase family co-payments within the minimum 12-month eligibility period unless the family's income is in a graduated phase-out of care as described at § 98.21(b)(2). When designing fee scales, we encourage Lead Agencies to consider how their fee scales address affordability for families at all income levels. Lead Agencies should ensure that small increases in earnings during the graduated phase-out period do not trigger large increases in co-payments that are unaffordable for families, in order to ensure stability for families as they improve their economic circumstance and transition off child care assistance.

Comment: National organizations and child care providers supported the NPRM's proposal to prohibit basing co-payment amounts on cost of care or amount of subsidy payment. Two States objected, saying the proposal was prescriptive and contrary to long-standing State practice.

Response: In the final rule, we include this provision at § 98.45(k)(2). This corrects a contradiction between the 1992 and 1998 preamble discussions. The 1992 preamble stated that "Grantees may take into account the cost of care in establishing a fee scale," (57 FR 34380), while the 1998 preamble states that "As was stated in the preamble to the regulations published on August 4, 1992, basing fees on the cost or category of care is not allowed." (63 FR 39960). The final rule corrects this discrepancy by stating that Lead Agencies may not base their co-payment amounts on the cost of care or subsidy amount. This is consistent with existing practice for the majority of States, and is essential to preserving equal access and parental choice because basing co-payments on cost or subsidy amount incentivizes families to use lower cost care and impedes access to higher cost care.

Comment: National organizations and two States endorsed the NPRM's proposal to allow Lead Agencies to waive co-payments for families meeting criteria set by the Lead Agency. One of the States said "this flexibility will better support efforts to provide services to vulnerable populations."

Response: We retain this provision in the final rule at § 98.45(k)(4), and add "at Lead Agency discretion" to clarify that the Lead Agency may choose whether or not to waive co-payments. Lead Agencies have often requested more flexibility to waive co-payments beyond just those families at or below the poverty level and children in need of protective services. This change increases flexibility to determine waiver criteria that the Lead Agency believes would best serve subsidy families. For example, a Lead Agency could use this flexibility to target particularly vulnerable populations, such as homeless families, migrant workers, victims of human trafficking, or families receiving TANF. Lead Agencies may choose to waive co-payments for children in Head Start and Early Head Start, including children served by ACF-funded Early Head Start-Child Care Partnerships, which is an important alignment strategy. Head Start and Early Head Start are provided at no cost to eligible families, who cannot be required to pay any fees for Head Start services. Waiving CCDF fees for families served by both Head Start/Early Head Start and CCDF can support continuity for families. While we are allowing Lead

Agencies to define criteria for waiving co-payments, the criteria must be described and approved in the CCDF Plan. Lead Agencies may not use this revision as an authority to eliminate the co-payment requirement for all families receiving CCDF assistance. We continue to expect that Lead Agencies will have co-payment requirements for a substantial number of families receiving CCDF subsidies.

Comment: The NPRM proposed to require that Lead Agencies prohibit child care providers receiving CCDF funds from charging parents additional mandatory fees above the family co-payment based on the Lead Agencies' sliding fee scale. Numerous commenters strongly objected to this proposal, including the letter from Senator Alexander and Congressman Kline, 13 States, national organizations, child care worker organizations, child care providers, and child care resource and referral agencies. Commenters said the proposal, while well-intentioned, would be a serious restraint on parental choice and impediment to accessing high-quality care. They were also concerned about the fiscal impact on child care providers, and anticipated that it would no longer be economically-feasible for many of them to keep slots open for CCDF children. Some of the commenters said the proposal would diminish socio-economic diversity in child care programs, and would be difficult to administer and enforce. One commenter, who opposed the proposal, suggested an alternative that would require Lead Agencies to estimate the size of the total family share (including co-payment and any additional amounts paid by the family) in order to frame to issue and inform future policy solutions.

Response: We withdraw our proposal in response to the strong negative reaction and specific issues raised by commenters. However, we remain concerned that, according to the 2016–2018 Plans, 42 Lead Agencies have policies allowing providers to charge families the difference between the maximum payment rate and their private-pay rate. Requiring families to pay above the established co-payment may make care unaffordable for families and may be a barrier to families receiving assistance. It masks the true cost of care to the family and whether co-pays are reasonable. Such policies require families to make up the difference for Lead Agencies' low payment rates. Due to these concerns, we have added new requirements at § 98.45(b)(5) that require the Lead Agency to include in its Plan a rationale for its policy on whether child care providers may charge additional amounts to families above the required family co-payment, including a demonstration that the policy promotes affordability and access. The Lead Agency must also provide an analysis of the interaction between any such additional amounts with the required family co-payments, and of the ability of subsidy payment rates to provide access to care without additional fees. In addition, under § 98.45(d)(2)(ii), mentioned earlier, Lead Agencies must track through the market rate survey or alternative methodology, or through a separate source, information on the extent to which CCDF providers charge such additional amounts, including data on the size and frequency of any such amounts disaggregated by category and licensing status of provider. This information will provide greater transparency on the scope of the issue and a basis for future decisions by policymakers and administrators.

Provider Payment Practices. The final rule at § 98.45(l) requires the Lead Agency to demonstrate in its Plan that it has established certain payment practices applicable to all CCDF child care providers, including practices related to timeliness, paying for absence days, and other generally-accepted payment practices. The NPRM proposed benchmarks in these key areas (discussed in more detail below), and asked for comment on whether the proposed benchmarks or other benchmarks should be included in the final rule.

Comment: National organizations, child care worker organizations, child care resource and referral agencies, and child care providers supported the proposed benchmarks. According to a coalition of national organizations, "Congress established a principle that payment practices under CCDBG should not differ from common practices for private-pay parents. Therefore, we support the benchmarks included in the NPRM. . . ." States opposed the benchmarks and asked for more flexibility.

Response: We retain the benchmarks for provider payment practices (with some modifications in response to comments, as discussed below) in light of the critical role of payment practices in ensuring equal access. At the same time, the final rule allows flexibility for Lead Agencies to choose from several options within each key area of payment practices (*i.e.*, timeliness, absence policies, and generally-accepted practices). In addition to payment rates, policies governing provider payments are an important aspect of ensuring equal access and supporting the ability of providers to provide high-quality care. When payment practices result in unstable, unreliable payments (as was often the case prior to reauthorization), it is difficult for providers to meet fixed costs of providing child care (such as rent, utilities and salaries) and to plan for investments in quality. Surveys and focus groups with child care providers have found that some providers experience problems with late payments, including issues with receiving the full payment on time and difficulties resolving payment disputes. (Adams, G., Rohacek, M., and Snyder, K., *Child Care Voucher Programs: Provider Experiences in Five Counties,* 2008) This research also found that delayed payments creates significant financial hardships for the impacted providers, and forces some providers to stop serving or limit the number of children receiving child care subsidies.

Comment: Some child care worker organizations requested additional language in the regulation to specify that the payment practices must be applied consistently over all categories of care, including family child care. One municipal agency recommended that absence day policies apply only to licensed providers.

Response: We have added language to the final rule to specify that the payment practices described in § 98.45(l) apply to all CCDF child care providers. It is important to ensure that the practices apply uniformly to all categories of providers in order to ensure parental choice for families.

Timeliness. The final rule at § 98.45(l)(1) requires Lead Agencies to ensure timeliness of payment. This provision is based on Section 658E(c)(4)(iv) of the Act, which requires Lead Agencies to describe how they will provide for the timely payment for child care services provided by CCDF funds. Under the rule, Lead Agencies must ensure timely provider payments by *either* paying prospectively prior to the delivery of services *or* paying providers retrospectively within no more than 21 calendar days of the receipt of a complete invoice for services.

Comment: While many commenters supported the proposal, a few (two States and a municipality) expressed concern about the option for prospective payments—suggesting that it would lead to improper payments and costly recoupment activities, and that it would be costly and unnecessary to redesign State payment systems.

Response: We do not believe prospective payments will lead to a higher incidence of improper payments, particularly if the Lead Agency has adequate policies allowing payment for absence days. As discussed elsewhere in this rule, recoupment for improper payments is not required by Federal rules, except in cases of fraud. We strongly encourage Lead Agencies to pay prospectively where possible, but the final rule still allows the option for paying on a reimbursable basis within 21 days.

Comment: One State and a locality in that State indicated that 21 days was not long enough, and requested expanding to 30 days. One commenter requested clarifying that the timeframe referred to calendar days. One commenter asked that providers be able to assess late fees to Lead Agencies that miss the deadline.

Response: Given that most States did not specifically object to the 21-day timeframe, the final rule retains it. The final rule clarifies that the timeframe refers to *calendar* days. The rule does not include a provision regarding late fees, but OCC intends to monitor State performance and may take compliance action if necessary. The final rule provides 21 days as a *maximum* period of time but we encourage Lead Agencies to provide payment sooner if possible. We do not expect this requirement to be burdensome for Lead Agencies. According to their FY2016–2018 CCDF Plans, 39 States/Territories had an established timeframe for provider payments ranging from 3 to 35 days, the majority of which were shorter than 21 days. We encourage administrative improvements such as automated billing and payment mechanisms, including direct deposit and web-based electronic attendance and billing systems, to help facilitate timely payments to providers.

Comment: A few commenters (three States and a city) requested exceptions to the timeframe for certain cases, including cases where there is a late or incomplete bill or cases where there is an investigation for potentially fraudulent activity or risk assessment occurring. One commenter argued that the timeframe should apply to all invoices.

Response: We agree that the timeframe should not begin until a complete invoice is received, and the final rule at § 98.45(l)(1)(ii) reflects this. We also recognize that there may be some limited instances, such as cases involving a fraud investigation, when the 21-day timeframe is not met. However, because these instances should be rare exceptions to the rule, a change to the regulatory provision governing most payments is not warranted.

Absence days. Section 98.45(l)(2) provides three examples for how Lead Agencies could meet the statutory requirement at section 658E(c)(2)(S)(ii) of the Act to support the fixed costs of providing child care services by delinking provider payment rates from an eligible child's occasional absences due to holidays or unforeseen circumstances such as illness, to the extent practicable. This may include: (1) By paying providers based on a child's enrollment, rather than attendance; (2) by providing a full payment to providers as long as a child attends for 85 percent of the authorized time; or (3) by providing full payment to providers as long as a child is absent for five or fewer days in a four week period. We recognize that these three examples represent different levels of stringency; however, the final rule provides flexibility in acknowledgement of the ways that States structure their policies. Lead Agencies that do not choose one of these three approaches must describe their approach in the State Plan, including how the approach is not weaker than one of the three listed above.

Prior to reauthorization, many States closely linked provider payments to the hours a child attends care. A child care provider was not paid for days or hours when a child was absent, resulting in a loss of income. Generally-accepted payment practices typically require parents who pay privately for child care to pay their provider a set fee based on their child's enrollment, often in advance of when services are provided. Payments are not altered due to a child's absence in part because the child's teacher still serves in the same capacity with the same salary even if a particular child does not attend on a given day.

We are establishing 85 percent, or five or fewer days, as a benchmark for when providers should receive a full payment, regardless of the reason for the absence (*e.g.,* whether it is approved or unapproved). We selected 85 percent (or five or fewer days) as a threshold based in part on Head Start policy, which currently requires center-based programs to maintain a monthly 85 percent attendance rate and to analyze absenteeism if monthly average daily attendance falls below that threshold. New proposed Head Start Performance Standards, issued in June 2015, would require programs to take actions (which could include additional home visits or the provision of support services) to increase child attendance when children have four or more consecutive unexcused absences or are frequently absent. While Head Start policy informed the development of this rule, the final rule's provisions differ in several ways. The final rule does not require CCDF child care providers to take action to address individual or systemic absenteeism, although Lead Agencies may encourage CCDF providers to take this approach and consider how child care providers may be supported in addressing high rates of absenteeism among families. Chronic absenteeism from high-quality programs is a concern because it may lessen the impact on children's school readiness and may signal that a family is in need of additional supports.

The Act and final rule require Lead Agencies to implement this provision "to the extent practicable." We interpret this language as setting a limit on the extent to which Lead Agencies must act, rather than providing a justification for not acting at all. The final rule does not require Lead Agencies to pay for *all* days when children are absent, although that would most closely mirror private-pay practices; however, each Lead Agency is expected to implement a policy that accomplishes the goals of the Act. A refusal to implement all such policies as being "impracticable" will not be accepted.

Comment: Many commenters supported the provision regarding absence days, including the letter from Senator Alexander and Congressman Kline, national organizations, child care providers, and one State. The commenters recognized that providing more stability in subsidy payments will increase provider participation and parental choice.

Response: We agree, and the final rule retains the provision in the final rule as proposed in the NPRM.

Comment: Three States and one municipality raised concerns or questions, objecting to the cost and administrative burden. One State said that it had recently invested in an attendance system that issues full payment based on an 80% benchmark.

Response: The final rule allows for significant Lead Agency flexibility by providing three options, in addition for the opportunity to justify an alternative approach in the Plan. Lead Agencies retain discretion to allow for *additional* excused and/or unexcused absences (above the level of 85 percent, or 5 or fewer days) and to provide for the full payment for services in those circumstances. We recognize that many Lead Agencies have invested in electronic time and attendance systems linked to provider payments. These systems may be used to track whether a child is enrolled and attending care; however, Lead Agencies should ensure that such systems do not link attendance and payment so tightly as to violate this provision.

Comment: The NPRM asked for comments on alternatives to the three identified examples of approaches that Lead Agencies may want to use for absence policies. Some States recommended greater flexibility in crafting absence policies that may be based on different periods of time (*e.g.*, 3-, 6- or 12-month periods), tiered attendance strata (*e.g.*, full-time, half-time), or other methods (*e.g.*, waivers and exceptions based on medical conditions). Other commenters supported only the three options without any additional choices. One State asked for clarification on what will be required for States to justify an alternative approach in lieu of the three identified options.

Response: The final rule accommodates the flexibility requested by State commenters. In addition to the three identified approaches, a Lead Agency may justify an alternative approach in its Plan. For example, a Lead Agency may choose an alternative time period for measuring absences (*e.g.*, 1, 3, 6, 12 months, etc.). In its Plan, the Lead Agency would need to demonstrate that its alternative approach delinks payment from a child's absences at least to the same extent as providing full payment for 85 percent attendance or five of fewer absences in a month.

Comment: A few commenters requested allowing flexibility for payment policies to accommodate program closure days, including holidays, inclement weather, and professional development days.

Response: We are sympathetic to this suggestion, and encourage Lead Agencies to adopt policies that provide payment for program closure days. However, we stop short of a requirement because the statutory provision focused on delinking payments from a child's absences rather than program closures.

Comment: One State asked whether States will be given the option of authorizing paid absences only for specific need categories (*e.g.*, children with chronic illnesses or court-ordered visitation), or be allowed to consider absence policies that discourage under-utilization.

Response: The absence policies must apply to all CCDF children and providers and may not be limited to specific need categories because the goal is to provide consistency and stability of payments consistent with generally-accepted practices in the private-pay market. The identified thresholds (85 percent, or five or fewer days) already acknowledge that children should be attending for large majority of the time, thereby guarding against under-utilization.

Generally-accepted payment practices. Consistent with section 658E(c)(2)(S) of the Act, § 98.45(l)(3) of the final rule requires CCDF payment practices to reflect generally-accepted payment practices of child care providers that serve children who do not receive CCDF-funded assistance. This provision is designed to support stability of funding and encourage more child care providers to serve children receiving CCDF funds. Unless a Lead Agency is able to prove that the following policies are *not* generally-accepted in its particular State, Territory, or service area, or among particular categories or types of providers, Lead Agencies must: (1) Pay providers based on established part-time or full-time rates, rather than paying for hours of service or smaller increments of time; and (2) pay for reasonable, mandatory registration fees that the provider charges to private-paying parents.

Lead Agencies should ensure that payment practices for each category or type of provider reflect generally-accepted payment practices for such providers in order to ensure that families have access to a range of child care options. We note that these benchmarks represent *minimum* generally-accepted practices. Lead Agencies may consider additional policies that are fair to providers, promote the financial stability of providers, and encourage more providers to serve CCDF eligible children. Such policies may include: Providing information on payment practices in multiple languages to promote the participation of diverse child care providers; implementing dedicated phone lines, web portals, or other access points for providers to easily reach the subsidy agency for questions and assistance regarding payments; and periodically surveying child care providers to determine their satisfaction with payment practices and timeliness, and to identify potential improvements.

Comment: Two States provided comments regarding part-time and full-time rates. One State requested that it be allowed to determine payment according to the time increment (*e.g.*, daily, weekly, etc.) that the provider uses to charge for services according to its rate structure. The other State requested an allowance to continue its current practice of paying a weekly rate when more than 35 hours of care is provided per week, or a daily rate when at least five hours of care is provided per day.

Response: The final rule allows Lead Agencies the flexibility to define part-time and full-time. However, the final rule prohibits Lead Agencies from paying for hours of service or smaller increments of time. Therefore, a Lead Agency may not pay in increments smaller than daily part-time and daily full-time rates. We encourage Lead Agencies to pay part-time and full-time rates on a weekly or monthly basis.

Comment: The NPRM proposed to require paying for mandatory fees that the provider charges to private-paying parents, such as fees for registration (unless the Lead Agency provides evidence that such practice is not generally-accepted in the State or service area). Several commenters, including eight States, objected—saying the provision would be administratively burdensome and costly, and would require revisions to automated payment systems and/or manual entry with the potential for errors. Commenters also said that it was unclear which mandatory fees were included (*e.g.*, fees for transportation, meals, supplies, late pick-up, etc.), and objected that the proposal did not include a cap or require fees to be reasonable.

Response: The final rule narrows and clarifies this provision in response to comments. The regulation at § 98.45(l)(3)(ii) limits the required payment to mandatory registration fees, which includes initial and annual registration fees, rather than including other types of fees. The rule also indicates that the registration fees must be "reasonable" so that a Lead Agency may establish a cap on fees that are beyond the bounds of fees typically charged, or establish an annual limit on the number of registration fees paid in a year (such as three registration fees a year) for families that change or start new providers. This requirement aligns with the statutory provision regarding generally-accepted payment practices as the payment of registration fees is generally-accepted in the private-pay market.

Other payment practices. In addition, there are certain other generally-accepted payment practices that the final rule requires of all Lead Agencies. Section 98.45(l)(4) through (6) requires Lead Agencies to: Ensure that child care providers receive payment for any services in accordance with a payment agreement or authorization for services; ensure that child care providers receive prompt notice of changes to a family's eligibility status that may impact payment; and establish timely appeal and resolution processes for any payment inaccuracies and disputes. While these practices are unique to the subsidy system, they are analogous to generally-accepted payment practices in the private pay market, such as establishing contracts between providers and parents and providing adequate advance notice of changes that impact payments. The appeals and resolution process is important in fairness to providers.

Comment: Child care worker organizations requested that the payment agreements or authorization for services must be in writing and include basic standards or content.

Response: The final rule at § 98.45(l)(4) specifies that the payment agreement or authorization for services must be "written" and include, at a minimum, information regarding provider payment policies, including rates, schedules, and fees charged to providers, and the dispute resolution process.

Comment: Regarding the proposed requirement for a Lead Agency to ensure child care providers receive prompt notice of any changes to a family's eligibility status that may impact payment, one major child care provider requested additional parameters to ensure the notice is timely.

Response: In response to this comment, the final rule at § 98.45(l)(5) specifies that the notice be sent to providers no later than the day on which the Lead Agency becomes aware that such changes to eligibility status will occur.

§ 98.46 Priority for Services

The CCDBG Act of 2014 included several provisions to increase access to CCDF services for children and families experiencing homelessness. Consistent with the spirit of these additions, the final rule adds "children experiencing homelessness" to the Priority for Services section at § 98.46.

Lead Agencies have flexibility as to how they offer priority to these populations, including by prioritizing enrollment, waiving co-payments, paying higher rates for access to higher-quality care, or using grants or contracts to reserve slots for priority populations. Section 658E(c)(3)(B)(ii) of the Act requires ACF to report to Congress on whether Lead Agencies are prioritizing services to children experiencing homelessness, children with special needs, and families with very low incomes.

The Section 658E(c)(2)(Q) of the Act also requires Lead Agencies to describe the process by which they propose to prioritize investments for increasing access to high-quality child care for children of families in areas that have significant concentrations of poverty and unemployment and lack such programs. The final rule reiterates this requirement at § 98.46(b). It is our interpretation that the investments referred to in the Act may include direct child care services provided under § 98.50(a) and activities to improve the quality of child care services under § 98.50(c).

While Lead Agencies have flexibility in implementing this new statutory language, ACF encourages Lead Agencies to target investments based on analysis of data showing poverty, unemployment and supply gaps. Lead Agencies may also consider how to best support parents' access to workforce development and employment opportunities (such as allowing job search as a qualifying activity for assistance and allowing broader access to assistance for education and training by reducing eligibility restrictions), which would support the child care needs of families in areas with high poverty and unemployment.

Commenters were supportive of adding "children experiencing homelessness" to the list of populations for which the Lead Agency must give priority for services. One commenter emphasized that "Homeless families face barriers over and above what other poor families face, by virtue of their extreme poverty, high rates of mobility, trauma, invisibility, and lack of documentation. Compared to poor housed parents, homeless parents are less likely to receive child care subsidies. At the same time, they are more likely to rely on informal child care arrangements and to report quitting jobs or school due to problems with child care. In addition to the barriers to accessing child care, research has shown that homelessness puts children at increased risk of health problems, developmental delays, academic underachievement, and mental health problems."

Another commenter highlighted that prioritizing homeless families has the added benefit of aligning "federal child care with the Head Start requirement for Head Start programs to prioritize homeless children for enrollment. Aligning policies between these two programs will help to create consistent State and local policy, and remove barriers to essential services."

One commenter did express concern that "the proposed CCDF regulations do not contain a requirement in the plan provision (§ 98.16 Plan) for States to report how they are prioritizing homeless children," and were worried that "without specificity in a description, made publically available in a State Plan, stakeholders will not have the opportunity to share insights, experiences, and ideas for effective prioritization of this population. Implementation of the requirement will not be as clear and robust as it needs to be to reach the children and families who are the intended beneficiaries."

While the CCDF State Plan Preprint already includes a question about meeting priority categories, we agree that this should be included in the regulatory language. Therefore, the final rules revises prior language at 98.16(i), which formerly required reporting on additional eligibility criteria, priority rules, and definitions pursuant to 98.20(b), and expands it to require reporting on a description of any eligibility criteria, priority rules, and definitions established pursuant to §§ 98.20 and 98.46.

By adding the reference to 98.46, Lead Agencies must now include a description in their State Plans of how they are providing priority to children of families with very low family income (considering family size), children with special needs, which may include any vulnerable populations as defined by the Lead Agency, and children experiencing homelessness.

Comment: Another commenter requested additional clarification about whether "priority is given to all homeless children based on the McKinney Vento definition (shall) or can lead agencies choose to make portions of the definition a priority?"

Priority must be given to children experiencing homeless as defined in this final rule at § 98.2: A child who is homeless as defined in section 725 of Subtitle VII–B of the McKinney-Vento Act (42 U.S.C. 11434a). There are a variety of ways in which a State can demonstrate priority that could include some variation and targeting within the definition of homeless, provided that some priority for services is extended for the population experiencing homelessness as defined.

Comment: One commenter raised a concern that prioritizing services to children experiencing homelessness may have the "unintended consequence [of] segregating populations of children in contracted programs which is counter to the McKinney-Vento law."

Response: We appreciate that this concern was raised and welcome the opportunity to provide some additional clarification. We emphasize that while children experiencing homelessness should be prioritized, it is not our intent to serve them in separate segregated programs. Some States do use grants and contracts in a targeted manner to ensure that there are slots available in areas with high concentrations of poverty and wide-spread instances of homelessness. This is a valuable strategy that can strengthen a State's ability to serve its most vulnerable populations and is a practice encouraged by § 98.50 of the final rule. Lead Agencies can use such a strategy to target resources while also remaining consistent with the spirit of McKinney Vento Act's "Prohibition on Segregating Homeless Students," which says that States shall not segregate such child or youth in a separate school, or in a separate program within a school, based on such child's or youth's status as homeless (42 U.S.C. 11434a, Section 722(e)(3) Subtitle VII–B).

Subpart F—Use of Child Care and Development Funds

Subpart F of CCDF regulations establishes allowable uses of CCDF funds related to the provision of child care services, activities to improve the quality of child care, administrative costs, Matching fund requirements, restrictions on the use of funds, and cost allocation.

§ 98.50 Child Care Services

This final rule specifies that paragraph (a), as re-designated, is describing use of funds for *direct* child care services. This clarifies that the reference to "a substantial portion of funds" at paragraph (g), as re-designated, applies to direct services, as opposed to other types of activities.

Section 658G(a)(2) of the Act increases the percentage of total CCDF funds (including mandatory funding) that Lead Agencies must spend on activities to improve the quality of child care services. Paragraphs (b), (d), (e), and (f), respectively, require Lead Agencies to spend a minimum of nine percent of funds (phased in over five years) on activities to improve the quality of care and three percent (beginning in FY 2017) to improve the quality of care for infants and toddlers; not more than five percent for administrative activities; not less than 70 percent of the Mandatory and Matching funds to meet the needs of families receiving TANF, families transitioning from TANF, and families at-risk of becoming dependent on TANF; and, after setting aside funds for quality and administrative activities, at least 70 percent of remaining Discretionary funds on direct services.

Grants and contracts. In the NPRM, ACF proposed to revise § 98.50(a)(3) to require States and Territories to use at least some grants and contracts for the provision of direct services, with the extent determined by the Lead Agency after consideration of shortages of supply of high-quality care and other factors as determined by the State. However, based on feedback from some members of Congress, States, and other stakeholders, we have chosen not to keep the proposed change to require the use of some grants or contracts and are making no changes to § 98.50(a)(3), as re-designated. While this final rule does not require States and Territories to use grants and contracts for direct services, we strongly encourage Lead Agencies to use grants and contracts to address the limited supply of high-quality child care options. They are a critical aspect of an effective CCDF system, and using grants and contracts in combination with certificates can play a role in building the supply and availability of child care, particularly high-quality care, for underserved populations and areas., While the majority of States and Territories rely solely on certificates to provide child care assistance to eligible families, Some States and Territories have reported in their CCDF Plans using grants and contracts to increase the supply of specific types of child care. These include contracts to fund programs to serve children with special needs, targeted geographic areas, infants and toddlers, and school-age children. Grants and contracts also are used to provide wrap-around services to children enrolled in Head Start and prekindergarten to provide full-day, full-year care and to fund programs that provide comprehensive services. Additionally, Lead Agencies report using grants and contracts to fund child care programs that provide higher-quality child care services.

Comment: We received a strong response to the proposed requirement. States and faith-based and private education organizations were strongly opposed, arguing it would inhibit State flexibility and parental choice and went against the intent of the Act. For example, one State said, "States understand the child care environment in which they operate. It may not always be the case that establishing grants or contracts is an effective way to increase access to quality care". Another said, "Each State and local area should have the flexibility to offer direct child care services through the use of certificates only". In addition, a letter from Senator Alexander and Congressman Kline said "Requiring the use of grants or contracts by States and Territories, limiting parents' ability to directly select the provider right for their family, is concerning as it reduces options, restricts parental choice, diminishes local control, and requires States to substantially change their operating procedures, as well as directly contradicts congressional intent." Specifically commenters said it violated the intent of Section 658Q(b) of the CCDBG Act which says nothing in this subchapter shall be construed in a manner (1) to favor or promote the use of grants and contracts for the receipt of child care services under this subchapter over the use of child care certificates; or (2) to disfavor or discourage the use of such certificates for the purchase of child care services, including those services provided by private or non-profit entities, such as faith-based providers.

Response: As discussed earlier, we have chosen not to keep the proposed requirement to use at least come grants and contracts for direct services. The proposed requirement to use grants and contracts was not meant to limit or discourage the use of certificates to provide assistance to families. However, after considering feedback from some members of Congress, States, and other stakeholders, we have chosen to not to change the regulatory language at § 98.50(a)(3), as re-designated, giving States and Territories the ability to choose whether or not they use grants or contracts to provide direct services.

Comment: Numerous national organizations and child care worker organizations supported the use of grants and contracts to build the supply of high-quality care, stating "Grants and contracts can be an effective means of ensuring that child care providers have the stable funding that they need to meet high-quality standards." In addition, a comment submitted by a group of child care resource and referral agencies said, "the use of contracts expands the choices for care that parents have by ensuring low-income families have access to higher quality care."

Response: While this final rule does not require the use of grants and contracts for direct services, we continue to think a system that includes certificates, grants or contracts, and private-pay families is the most sustainable option for the CCDF program and for child care providers. Certificates play a critical role in supporting parental choice; however, demand-side mechanisms like certificates are only fully effective when there is an adequate supply of child care. Multiple research studies have shown a lack of supply of certain types of child care and for certain localities. Child care supply in many low-income and rural communities is often low, particularly for infant and toddler care, school-age children, children with disabilities, and families with non-traditional work schedules.

Grants or contracts can play a role in building the supply and availability of child care, particularly high-quality care, in underserved areas and for special populations in order to expand parental choice. For example, Lead Agencies may use grants or contracts to incentivize providers to open in an area they might not otherwise consider, or to serve children for whom care is more costly. Grants and contracts are paid directly to the provider so long as slots are adequately filled, which is a more predictable funding source than vouchers or certificates. Stable funding offers providers incentive to pay the fixed costs associated with providing high-quality child care, such as adequate salaries to attract qualified staff, or to provide higher cost care, such as for infants and toddlers or children with special needs, or to locate in low-income or rural communities.

If a Lead Agency chooses to use grants and contracts to provide direct services, we recommend considering the ability of the child care market to sustain high-quality child care providers in certain localities for specific populations. Grants and contracts may help lessen the effects of larger economic changes that may impact the child care market. A recession may cause high-quality child care centers to close. However, because of the significant start-up costs associated with establishing a high-quality child care facility, the supply of child care may take longer to return to the market, making it difficult for parents to find child care. Contracting slots during a recession helps to preserve access to high-quality child care for low-income families and stabilize the income of providers, helping them survive the recession and continue to benefit the community. (Warner, M., *Recession, Stimulus and the Child Care Sector: Understanding Economic Dynamics, Calculating Impact,* 2009) Grants or contracts can also be used to support two-generation programs for community college students, teen parents, or meet other State priorities such as for homeless children. Finally, grants or contracts can improve accountability by giving the Lead Agency more access to monitor a child care provider's compliance with health and safety requirements and appropriate billing practices.

When considering whether to use grants or contracts, Lead Agencies are encouraged to contract with multiple types of settings, including child care centers and staff family child care networks or systems. Family child care networks or systems are groups of associated family child care providers who pool funds to share some operating and staffing costs who provide supports to providers often to manage their businesses and enhance quality. Contracting directly with family child care networks allows for more targeted use of funds with providers that benefit from additional supports that may improve quality. Research shows affiliation with a staffed family child care network is a strong predictor of quality in family child care homes, when providers receive visits, training, materials, and other supports from the network through a specially trained coordinator. (Bromer, J. et al., *Staffed Support Networks and Quality in Family Child Care: Findings from the Family Child Care Network Impact Study,* Erikson Institute, 2008)

Expenditures on activities to improve the quality of child care. Both the quality activity set-aside and the set-aside for infants and toddlers at § 98.50(b) apply to the State and Territory's full CCDF award, which includes Discretionary, Mandatory, and Federal and State shares of Matching funds. Non-Federal maintenance-of-effort funds are not subject to the quality and infant and toddler set-asides. These amounts are minimum requirements. States and Territories may reserve a larger amount of funding than is required at paragraphs (b)(1) and (2) for these activities. Note that the phase-in of the increase in the quality set-aside at § 98.50(b) only applies to States and Territories. The regulatory language at § 98.50(b) provides that the quality expenditure requirement is out of the aggregate amount of funds expended *by a State or Territory.* The phase-in and applicability of the quality set-aside for Tribal grantees is at § 98.83(g) and discussed in Subpart I of this final rule.

This final rule at § 98.53(c) lays out specific requirements related to the quality activities funds. First, this rule requires the use of the quality funds to align with an assessment of the Lead Agency's need to carry out such services. As part of this assessment, we expect Lead Agencies to review current expenditures on quality, assess the need for quality investment in comparison with revised purposes of the Act, including the placement of more low-income children in high-quality child care, and determine the most effective and efficient distribution of funding among and across the categories authorized by the Act. Second, the activities must include measurable indicators of progress in accordance with the requirement at § 98.53(f). We recognize some activities may have the same indicators of progress. However, each activity must be reported on and linked to some indicator(s). Finally, this rule allows for quality activities to be carried out by the Lead Agency or through grants and contracts with local child care resources and referral organizations or other appropriate entities.

Comment: Commenters were supportive of the proposed provisions related to quality expenditures. One State asked for clarification about what the assessment must entail, and a few other commenters asked for clarification about whether the assessment of quality activities had to be done on an annual basis. One comment signed by several national organizations expressed concern that an annual assessment would be a burden for Lead Agencies and overlook the fact that "quality improvement strategies are often multi-year initiatives and in many cases areas targeted for improvement will not change dramatically from year to year."

Response: Lead Agencies have the flexibility to design an assessment of quality activities that best meets their needs, including how often they do the assessment. We recommend, but do not require, it be done at least every three years to support the CCDF State Plan. We also recommend Lead Agencies include measures and outcomes when quality investments are made to facilitate assessment and ensure that funds are used in an intentional and effective manner.

Comment: A national organization suggested the regulation include a set-aside to improve the quality of care for school-age children and programs.

Response: School-age care is critical to meeting the needs of working families, and we strongly support Lead Agencies continuing to invest quality funds into activities that improve the school-age programs. The allowable quality activities continue to provide opportunities for Lead Agencies to invest in improving the quality of care for school-aged children. However, as the CCDBG Act of 2014 did not include a permanent set-aside for school-age quality activities, we decline to require such a set-aside in this final rule.

Comment: Faith-based and private education organizations requested we revise the regulatory language to require that quality funds be used "in a manner that accommodates a variety of distinctive approaches to early childhood education, such as faith-based, Montessori, and Waldorf programs."

Response: We declined to add this to the regulatory language. Lead Agencies may choose to follow those parameters when deciding how to spend their quality funds, but we do not want to limit their flexibility by including additional requirements related to their quality funds. Further, regulatory language at § 98.53(a)(3)(vii) related to the use of quality funds for QRIS or other systems of quality indicators already provides for funds to be used in a way that "accommodate a variety of distinctive approaches to early childhood education and care, including but not limited to, those practices in faith-based settings, community-based settings, child-centered settings, or similar settings that offer a distinctive approach to early childhood development." It is more appropriate to include this requirement under the QRIS activity than as a general requirement related to quality spending. We have kept the proposed regulatory language.

Funding for Direct Services. At § 98.50, this final rule includes a technical change at paragraph (e) to clarify that the provision applies to the Mandatory and Federal and State share of Matching funds. This change simply formalizes previously existing policy. Paragraph (h) has been re-designated without changes.

Paragraph (f) incorporates statutory language and requires Lead Agencies to use at least 70 percent of any Discretionary funds left after the Lead Agency sets aside funding for quality and administrative activities to fund direct services.

This final rule includes a technical change at § 98.50(g), as re-designated, that requires Lead Agencies to spend a substantial portion of the funds remaining after applying provisions at paragraphs (a) through (f) of this section to provide *direct* child care services to low-income families who are working or attending training or education.

Comment: We received one comment asking for clarification about how the change at paragraph (g) might impact services for certain groups, including "children categorized as protective service cases (for CCDF purposes) whose parents are not working or in education or training."

Response: The provision at paragraph (g) is a long standing regulatory requirement based on statutory language. The proposed clarification that the funding apply to *direct services,* which has been retained in this final rule, is based on previously existing policy, and we do not expect it to have an impact on how Lead Agencies deliver services. We did not receive other comments on these provisions and have kept the proposed regulatory language.

§ 98.51 Services for Children Experiencing Homelessness

This final rule includes a new section at § 98.51 that reiterates new statutory language at 658E(c)(3)(B)(i) of the Act, which requires Lead Agencies to spend at least some CCDF funds on activities that improve access to quality child care services for children experiencing homelessness. This requires Lead Agencies to have procedures for allowing children experiencing homelessness to be determined eligible and enroll prior to completion of all required documentation.

The final rule also clarifies that if a child experiencing homelessness is found ineligible, after full documentation, any CCDF payments made prior to the final eligibility determination will not be considered errors or improper payments and any payments owed to a child care provider for services should be paid. Lead Agencies are expected to provide training and technical assistance on identifying and serving children and families experiencing homelessness and outreach strategies.

Comment: Commenters were very supportive of this new section on services to children experiencing homelessness. One national organization was "particularly pleased to see the clear indication that if a family experiencing homelessness is determined to be ineligible after full documentation is obtained, providers still will be paid. This is an important strategy for removing barriers to child care for this population, as many child care providers may be hesitant to accept homeless families into their program for fear of not being paid for services rendered." They were also supportive of the policy clarification that ". . . training and technical assistance is not limited to child care providers only, but is to be directed to Lead Agency staff as well. This will better ensure that children can be identified at the point of application and that administrators and policy makers are better educated on the unique needs of this population."

§ 98.52 Child Care Resource and Referral System

Section 658E(c)(2)(E) of the Act allows, but does not require, Lead Agencies to use CCDF funds for child care resource and referral services to assist with consumer education and specifies functions of such entities. Consistent with this provision, this final rule at § 98.52 incorporates statutory language that allows Lead Agencies to spend funds to establish or support a system of local or regional child care resource and referral organizations that is coordinated, to the extent determined by the Lead Agency, by a statewide public or private nonprofit, community-based or regionally based, local child care resource and referral organization.

Paragraph (b) specifies a list of resource and referral activities that should be carried out at the direction of the Lead Agency. Therefore, if the Lead Agency does not need the child care resource and referral organization to carry out a certain activity, the organization does not have to carry out that activity.

Comment: Commenters expressed support for child care resource and referral agencies and the important role they can play in helping families access child care and providing consumer education about quality child care to parents of children receiving subsidies and the general public. A national organization representing many child care resource and referral agencies recommended "the community relationships that have been built over the past decades by State and local child care resource and referral agencies can be utilized as a foundation for any initiatives designed to improve the information provided to consumers, as well as expanding the reach of the services." While most comments related to this provision were generally about the work of child care resource and referral agencies, one commenter expressed concern about language included in the proposed regulation that would give Lead Agencies discretion to decide which of the activities at paragraph (b) would be required if a Lead Agency chose to fund child care resource and referral agencies. The commenter noted, "These are important and interrelated functions. There is the possibility under the proposed regulations that States may pursue a checklist."

Response: We strongly agree with commenters that child care resource and referral organizations can play a critical role in helping parents access high-quality child care. Child care resource and referral organizations should assist Lead Agencies in meeting the expanded requirements to provide information to families and help meet the new purpose of increasing family engagement. When determining partnerships with local resource and referral agencies, we recommend Lead Agencies give consideration to the expanded requirements for consumer education at § 98.33 and how best to meet those requirements, including whether existing child care resource and referral agencies and/or additional partners can assist in reaching low-income parents of children receiving subsidies, providers, and the general public.

The activities at paragraph (b) lay out a strong framework for how Lead Agencies and child care resource and referral agencies can work together. However, Lead Agencies need flexibility in how they choose to work with different organizations, including child care resource and referral agencies, and we have chosen to leave the regulatory language as proposed in the NPRM.

§ 98.53 Activities To Improve the Quality of Child Care

As noted above, the CCDBG Act of 2014 increased the percent of expenditures Lead Agencies must spend on quality activities. We strongly encourage Lead Agencies to develop a carefully considered framework for quality expenditures that takes into account the activities specified by the Act, and uses data on gaps in quality of care and the workforce, as well as effectiveness of existing quality-enhancement efforts, to target these resources. Lead Agencies should also coordinate quality activities with the statutory requirement to spend at least three percent of expenditures on improving quality and access for infants and toddlers, beginning in FY 2017.

Section 658G(b) of the Act includes a list of 10 allowable quality activities and requires Lead Agencies to spend their quality funds on at least one of the 10 activities. This final rule incorporates and expands on the list of allowable activities at § 98.53(a). In addition, we removed language included in the proposed rule at § 98.53(a) that said quality funds had to be used to "increase the number of low-income children in high-quality child care" and replaced it with "improve the quality of child care services for all children, regardless of CCDF receipt, in accordance with paragraph (d)." This ensures consistency with the provision at § 98.53(d) that clarifies quality activities are not restricted to CCDF children. Below we include an explanation and response to comments on the allowable quality activities.

1. *Supporting the training, professional development, and postsecondary education of the child care workforce as part of a progression of professional development.* This final rule includes professional development as an allowable quality improvement expenditure at § 98.53(a)(1). The Act references the section of the Plan requiring assurances related to training and professional development, which is elaborated in this final rule at § 98.44. We encourage Lead Agencies to align the uses of funds for training, professional development, and postsecondary education with the State or Territory's framework and progression of professional development to maximize resources. Training and professional development may be provided through institutions of higher education, child care resource and referral agencies, worker organizations, early childhood professional associations, and other entities. Additional areas for investments in training and professional development, are included with additional detail at § 98.53(a)(1)(i) through (vii) as follows:

(a) Offering training, professional development and post-secondary education that relate to the use of scientifically-based, developmentally, culturally, and age-appropriate strategies to promote all of the major domains of child development and learning, including those related to nutrition and physical activity and specialized training for working with populations of children, including different age groups, English learners, children with disabilities, and Native Americans and Native Hawaiians, to the extent practicable, in accordance with the Act.

(b) Incorporating the effective use of data to guide program improvement and improve opportunities for caregivers, teachers and directors to advance on their progression of training, professional development, and postsecondary education. We expanded upon the statutory language to include opportunities for caregivers, teachers and directors to advance professionally as there are a variety of data collected (such as information from licensing inspectors, quality rating and improvement systems, or accreditation assessments) that can guide program improvement by helping providers make adjustments in the physical environment and teaching practices.

(c) Including effective, age-appropriate behavior management strategies and training, including positive behavior interventions and support models for birth to school-age, that promote positive social and emotional development and reduce challenging behaviors, including reducing suspensions and expulsions of children under age five for such behaviors.

(d) Providing training and outreach on engaging parents and families in culturally and linguistically appropriate ways to expand their knowledge, skills, and capacity to become meaningful partners in supporting their children's positive development.

(e) Providing training in nutrition and physical activity needs of young children.

(f) Providing training or professional development for caregivers, teachers and directors regarding the early neurological development of children; and

(g) Connecting caregivers, teachers and directors of child care providers with available financial aid to help them pursue relevant postsecondary education, or delivering other financial resources directly through programs that provide scholarships and compensation improvements for education attainment and retention.

2. *Improving upon the development or implementation of the early learning and development guidelines.* We restate at § 98.53(a)(2) statutory language to allow the use of CCDF quality funds to provide technical assistance to eligible child care providers on the development or implementation of early learning and development guidelines. Early learning and development guidelines should be developmentally appropriate for all children from birth to kindergarten entry, describing what such children should know and be able to do, and cover the essential domains of early childhood development. Most States and Territories already have such guidelines, but may need to update them or better integrate them into their professional development system required at § 98.44. Section 658E(c)(G) of the Act requires Lead Agencies to describe training and professional development, including the ongoing professional development on early learning guidelines. In June 2015, ACF released the newly revised *Head Start Early Learning Outcomes Framework: Ages Birth to Five* (HSELOF, 2015). The HSELOF provides research-based expectations for children's learning and development across five domains from birth to age five. As States and Territories undertake revisions to their early learning guidelines, we encourage them to crosswalk their guidelines with the HSELOF to ensure they are comprehensive and aligned. Coordinating between State/Territory early learning and development guidelines and the HSELOF can help build connections between child care programs and Early Head Start/Head Start programs. We also encourage Lead Agencies to consider expanding learning and development guidelines for school-age children, either through linkages to programs already in place through the State department of education or local educational agencies (LEAs), or by adapting current early learning and development guidelines to

be age-appropriate for school-age children.

Developing, implementing, or enhancing a tiered quality rating and improvement system (QRIS). We incorporate this allowable activity at § 98.53(a)(3). The Act lists seven characteristics of a QRIS that Lead Agencies may choose to incorporate when developing a QRIS with quality funds, which we expand upon:

(a) Support and assess the quality of child care providers in the State, Territory, or Tribe. QRIS should include training and technical assistance to child care providers to help them improve the quality of care and on-site quality assessments appropriate to the setting;

(b) Build on licensing standards and other regulatory standards for such providers. We encourage Lead Agencies to incorporate their licensing standards and other regulatory standards as the first level or tier in their QRIS. Making licensing the first tier facilitates incorporating all licensed providers into the QRIS;

(c) Be designed to improve the quality of different types of child care providers and services. We encourage Lead Agencies to implement QRIS that are applicable to all child care sectors and address the needs of all children, including children of all ages, families of all cultural-socio-economic backgrounds, and practitioners. One way to provide support for different types of care is providing quality funds to support staffed family child care networks that can provide coaching and support to individual family child care providers to improve the quality in those settings.

(d) Describe the safety of child care facilities. Health and safety are the foundations of quality, and should not be treated as wholly separate requirements. Including the safety of child care facilities as part of a QRIS helps to reinforce this connection.

(e) Build the capacity of early childhood programs and communities to support parents' and families' understanding of the early childhood system and the ratings of the programs in which the child is enrolled. This capacity may be built through a robust consumer and provider education system, as described at § 98.33. Lead Agencies should provide clear explanations of quality ratings to parents. In addition to the Web site, Lead Agencies may have providers post their quality rating or have information explaining the rating system available at child care centers and family child care homes. This information should also be accessible to parents with low literacy or limited English proficiency;

(f) Provide, to the maximum extent practicable, financial incentives and other supports designed to expand the full diversity of child care options and help child care providers improve the quality of services. Research has found that initial supports and significant financial incentives are needed to make the quality improvements necessary for providers to move up levels in the QRIS. In order to ensure that providers continue to improve their quality and help move more low-income children into high-quality child care, we recommend Lead Agencies to make these incentives a focus of investment; and

(g) Accommodate a variety of distinctive approaches to early childhood education and care, including but not limited to, those practices in faith-based settings, community-based settings, child-centered settings, or similar settings that offer a distinctive approach to early childhood development. Parental choice is a very important part of the CCDF program, and parents often consider a variety of factors, including religious affiliation, when choosing a child care provider. Lead Agencies should take these factors into account when setting quality standards and levels in their QRIS, as well as designing how the information will be made available to the public.

4. *Improving the supply and quality of child care programs and services for infants and toddlers.* The Act includes improving the supply and quality of child care programs and services for infants and toddlers as an allowable quality activity, which we reiterate at § 98.53(a)(4). Lead Agencies may use any quality funds for infant and toddler quality activities, in addition to the required three percent infant and toddler quality set-aside. Lead Agencies are encouraged to pay special attention to what is needed to enhance the supply of high-quality care for infants and toddlers in developing their quality investment framework and coordinate activities from the main and targeted set asides to use resources most effectively. The Act and rule state that allowable activities may include:

(a) Establishing or expanding high-quality community or neighborhood-based family and child development centers, which may serve as resources to child care providers in order to improve the quality of early childhood services provided to infants and toddlers from low-income families and to help eligible child care providers improve their capacity to offer high-quality, age-appropriate care to infants and toddlers from low-income families. We interpret this provision to encourage the provision of resources to high-quality child care providers or other qualified community-based organizations that serve as hubs of support to providers in the community (by providing coaching or mentoring opportunities, facilitating efficient shared services, lending libraries, etc.);

(b) Establishing or expanding the operation of community or neighborhood-based family child care networks. As discussed earlier, staffed family child care networks can help improve the quality of family child care providers. Lead Agencies may choose to use the quality funds to help networks cover overheard and quality enhancement costs, such as providing access to coaches or health consultants, substitutes in order for staff to attend professional development, and peer activities;

(c) Promoting and expanding child care providers' ability to provide developmentally appropriate services for infants and toddlers, such as primary caregiving, continuity, responsive care, and foundations for future cognitive development;

(d) If applicable, developing infant and toddler components within the Lead Agency's QRIS for child care providers for infants and toddlers, or the development of infant and toddler components in the child care licensing regulations or early learning and development guidelines. Adopting standards specifically for infants and toddlers may be necessary to ensure the systemic support needed for individually-responsive care;

(e) Improving the ability of parents to access transparent and easy to understand consumer education about high-quality infant and toddler care as described at § 98.33; and

(f) Carrying out other activities determined by the Lead Agency to improve the quality of infant and toddler care provided, and for which there is evidence that the activities will lead to improved infant and toddler health and safety, infant and toddler cognitive and physical development, or infant and toddler well-being, including providing health and safety training (including training in safe sleep practices, first aid, and cardiopulmonary resuscitation for providers and caregivers).

5. *Establishing or expanding a statewide system of child care resource and referral services.* Section § 98.53(a)(5) of the final rule reiterates statutory language to include establishing or expanding a statewide

system of child care resource and referral services as an allowable quality activity. While § 98.52 includes a list of activities that child care resource and referral agencies should carry out if they are funded by Lead Agencies, Lead Agencies do not have to limit their resource and referral-related quality funds to those activities.

6. *Facilitating compliance with health and safety.* The final rule restates statutory language at § 98.53(a)(6) to include facilitating compliance with Lead Agency requirements for inspection, monitoring, training, and health and safety, and with licensing standards. While it is likely Lead Agencies will need to use quality funding for implementation and enforcement of the new minimum health and safety requirements for child care providers in the Act, we urge them to consider expenditures on this purpose foundational to enhancing quality, and consider how these investments are a part of the States' progress in improving the quality of child care available. For example, Lead Agencies should consider linking quality expenditures for health and safety training to the quality framework discussed earlier in this preamble, such that a Lead Agency may establish a QRIS that ties eligibility for providers to participate directly to licensing as the base level.

7. *Evaluating and assessing the quality and effectiveness of child care programs and services offered, including evaluating how such programs positively impact children.* The statutorily-allowable list of quality activities includes at § 98.53(a)(7) evaluating and assessing the quality and effectiveness of child care programs and services offered, including evaluating how such programs positively impact children. This final rule at § 98.53(f)(3) requires Lead Agencies to report on the measures they will use to evaluate progress in improving the quality of child care programs and services. Including evaluation as an allowable quality activity recognizes that evaluating progress may take additional investments, for which Lead Agencies may use quality funds. A good evaluation design can provide information critical to improving a quality initiative at many points in the process, and increase the odds of its ultimate success. (Government Accountability Office, *Child Care: States Have Undertaken a Variety of Quality Improvement Initiatives, but More Evaluations of Effectiveness Are Needed,* GAO–02–897).

8. *Supporting child care providers in the voluntary pursuit of accreditation by a national accrediting body with demonstrated, valid, and reliable program standards of high-quality.* The final rule restates statutory language at § 98.53(a)(8) supporting child care providers in the voluntary pursuit of accreditation by a national accrediting body with demonstrated, valid and reliable program standards of high-quality as an allowable quality activity. Accreditation is one way to differentiate the quality of child care providers. In order to gain accreditation, child care centers and family child care homes must meet certain quality standards outlined by accrediting organizations. Meeting these standards involves upfront investments and changes to programs or child-to-staff ratios which increase financial costs to programs. Quality funds can help providers cover these costs.

9. *Supporting efforts to develop or adopt high-quality program standards relating to health, mental health, nutrition, physical activity, and physical development.* The final rule restates statutory language at § 98.53(a)(9) supporting Lead Agency or local efforts to develop or adopt high-quality program standards relating to health, mental health, nutrition, physical activity, and physical development for children as an allowable quality activity. We recommend Lead Agencies look to Head Start for strong program standards in comprehensive services and consider how these standards may be translated into State and local strategies to deliver a similar array of services to families and children in child care. Half of children receiving CCDF are under the Federal Poverty Line and would quality for Head Start. This could include adding the standards to licensing, encouraging standards through QRIS, or embedding them in the requirements of grants or contracts for direct services. We encourage Lead Agencies that choose to use their quality funds for this activity to focus on research-based standards and work with specialists to develop age-appropriate standards in these areas.

10. *Carrying out other activities, including implementing consumer education provisions, determined by the Lead Agency.* This final rule restates statutory language at § 98.53(a)(10) that carrying out other activities, including implementing consumer education provisions at § 98.33, determined by the Lead Agency to improve the quality of child care services provided and for which measurement of outcomes relating to improvement of provider preparedness, child safety, child well-being, or entry to kindergarten is possible, are considered allowable quality activities. This tenth allowable activity provides Lead Agencies flexibility to invest in quality activities that best suit the needs of parents, children, and providers in their area. Over the years, Lead Agencies have been innovative in how they spent their quality funds, creating novel ways for improving quality of care, such as QRIS, that are now widely used tools for quality improvement. Therefore, we encourage Lead Agencies to experiment with the types of quality activities in which they invest. However, it is critical that Lead Agencies ensure that these new quality activities are focused and represent a smart investment of limited resources, which is why any activity that falls in the "other" category must have measurable outcomes that relate to provider preparedness, child safety, child well-being, or entry to kindergarten. Lead Agencies are encouraged to establish research-based measures for evaluating the outcomes of these quality activities. Lead Agencies will report on these measures and activities on an annual basis through the Quality Progress Report at § 98.53(f).

Commenters were overwhelmingly supportive of the increased focus on quality activities. While there were not many comments on individual allowable activities, several organizations specifically expressed support for the seventh allowable activity of evaluating and assessing the quality and effectiveness of child care programs and services offered at§ 98.53(a)(7), including evaluating how such programs positively impact children. As one national organization said "Transparency in this area is both important for State accountability and for informing the field and other States on best practices."

Comment: Several commenters, including national organizations and child care worker organizations, requested that supporting increased compensation for child care workers be included as an allowable use of quality funds. One commenter said, "Predicated upon the research-based connection between quality and compensation, ACF should be explicitly and abundantly clear about States' ability to use quality dollars to directly support increased compensation for early childhood educators." Another comment signed by several organizations recommended we "clarify that these resources are presented as additional funding options, but in no way preclude the use of CCDBG funds for such purposes of scholarships or compensation."

Response: We agree low pay for child care workers is a significant issue and impacts the quality of teachers and directors that choose to work in child care. As we know that teacher-child interaction is one of the most important determinants of quality, it only makes sense that CCDF quality funds be allowed to be used to help access programs that may help to increase a child care worker's compensation. In response, § 98.53(a)(1)(vii) of the final rule provides that quality funds may be used to deliver financial resources to child care caregivers, teachers, and directors directly through programs that provide scholarships and compensation improvements for education attainment. These resources may include programs designed to increase wages through educational scholarships, education-based salary supplements, and training to current child care staff that will lead to a nationally-recognized credential and/or college credit in early childhood education.

Comment: Several national organizations and child care worker organizations requested we clarify that quality funds may be used for enhanced or differential payment rates for child care providers to cover the higher costs of providing high-quality care or care to infants and toddlers. One comment signed by several national organizations said "Because the base cost of providing quality for infants and toddlers is higher than that for older children, regulations should clarify that enhanced rates, even if not connected to a QRIS, are an allowable quality improvement strategy." In contrast, one commenter representing several child care resource and referral agencies recommended prohibiting quality funds from being used to support enhanced or differential payment rates because "given the need to increase rates overall throughout the states, [enhanced rates] would crowd out quality activities designed to strengthen the workforce, which we think are already underfunded."

Response: We recognize that certain types of care are more expensive to provide, including high-quality care and care for infants and toddlers. Lead Agencies have used their quality funds to provide differential rates to child care providers meeting higher levels of quality, either based on state QRIS ratings or other indicators of quality. These enhanced rates both incentivize providers to meet higher-quality standards and supports the increase costs for providers often associated with quality improvements. This final rule continues to allow differential payment rates for higher-quality care as an allowable use of quality funds.

However, we have concerns about quality funds being used to increase rates without consideration for the quality of care. The reauthorized Act clearly moves away from the idea that quality funds may be used to simply increase access and instead increase access to high-quality child care. We strongly discourage the use of quality funds for direct services, including enhanced rates for infant and toddler care regardless of quality, and suggest that in the limited circumstances when quality funds are used for this purpose, the rates still be tied in some way to high-quality care.

Comment: A few commenters, including professional organizations, suggested adding to § 98.53(b)(3)(viii): "Build on existing research-based, national accreditation by creating an entry point for accredited providers at an appropriate level higher than level one. Embedding accreditation into the QRIS supports a continuous quality improvement process and facilitates incorporating more and higher-quality providers into the QRIS."

Response: We declined to add this language to the regulation. We understand that national accreditations are often a marker for higher-quality child care, and some Lead Agencies already consider how these accreditations match up with the requirements of their QRIS or other system of quality indicators. This final rule in no way limits a Lead Agency's ability to continue this practice. However, adding this to regulatory language may have the impact of limiting a Lead Agency's flexibility in designing its QRIS. We have chosen to leave how accreditation is incorporated into a QRIS to the discretion of the Lead Agency.

Quality activities not restricted to CCDF children. This final rule clarifies at § 98.53 paragraph (d) that activities to improve the quality of child care are not restricted to children meeting eligibility requirements under § 98.20 or to the child care providers serving children receiving subsidies. Thus, CCDF quality funds may be used to enhance the quality and increase the supply of child care for all families, including those who receive no direct assistance. To ensure consistency, this final rule also removed language included in the proposed rule at § 98.53(a) that said the funds had to be used to "increase the number of low-income children in high-quality child care." This final rule instead says the Lead Agency must expend funds from each fiscal year's allotment on quality activities pursuant to § 98.50(b) and § 98.83(g) in accordance with an assessment of need by the Lead Agency. Such funds must be used to carry out at least one of the listed quality activities.

Comment: The few comments we received on the provision supported the proposed changes. A local child care resource and referral organization said, "We are fully supportive of the clarification and from our experience on the ground within communities, we see that the broader use of quality dollars is making a difference within communities." However, one commenter expressed concern that this policy could lead to an increase in quality expenditures at the expense of direct services funding.

Response: This provision clarifies existing policy regarding CCDF quality expenditures, and we do not expect it to cause a shift in how Lead Agencies spend their funds. Lead Agencies continue to have the flexibility to determine how much of their allocation is spent on quality improvements, provided that they meet the expenditure minimums at § 98.50(b) and any targeted expenditure requirements at § 98.53(e). Therefore, we kept the proposed regulatory language.

Targeted funds and quality minimum. This final rule adds paragraph (e) at § 98.53 to codify longstanding ACF policy that targeted funds for quality improvement and other activities included in appropriations law may not count towards meeting the minimum quality spending requirement, unless otherwise specified by Congress. Beginning in FY 2000, Congress included in annual appropriations law for CCDF discretionary funds a requirement for Lead Agencies to spend portions of such funds on specified quality activities. Changes to the minimum quality spending requirement and the addition of a set-aside for infant and toddler care included in reauthorization may lead to changes or removal of targeted funds from annual appropriations law. However, we have chosen to include this provision to formalize the policy, in the event that targeted funds are included in future appropriations.

Reporting on quality activities. Sections 658G(c) and (d) of the Act require Lead Agencies to report total expenditures on quality activities, certify that those expenditures met the minimum quality expenditure requirement, and describe the quality activities funded. This final rule incorporates these reporting requirements into the regulation at § 98.53(f), requiring Lead Agencies to prepare and submit annual reports to the Secretary, including a quality progress report and expenditure report. The reports must be made publicly available, preferably on the Lead Agency's consumer education Web site required at § 98.33(a). This final rule also requires that Lead Agencies detail the measures used to evaluate progress in improving the quality of child care programs and services, and data on the extent to which investments have shown improvements on the measures. Additionally, Lead Agencies must describe any changes to regulations, enforcement mechanisms, or other policies addressing health and safety based on an annual review and assessment of serious child injuries and any deaths occurring in child care programs serving children. While Lead Agencies are required to include child care programs serving children receiving CCDF in their reporting, we encourage the inclusion of other regulated and unregulated child care centers and family child care homes, to the extent possible, in keeping with the overall purpose of CCDF to enable more low-income children to access high-quality child care.

Currently, States and Territories report their categorical expenditures through the ACF–696 reporting form. This form is used to determine if the Lead Agency has met the minimum quality expenditure amount and is referenced at § 98.65(g) in this rule. We expect to continue to use the ACF–696 form to determine whether a Lead Agency has met expenditure requirements at § 98.50(b), including both the quality set-aside and the set-aside to improve quality for infants and toddlers.

We will capture information on the quality activities and the measures and data used to determine progress in improving the quality of child care services through a Quality Progress Report. This report replaces the Quality Performance Report that was an appendix to the Plan. The Quality Performance Report has played an important role in increasing transparency on quality spending. The new Quality Progress Report will continue to gather detailed information about quality activities, but include more specific data points to reflect the new quality activities required by the Act and this final rule. The Quality Progress Report will be a new annual data collection and will require a public comment and response period as part of the Paperwork Reduction Act process, which will give Lead Agencies and others the opportunity to comment on the specifics of the report.

As part of the Quality Progress Report, States and Territories will be required to describe any changes to regulations, enforcement mechanisms, or other policies addressing health and safety based on an annual review and assessment of any serious injuries and deaths occurring in child care programs serving children receiving CCDF assistance, and, to the extent possible, in other regulated and unregulated child care centers and family child care homes. This provision complements § 98.41(d)(4), discussed earlier in the preamble, which requires child care providers to report to a designated State or Territorial entity any serious injuries or deaths of children occurring in child care. States and Territories must consider any serious injuries and deaths reported by providers and other information as part of their annual review and assessment. This report also works in conjunction with the requirements at § 98.33(a)(4) that Lead Agencies post the annual aggregate number of deaths and serious injuries to their consumer education Web sites.

This provision requires Lead Agencies to list and describe the annual number of child injuries and fatalities in child care and to describe the results of an annual review of all serious child injuries and deaths occurring in child care. The primary purpose of this change is the prevention of future tragedies. Sometimes, incidents of child injury or death in child care are preventable. For example, one State reviewed the circumstances surrounding a widely-publicized, tragic death in child care and identified several opportunities to improve State monitoring and enforcement that might otherwise have identified the very unsafe circumstances surrounding the child's death and prevented the tragedy. The State moved quickly to make several changes to its monitoring procedures. It is important to learn from these tragedies to better protect children in the future. Lead Agencies should review all serious child injuries and deaths in child care, including lapses in health and safety (*e.g.,* unsafe sleep practices for infants, transportation safety, issues with physical safety of facilities, etc.) to help identify appropriate responses, such as training needs.

The utility of this assessment is reliant upon the Lead Agency obtaining accurate, detailed information about any child injuries and deaths that occur in child care. Therefore, ACF strongly encourages Lead Agencies to work with the State or Territory entity responsible for child care licensing in conducting the review and also with their established Child Death Review systems and with the National Center for the Review and Prevention of Child Death (*www.childdeathreview.org*). The National Center for the Review and Prevention of Child Death, which is funded by the Maternal and Child Health Bureau in the Health Resources and Services Administration (HRSA), reports there are more than 1,200 State and local teams in all 50 States and the District of Columbia, and emerging teams in Guam and the Navajo Nation. (National Center for the Review and Prevention of Child Death, *Keeping Kids Alive: A Report on the Status of Child Death Review in the United States,* 2013) The Child Death Review system is a process in which multidisciplinary teams of people meet to share and discuss case information on deaths in order to understand how and why children die so that they can take action to prevent other deaths. These review systems vary in scope and in the types of death reviewed, but every review panel is charged with making both policy and practice recommendations that are usually submitted to the State governor and are publicly available. The National Center for the Review and Prevention of Child Death provides support to local and State teams throughout the child death review process through training and technical assistance designed to strengthen the review and the prevention of future deaths.

Lead Agencies also may work in conjunction with the National Commission to Eliminate Child Abuse and Neglect Fatalities, established in 2013 by the Protect Our Kids Act. (Pub. L. 112–275). The Commission, consisting of 12 members appointed by the President and Congress, published its report *Within Our Reach: A National Strategy to Eliminate Child Abuse and Neglect Fatalities* (*http://eliminatechildabusefatalities.sites.usa.gov/files/2016/03/CECANF-final-report.pdf*) in 2016. Over two years, the Commission held hearings in 11 jurisdictions to hear from State leaders, local and tribal leaders, child protection and safety staff, advocates, parents, and other stakeholders. The report outlines a strategy to protect children at highest risk of fatality from abuse and neglect. Although this Commission only studied a subsection of child injuries and deaths, it is important that Lead Agencies work with the agencies charged with reviewing and implementing these recommendations and take them into consideration as they examine serious injuries and deaths occurring in child care settings.

The only comment received on this provision was positive and said, "This requirement will help prevent future incidents and ensure States use this feedback proactively to protect children". We have kept the proposed regulatory language.

This final rule adds a fifth component to the QPR, which requires Lead Agencies to report how they responded to complaints received through the national hotline and Web site required by Section 658L(b)(2) of the Act. As discussed earlier, § 98.16(hh) requires Lead Agencies report in their CCDF plans how they will respond to complaints received through the national hotline and Web site. The addition of this component to the QPR allows for HHS to gather information on how Lead Agencies handled the complaints they received. Adding this question to the QPR allows for HHS to ensure that complaints received through the national hotline and Web site have been addressed in a way deemed appropriate by the Lead Agency, provided the response meets health and safety requirements. As the QPR will be going through a new OMB clearance process under the Paperwork Reduction Act, Lead Agencies and other stakeholders will have the opportunity to comment on specific questions related to this regulatory requirement.

§ 98.54 Administrative Costs

Section 658E(c)(3) of the Act and regulations at § 98.54(a), as re-designated, prohibit Lead Agencies from spending more than five percent of CCDF funds for administrative activities, such as salaries and related costs of administrative staff and travel costs. Paragraph 98.54(c) provides that this limitation applies only to States and Territories (note that a 15 percent limitation applies to Tribes under § 98.83(g)). This final rule at § 98.54(b) formally adds a list of activities that should not be counted towards the limitation on administrative expenditures. As stated in the preamble to the 1998 CCDF Final Rule, the Conference Agreement that accompanied the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (H. Rep. 104–725 at 411) indicated that these activities should not be considered administrative costs. This list is incorporated into the regulation itself for clarity and easy reference. We did not receive any comments on this provision and kept the proposed regulatory language.

Administrative costs and sub-recipients. New paragraph § 98.54(e) clarifies that if a Lead Agency enters into agreements with sub-recipients for operation of the CCDF program, the amount of the contract or grant attributable to administrative activities as described at § 98.54(a) (or § 98.83(g) for Tribes) shall be counted towards the administrative cost limit. Previously existing CCDF regulation at § 98.54(a) provides a listing of activities that may constitute administrative costs and defines administrative costs to include administrative services performed by grantees or sub-grantees or under agreements with third-parties. We have received questions from Lead Agencies to clarify whether activities performed through sub-recipients or contractors are subject to the five percent administrative cost limitation. While we do not as a technical matter separately apply the administrative cap to funds provided to each sub-recipient, the Lead Agency must ensure that the total amount of CCDF funds expended on administrative activities—regardless of whether expended by the Lead Agency directly or via sub-grant, contract, or other mechanism—does not exceed the administrative cost limit.

Comment: A couple States submitted comments requesting clarification about which activities the cap applied to and how the change might impact their current sub-contracts. For example, one State commented that applying the five percent administrative cap to contracted centers would cause a significant number of providers to close.

Response: The administrative expenditure cap applies to activities related to administering the CCDF program. Administrative activities at § 98.54(a), as re-designated, include, but are not limited to: (1) Salaries and related costs of the staff of the Lead Agency or other agencies engaged in the administration and implementation of the program pursuant to § 98.11; (2) travel costs for official business in carrying out the program; (3) administrative services, including such services as accounting services, performed by grantees or sub-grantees or under agreements with third parties; (4) audit services as required at § 98.65; (5) other costs for goods and services required for the administration of the program, including rental or purchase of equipment, utilities, and office supplies; and, (6) indirect costs as determined by an indirect cost agreement or cost allocation plan pursuant to § 98.57, as re-designated.

The administrative cost cap only applies to activities related to administering the CCDF program in a State, Territory, or Tribe. It does not apply to administration of child care services in an individual child care center or family child care home. Any costs related to administration of services by a provider, even if that provider is being paid through a contract, are considered direct services. However, if a sub-recipient provides services that are part of administering the CCDF program and included in the list above, then those administrative costs would count toward the administrative cost limit.

Determining whether a particular service or activity provided by a sub-recipient under a contract, sub-grant, or other mechanisms would count as an administrative activity towards the five percent administrative cost limitation depends on the function or nature of the contract/sub-grant/mechanism. If a Lead Agency provides a contract or sub-grant for direct services, the entire cost of the contract could potentially be counted as direct services if there is no countable administrative component. On the other hand, if the entire sub-grant or contract provided services to administer the CCDF program (*e.g.*, for payroll services for Lead Agency employees), then the entire cost of the contract would count towards the administrative cost cap. If a sub-grant/contract includes a mix of administrative and programmatic activities, the Lead Agency must develop a method for attributing an appropriate share of the sub-grant/contract costs to administrative costs. Lead Agencies should refer to the list of activities that are exempt from the administrative cost cap at § 98.54(b) when determining what components must be included in the administrative cost limit. The regulation at § 98.54(e) formalizes pre-existing ACF policy regarding administrative costs. Therefore, the new paragraph should not have a significant impact on CCDF programs or create additional burdens to staying below the administrative cost cap. We have kept the proposed regulatory language.

§ 98.56 Restrictions on the Use of Funds

CCDF regulations at § 98.56(b)(1), as re-designated, indicate that States and local agencies may not spend CCDF funds for the purchase or improvement of land or for the purchase, construction, or permanent improvement of any building or facility. However, funds may be expended for minor remodeling, and for upgrading child care facilities to assure that providers meet State and local child care standards, including applicable health and safety requirements. States and Territories may use CCDF funds for minor renovations related to meeting the requirements of the Americans with Disabilities Act (ADA) of 1990 (42 U.S.C. 12101, *et seq.*) However, funds may not be used for major renovation or construction for purposes of meeting the requirements of the ADA. Tribal Lead Agencies may request approval to use CCDF funds for construction and major renovation of child care facilities (§ 98.84).

This final rule adds language at § 98.56(b)(1) to indicate that improvements or upgrades to a facility that are not specified under the definitions of construction or major renovation at § 98.2 may be considered minor remodeling and are, therefore, not prohibited. This final rule formally incorporates ACF's long-standing interpretation into regulatory language.

We received one comment expressing support for this clarification and the continued prohibition on using CCDF funds construction and major renovations. We left the language as proposed in the NPRM.

This final rule includes a technical change at § 98.56(e), as re-designated, adding that CCDF may not be used as the non-Federal share for other Federal grant programs, *unless explicitly authorized by statute.* We did not receive any comments on this provision.

Subpart G—Financial Management

The focus of subpart G is to ensure proper financial management of the CCDF program, both at the Federal level by HHS and the Lead Agency level. The final rule changes to this section include: Addressing the amount of CCDF funds the Secretary may set-aside for technical assistance, research and evaluation, a national toll-free hotline and Web site; incorporating targeted funds that have been included in appropriations language (but were not in the previous regulations); inclusion of the details of required financial reporting by Lead Agencies; and clarifying requirements related to obligations. Lastly, the final rule added a new section on program integrity.

§ 98.60 Availability of Funds

Technical assistance; research and evaluation; national toll-free hotline and Web site. Prior to reauthorization, the Act allowed the Secretary to provide technical assistance to help Lead Agencies carry out the CCDF requirements. Pursuant to pre-existing regulations, the Secretary withheld one quarter of one percent of a fiscal year's appropriation for technical assistance. The reauthorization added greater specificity to the Act regarding the provision of technical assistance. Specifically, Section 658I(a)(3) of the Act requires the Secretary to provide technical assistance, such as technical assistance to improve the business practices of child care providers, (which may include providing technical assistance on a reimbursable basis) which shall be provided by qualified experts on practices grounded in scientifically valid research, where appropriate. Section 658I(a)(4) requires the Secretary to disseminate, for voluntary informational purposes, information on practices that scientifically valid research indicates are most successful in improving the quality of programs that receive CCDF assistance. Section 658G requires the Secretary to offer technical assistance which may include technical assistance through the use of grants or cooperative agreements, on activities funded by quality improvement expenditures.

In addition, Sections 658O(a)(4), and 658O(a)(5) of the Act indicate that the Secretary shall reserve up to ½ of 1 percent of the amount appropriated for the Act to support these technical assistance and dissemination activities. Additionally, section 658O(a)(3) of the Act indicates that the Secretary may reserve up to $1.5 million for the operation of a national toll-free hotline and Web site. Annual appropriations law has provided funding for a national hotline and Web site in prior years, but this funding is now authorized through the Act with an expanded scope and requirements. In this final rule at § 98.60(b), we do not specify a particular funding amount for technical assistance, research and evaluation, or the national hotline and Web site. Rather, we say that "a portion" of CCDF funds will be made available for these purposes. Because appropriations law has addressed the amount of funding for some of these activities in the past, we want to leave flexibility to accommodate any future decisions by Congress. As we indicate in the regulatory language, funding for these activities is subject to the availability of appropriations, and will be made in accordance with relevant statutory provisions and the apportionment of funds from the Office of Management and Budget.

Obligations. The final rule adds a new provision at § 98.60(d)(7) to clarify that the transfer of funds from a Lead Agency to a third party or sub-recipient counts as an obligation, even when these funds will be used for issuing child care certificates. Some Lead Agencies contract with local units of government or non-governmental third parties, such as child care resource and referral agencies, to administer their CCDF programs. The functions included in these contracts could include eligibility determination, subsidy authorization, and provider payments. The contracting of some of these duties to a third party has led to many policy questions as to whether CCDF funds that are used by third parties to administer certificate programs are considered obligated at the time the subgrant or contract is executed between the Lead Agency and the third party pursuant to regulation at § 98.60(d)(5), or rather at the time the voucher or certificate is issued to a family pursuant to pre-existing regulation at § 98.60(d)(6).

The preamble to the August 4, 1992, CCDBG Regulations (57 FR 34395) helps clarify the intent of § 98.60(d). It states, "The requirement that State and Territorial grantees obligate their funds [within obligation timeframes] applies only to the State or Territorial grantee. The requirement does not extend to the Grantee's sub-grantees or contractors unless State or local laws or procedures require obligation in the same fiscal year." It follows that, in the absence of State or local laws or procedure to the contrary, § 98.60(d)(6) would not apply when the issuance of a voucher or certificate is administered by a third party because the funds used to issue the vouchers or certificates would have already been obligated by the Lead Agency. Based on this language, we have interpreted the obligation to take place at the time of contract execution between the Lead Agency and the third party. The addition of the added paragraph (d)(7) simply codifies pre-existing ACF policy, and does not change pre-existing obligation and liquidation requirements. Note that a local office of the Lead Agency, and certain other entities specified in regulation at § 98.60(d)(5) are not considered third parties. A third party must be a wholly separate organization and cannot be subordinate or superior offices of the Lead Agency, or under the same governmental organization as the Lead Agency.

The final rule adds several technical changes at § 98.60(d). It updates a reference to HHS regulations on expenditures and obligations at § 98.60(d)(4)(ii) to reflect new rules issued by HHS that implement the Office of Management and Budget's Uniform Administrative Requirements for Federal awards. The final rule includes § 98.60(d)(6) to clarify that the provision regarding the obligation of funds used for certificates applies specifically in instances where the Lead Agency issues child care certificates. Additionally, the final rule adds a technical change at § 98.60(h) to eliminate a reference to § 98.51(a)(2)(ii), which has been deleted. This technical change does not change the meaning or the substance of paragraph (h), which specifies that repayment of loans made to child care providers as part of a quality improvement activity may be made in cash or in services provided in-kind.

Comment: One State suggested that we modify the term "certificate" related to payment of services in § 98.60(d)(6) and (7) of this final rule. The commenter said that the Act's definition of the term 'certificate' indicates that disbursement is issued by a grantee directly to a parent, implying that the parent then uses this to pay a child care provider—a sort of arm's length transaction common in a market based system. The commenter stated that this does not match the certificate payment process in many States—where payment is made to the provider rather than the parent. Furthermore, the commenter stated that the term "grantee", used in the definition of "certificate", is synonymous with "Lead Agency" or with their designee. The commenter suggested either defining "grantee" or, replacing use of "grantee" where it occurs with "Lead Agency" or their designee for consistency.

Response: We declined to modify the regulatory definition for the term "certificate," also commonly known as "voucher," since the definition is largely based on statutory language. In the Act, the term "child care certificate" means a certificate (that may be a check, or other disbursement) that is issued directly to a parent who may use such certificate only as payment for child care services. However, we recognize that many States in fact make payments directly to child care providers on the parents' behalf for purposes of administrative ease, which is allowable as long as other requirements regarding certificates are met (including the parental choice provisions). We agree that the term "grantee" in this definition has the same meaning as the term "Lead Agency" or designee.

§ 98.61 Allotments From Discretionary Funds

Tribal funds. To address amended section 658O(a)(2) of the Act, this final rule revises § 98.61(c) to indicate that Indian Tribes and Tribal organizations will receive an amount "not less than" two percent of the amount appropriated for the Child Care and Development Block Grant (*i.e.,* CCDF Tribal Discretionary Funds). Under prior law and regulation, Tribes received "up to" two percent. Under the reauthorized Act, the Secretary may only reserve an amount greater than 2 percent for Tribes if two conditions are met: (1) The amount appropriated is greater than the amount appropriated in FY 2014, and (2) the amount allotted to States is not less than the amount allotted in FY 2014. It is important to note that reauthorization of the Act allows for a potential increase in the Tribal Discretionary funds, but it does not affect the Tribal Mandatory funds. Tribes may only be awarded up to 2 percent of the Mandatory Funds, per Section 418(a)(4) of the Social Security Act (42 U.S.C. 618(a)(4)). Recognizing the needs of Tribal communities, ACF increased the Tribal CCDF Discretionary set-aside from 2 percent to 2.5 percent for FY 2015, and to 2.75 percent for FY 2016. We encourage Tribes to use any increased funds for activities included in reauthorization, such as health and safety, continuity of care, and consumer education. ACF has consulted with Tribes regarding future funding levels and plans to make that determination on an annual basis, taking into consideration the overall appropriation level as well as unique Tribal needs and circumstances, including the need for sufficient funding to provide care that address culture and language in Tribal communities.

Targeted funds. This final rule adds § 98.61(f) to reference funds targeted through annual appropriations law. In prior years since FY 2000, annual appropriations law has required the use of specified amounts of CCDF funds for targeted purposes (*e.g.,* quality, infant and toddler quality, school-age care and resource and referral). The reauthorized Act includes increased quality spending requirements; however, we include this regulatory provision in the event that Congress provides for additional targeted funds in the future. The new paragraph (f) is for clarification so that the regulations provide a complete picture of CCDF funding parameters. New paragraph (f) provides that Lead Agencies shall expend any funds set-aside for targeted activities as directed in appropriations law.

Audits and financial reporting. The final rule adds a technical change at § 98.65(a), regarding the requirement for the Lead Agency to have an audit conducted in accordance with the Single Audit Act Amendments of 1996. This paragraph replaces a reference to OMB Circular A–133 with a reference to 45 CFR part 75, subpart F, which is the new HHS regulation implementing the audit provisions in the Office of Management and Budget's Uniform Administrative Requirements for Federal awards.

The final rule adds regulatory language at § 98.65(g), which previously provided that the Secretary shall require financial reports as necessary, to now specify that States and Territories must submit quarterly expenditure reports for each fiscal year. Currently, States and Territories file quarterly expenditure reports via the ACF–696; however, the prior regulations did not describe this reporting in detail. Revised paragraph (h) requires States and Territories to include the following information on expenditures of CCDF grant funds, including Discretionary (which includes any reallocated funds and funds transferred from the TANF block grant), Mandatory, and Matching funds; and State Matching and Maintenance-of-Effort (MOE) funds: (1) Child care administration; (2) Quality activities, including any sub-categories of quality activities as required by ACF; (3) Direct services; (4) Non-direct services including: (i) Computerized information systems, (ii) Certificate program cost/eligibility determination, (iii) All other non-direct services; and (6) Such other information as specified by the Secretary.

We added greater specificity to the regulation in light of the important role expenditure data play in ensuring compliance with the quality expenditure requirements at § 98.51(a), administrative cost cap at § 98.52(a), and obligation and liquidation deadlines at § 98.60(d). Additional expenditure data provide us with important details about how Lead Agencies are spending both their Federal and State CCDF funds, including what proportion of funds are being spent on direct services to families and how much has been invested in quality activities. These reporting requirements do not create an additional burden on Lead Agencies because we are simply updating the regulations to reflect current expenditure reporting processes.

Tribal financial reporting. This final rule adds a new provision at § 98.65 that requires Tribal Lead Agencies to submit annual expenditure reports to the Secretary via the ACF–696T. As with State and Territorial grantees, these expenditure reports help us to ensure that Tribal grantees comply with obligation and liquidation deadlines at§ 98.60(e), the fifteen percent administrative cap at § 98.83(g), and the quality expenditure requirement at § 98.51(a). This reporting requirement is current practice.

§ 98.68 Program Integrity

The final rule adds a new section § 98.68, which requires Lead Agencies to have effective procedures and practices that, ensure integrity and accountability in the CCDF program. These regulatory changes formalize the implementation process of the CCDF Plan, which require Lead Agencies to report in these areas.

The Plan now includes questions on internal controls, monitoring sub-recipients, approach to identify fraud and payment errors, methods of investigation and collection of identified fraud, and sanctions for clients and providers who engage in fraud. ACF has been working with State, Territorial, and Tribal CCDF Lead Agencies to strengthen program integrity to ensure that funds are maximized to benefit eligible children and families. For example, ACF issued a Program Instruction (CCDF–ACF–PI–2010–06) that provides stronger policy guidance on preventing waste, fraud, and abuse and has worked with States to conduct case record reviews to reduce administrative errors. The requirements in this section build on these efforts and are designed to reduce errors in payment and minimize waste, fraud, and abuse to ensure that funds are being used for allowable program purposes and for eligible beneficiaries.

In the final rule, section § 98.68(a) requires Lead Agency internal controls to include processes to ensure sound fiscal management, processes to identify areas of risk, processes to train child care providers and staff of Lead Agency and other agencies engaged in the administration of CCDF about program requirements and integrity, and regular evaluation of internal control activities. Examples of internal controls include practices that identify and prevent errors associated with recipient eligibility and provider payment such as: Checks and balances that ensure accuracy and adherence to procedures; automated checks for red flags or warning signs; and established protocols and procedures to ensure consistency and accountability. We have also added language to the final rule to indicate that such internal controls should be undertaken while maintaining continuity of services. In other words, Lead Agencies must ensure that internal controls designed to limit errors and improper payments do not result in undue administrative burdens for families that would interfere with continued, stable subsidy receipt for eligible families. In addition, § 98.68(b)(1) of this final rule requires Lead Agencies to describe in their Plan the processes that are in place to identify fraud and other program violations associated with recipient eligibility and provider payment. These processes may include, but are not limited to, record matching and database linkages, review of attendance and billing records, quality control or quality assurance reviews, and staff training on monitoring and audit processes.

The provision at § 98.68(b)(2) of the final rule requires Lead Agencies to establish internal controls to investigate and recover fraudulent payments and impose sanctions on clients or providers in response to misuse of CCDF program funds. Lead Agencies are required to describe in their Plan the processes that are in place to identify fraud or other program violations. The Lead Agencies' requirements mandated under § 98.68(b)(2) build on pre-existing requirements at § 98.60(h)(1) to reduce errors in payment and minimize waste, fraud, and abuse to ensure that funds are being used for allowable program purposes and for eligible beneficiaries.

Similarly, the provision at § 98.68(c) requires Lead Agencies to describe in their Plans the procedures that are in place for documenting and verifying that children meet eligibility criteria at the time of eligibility determination and redetermination. Lead Agencies are responsible for ensuring that all children served in CCDF are eligible at the time of eligibility determination or redetermination. Lead Agencies should, at a minimum, verify or maintain documentation of the child's age, family income, and require proof that parents are engaged in eligible activities. Income documentation may include, but is not limited to, pay stubs, tax records, child support enforcement documentation, alimony court records, government benefit letters, and receipts for self-employed applicants. Documentation of participation in eligible activities may include school registration records, class schedules, or job training forms. Lead Agencies are encouraged to use automated verification systems and electronic recordkeeping practices to reduce paperwork.

Comment: A child care worker organization and a national organization supported the new paragraph in section 98.68(a) of this final rule, but wanted to add further language that would require Lead Agencies to describe in their Plan, the processes that are in place to make sure that child care providers are trained and knowledgeable about program violations and administrative rules.

Response: We agree and the final rule incorporates this language at § 98.68(a)(3). In order to ensure program integrity in a fair, consistent, and effective manner, it is essential for child care providers to be trained and knowledgeable about program rules, while maintaining quality of care and continuity of CCDF services. In addition, we have expanded this provision to require training for staff of the Lead Agency and other agencies engaged in administration of the CCDF about program requirements and integrity. It is essential for CCDF staff, especially frontline caseworkers who determine eligibility and authorize services, to be trained in program rules and program integrity efforts.

Subpart H—Program Reporting Requirements

§ 98.71 Contents of Reports

Section 98.71 of the final rule describes administrative data elements that Lead Agencies are required to report to ACF, including basic demographic data on the children served, the reason they are in care, and the general type of care. The majority of changes to reporting requirements described in this final rule have already been implemented through the Office of Management and Budget's information collection process under the Paperwork Reduction Act. The Office of Child Care issued revised forms and instructions for the ACF–800 (annual aggregate report) and ACF–801 (monthly case-level report) in January 2016. This final rule makes conforming changes in the regulation.

The ACF–801 report includes a data element on the total monthly family income and family size used for determining eligibility. Previous regulations at § 98.71(a)(1) do not include family size. Therefore, this final rule amends the regulatory language at § 98.71(a)(1) to align the regulations with the reporting requirements in effect. This does not represent any change in how Lead Agencies previously reported family income.

In addition, the final rule adds a new provision at § 98.71(a)(2), which requires Lead Agencies to report zip code data on both the family and the child care provider records. These new elements will allow States and Territories and ACF to identify the communities where CCDF families and providers are located, including the type and quality level of providers. Sections 658E(a)(2)(M) and 658E(a)(2)(Q) of the Act require States and Territories to address the needs of certain populations regarding supply and access to high-quality child care services in underserved areas including areas that have significant concentrations of poverty and unemployment. In comments, one national organization strongly supported this provision because it will enable policymakers to assess where families and providers reside and the level of quality available in their communities.

This final rule adds a new element at § 98.71(a)(11) that requires Lead Agencies to report, in addition to the total monthly family co-payment, any amount charged by the provider to the family more than the co-payment in instances where the provider's price exceeds the subsidy payment, if applicable. Unlike all the other new data elements in this rule, this element has not yet been added to the ACF–801 form, but will be added through the Paperwork Reduction Act clearance process. For more information about the importance of this data element, see the related discussion on equal access (§ 98.45) earlier in the preamble.

Section 658K(a)(1)(E) of the Act prohibits the monthly case-level report from containing personally identifiable information. As a result, this final rule amends language at § 98.71(a)(14) by deleting Social Security Numbers (SSNs) and instead requiring a unique identifying number from the head of the family unit receiving assistance and from the child care provider. It is imperative that the unique identifier assigned to each head of household be used consistently over time—regardless of whether the family transitions on and off subsidy, or moves within the State or Territory. This will allow Lead Agencies and ACF to identify unique families over time in the absence of the Social Security Number (SSN). A Lead Agency may still use personally identifiable information, such as SSNs, for its own purposes, but this information cannot be reported on the ACF–801. Furthermore, pursuant to the Privacy Act (5 U.S.C. 552a note), Lead Agencies cannot require families to disclose SSNs as a condition of receiving CCDF services. The final rule adds a new provision at § 98.71(a)(16) to indicate whether a family is experiencing homelessness based on statutory language at Section 658K(a)(1)(B)(xi) that requires Lead Agencies to report whether children receiving CCDF assistance are experiencing homelessness. Many national organizations strongly supported this provision in their comments. This final rule also adds a new provision at § 98.71(a)(17) to indicate whether the parent(s) are in the military service. The Administration has taken a number of actions to increase services and supports for members of the military and their families. This element will identify if the parent is currently active duty (*i.e.*, serving fulltime) in the U.S. Military or a member of either a National Guard unit or a Military Reserve unit. This data will allow Lead Agencies and ACF to determine the extent to which military families are accessing the CCDF program.

In addition, this final rule adds a new provision at § 98.71(a)(18) to indicate whether a child is a child with a disability. Section 658E(c)(3)(B) of the Act requires a Lead Agency's priority for services to include children with special needs. ACF is required to determine annually whether Lead Agencies use CCDF funds in accordance with priority for services requirements, including the priority for children with special needs. While Lead Agencies have flexibility to define "children with special needs" in their CCDF Plans, many include children with disabilities in their definitions. This data will help ACF determine, as required by the Act, whether Lead Agencies are in compliance with priority for service requirements. Furthermore, the reauthorization added several other provisions related to ensuring children with disabilities have access to subsidies, and that the child care available meets the needs of these children. This data element will provide information about the extent to which the CCDF program is serving children with disabilities.

Additionally, the final rule adds a new provision at § 98.71(a)(19) to require Lead Agencies to report a new data element on the primary language spoken in the child's home, using responses that are consistent with data reporting requirements for the Head Start program. The reauthorized Act includes provisions that support services to English learners. Section 658E(c)(2)(G) of the Act requires Lead Agencies to assure that training and professional development of child care providers address needs of certain populations to the extent practicable, including English learners. Under Section 658G, allowable quality activities include providing training and outreach on engaging parents and families in culturally and linguistically appropriate ways to expand their knowledge, skills, and capacity to become meaningful partners in supporting their children's positive development.

In accordance with sections 658E(c)(2)(J) and 658E(c)(2)(C) of the Act, which mandates monitoring and inspection requirements for Lead Agencies, the final rule adds a new provision at § 98.71(a)(20) to indicate, for each child care provider currently providing services to a CCDF child, the date of the most recent inspection for compliance with health, safety, and fire standards (including licensing standards for licensed providers) as described in § 98.42(b). Lead Agencies will need to track inspection dates to ensure that CCDF providers are monitored at least annually. If the Lead Agency uses more than one visit to check for compliance with these standards, the Lead Agency should report the most recent date on which all inspections were completed. Moreover, the final rule adds provision at § 98.71(a)(21) to require Lead Agencies to submit an indicator of the quality of the child care provider as part of the quarterly family case-level administrative data report. This change will allow ACF and Lead Agencies to capture child-level data on provider quality for each child receiving a child care subsidy. This addition is in line with one of the Act's new purposes, which is to increase the number and percentage of low-income children in high-quality child care. States and Territories currently report on the quality of child care provider(s) based on several indicators—including: QRIS participation and rating, accreditation status, compliance with State prekindergarten standards or Head Start performance standards, and other State defined quality measure. However, until recently, States and Territories were required to report on at least one of the quality elements for a portion of the provider population. This resulted in limited quality data, often for only a small portion of child care providers in a State or Territory. This change now requires quality information for every child care provider. Working with States and Territories to track this data will give us a key indicator on the progress we are making toward the goal of increasing the number of low-income children in high-quality care. Lead Agencies must also take into consideration the cost of providing higher-quality care when setting payment rates pursuant to § 98.44(f)(iii). To ensure that the CCDF program is providing meaningful access to high-quality care, it is essential for Lead Agencies to have data on the quality of CCDF providers. Prior paragraph (a)(16) is re-designated as paragraph (a)(22) but otherwise is unchanged. Several national organizations submitted comments in support of this provision.

The final rule also adds a new provision at § 98.71(b)(5) to report the number of child fatalities by type of care, as required by section 658K(a)(2)(F) of the Act. This should include the number of fatalities occurring among children while in the care and facility of child care providers serving CCDF children (regardless of whether the child who dies was receiving CCDF). Previous paragraph (b)(5) is re-designated as paragraph (b)(6) but otherwise is unchanged.

The final rule revises paragraph (c), regarding reporting requirements for Tribal Lead Agencies to specify that the Tribal Lead Agency's annual report shall include such information as the Secretary will require. We intend to revisit requirements for all Tribal Lead Agencies, pursuant to the changes in Subpart I. Proposed reporting requirements will be subject to public comment under the Paperwork Reduction Act.

Comment: In general, commenters supported revisions to this section. Specifically, commenters appreciated the additional reporting of various data elements to improve the quality and transparency of the program reporting requirements. Some commenters recommended that Lead Agencies be required to post all reports submitted to ACF on the Lead Agency Web site in a timely manner (*e.g.*, within 30 days), while always respecting family confidentiality.

Response: The final rule adds a new provision at § 98.71(d) to require State and Territorial Lead Agencies make available on a Web site in a timely manner annual aggregate administrative data reports via the ACF–800 under § 98.71(b), quarterly financial reports under § 98.65(g), and annual quality progress reports under § 98.53(f). We understand the value of having reports submitted by Lead Agencies available via the Lead Agencies' Web sites in a timely manner for purposes of transparency regarding administration of the program.

We declined to require Lead Agencies to post case level reports on their Web site. Pursuant to section 658K(a)(1)(E) of the Act and § 98.71(a)(13) of this final rule, we are concerned about the potential confidentiality issues that may arise related to case-level reporting on ACF–801. We want to protect the confidentiality of families and children who receive CCDF assistance. Furthermore, we post State-by-State tables of CCDF administrative data on the Office of Child Care Web site. In addition, each year we post an updated dataset of the administrative reports on our collaborative research Web site *www.researchconnections.org* for use and analysis by researchers.

Comment: Many national organizations supported the provision at § 98.71(a)(18) to require Lead Agencies to report the language spoken at home on the ACF–801. However, one commenter said that the requirements in the Act and the NPRM to provide services and take reasonable steps to provide access to individuals with limited English proficiency can be accomplished without placing additional burdens on States and families to report the language spoken at home. The commenter also stated that Lead Agencies are already aware of the typical languages spoken by families in the community and can design training services to meet the needs of the local community without placing this additional reporting burden on parents.

Response: We declined to remove the provision at § 98.71(a)(18) of this final rule to require Lead Agencies to submit data reporting on language spoken at home on ACF–801. Retaining this reporting requirement is necessary to obtain adequate national longitudinal data on the languages spoken by families at home, so Lead Agencies and child care providers can tailor their services to meet the needs of the families they serve, and to allow for transparency and oversight to ensure adequate access for these families.

Comment: Some national organizations supported the provision we added at § 98.71(a)(17) of this final rule that requires Lead Agencies to report whether a child receiving CCDF has a disability. Some commenters were disappointed with the definition of "child with a disability" in the Act that gives Lead Agencies the flexibility to include their own State-specific definition. One commenter recommended that the data collection distinguish whether the child has a disability in accordance with (a) IDEA; or (b) ADA or Section 504 of the Rehabilitation Act.

Response: While we appreciated commenters' support and input on approaches for Lead Agencies to report disability data, we declined to further clarify the type of disability that Lead Agencies must report. We expect Lead Agencies to follow the Act's definition of "child with a disability". Under the Act, "child with a disability" means (1) A child with a disability, as defined in section 602 of the Individuals with Disabilities Education Act (20 U.S.C. 1401); (2) A child who is eligible for early intervention services under part C of the Individuals with Disabilities Education Act (20 U.S.C. 1431 *et seq.*); (3) A child who is less than 13 years of age and who is eligible for services under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); and (4) A child with a disability, as defined by the State involved.

Comment: One State commented about the information technology costs associated with the implementation of the provisions in section § 98.71 of this final rule.

Response: As mention earlier, the Office of Child Care has already implemented the majority of new data reporting requirements through the Paperwork Reduction Act information collection clearance process. For many of the new data elements, we have provided a phased-in implementation period to allow for States and Territories to make necessary changes to their automated systems. Lead Agencies may use CCDF funds to upgrade their data reporting systems to meet the new requirements.

Subpart I—Indian Tribes

This subpart addresses requirements and procedures for Indian Tribes and Tribal organizations applying for or receiving CCDF funds. This section describes provisions of Subpart I and serves as the Tribal summary impact statement as required by Executive Order 13175. CCDF currently provides funding to approximately 260 Tribes and Tribal organizations that administer child care programs for approximately 520 federally-recognized Indian Tribes, either directly or through consortia arrangements. Tribal CCDF programs are intended for the benefit of Indian children, and these programs serve only Indian children. With few exceptions, Tribal CCDF grantees are located in rural and economically challenged areas. In these communities, the CCDF program plays a crucial role in offering child care options to parents as they move toward economic stability, and in promoting learning and development for children. In many cases, Tribal child care programs also emphasize traditional culture and language. Below we discuss the Tribal CCDF framework and regulatory changes.

The Act is not explicit in how its provisions apply to Tribes. ACF traditionally issues regulations to define how the Act applies to Tribes. This final rule is the result of several months of consultation on the reauthorized Act and on the 2015 NPRM with Tribes, as well as past consultations and Tribal comments on our 2013 NPRM. We heard from many Tribal leaders and CCDF Administrators asking for flexibility to implement child care programs that meet the needs of individual communities. The requirements in this final rule are designed to increase Tribal Lead Agency flexibility, while balancing the CCDF dual goals of promoting families' financial stability and fostering healthy child development.

Tribal consultation and comments. ACF is committed to consulting with Tribes and Tribal leadership to the extent practicable and permitted by law, prior to promulgating any regulation that has Tribal implications. As this rule has been developed, ACF has engaged with Tribes through multiples means. The requirements in this final rule were informed by past consultations, listening sessions, and meetings with Tribal representatives on related topics.

Starting in early 2015, we began a series of formal consultations, conducted in accordance with the ACF Tribal Consultation Policy (76 FR 55678) with Tribal leaders to determine how the provisions in the Act should apply to Tribes and Tribal organizations. In addition to an informal listening session in February 2015, from March to May 2015, OCC held three formal conference calls and an in-person consultation session with Tribal leaders and Tribal CCDF administrators to discuss the impact of reauthorization on Tribes. Tribes and Tribal organizations were informed of these consultations and conference calls through letters to Tribal leaders. Much of the testimony and dialogue focused on the vast differences among Tribes and Tribal organizations.

After the proposed rule was published, OCC conducted a formal, in-person consultation with Tribal leadership in January 2016 during the public comment period. Tribal CCDF administrators and staff were also invited to attend. We included the written testimonies we received as formal comments on the proposed rule. In addition, we held conference calls, including Regional calls with Tribal CCDF Administrators, and disseminated materials specifically addressed to Tribes to describe the impact of the proposed rule. Throughout, we encouraged Tribes to submit written comments during the public comment period. We received 15 comments from Tribes and Tribal organizations, many of which were co-signed by multiple Tribes. We will address these comments in this subpart.

This rule was informed by these conversations and comments. We continue to balance flexibility for Tribes to address the unique needs of their communities with the need to ensure accountability and quality child care for children. In response to the comments we received from Tribes, we have made changes to how the final rule applies to Tribes, including clarifying implementation periods and adding in flexibility around the background check requirements. Below we discuss broader contextual issues, including how provisions located outside of Subpart I apply to Tribes, before moving on to a discussion of changes to Sections 98.80, 98.81, 98.82, 98.83, and 98.84.

102–477 programs. We note that Tribes continue to have the option to consolidate their CCDF funds under a plan authorized by the Indian Employment, Training and Related Services Demonstration Act of 1992 (Pub. L. 102–477). This law permits Tribal governments to integrate a number of their federally-funded employment, training, and related services programs into a single, coordinated comprehensive program. ACF publishes annual program instructions providing directions for Tribes wishing to consolidate CCDF funds under an Indian Employment, Training, and Related Services plan. This program instruction will include information on how this final rule impacts the 102–477 Plan. The Department of the Interior has lead responsibility for administration of Public Law 102–477 programs.

Dual eligibility of Indian children. Census data indicates over 60 percent of American Indian and Alaskan Native families do not reside on reservations or other Native lands; therefore, significant numbers of eligible Indian children and families are served by State Lead Agencies. Eligible Indian children who reside in Tribal service areas continue to have dual eligibility to receive child care services from either the State or Tribal CCDF program, in accordance with pre-existing regulation, at § 98.80(d). Section 658O(c)(5) of the Act mandates that, for child care services funded by CCDF, the eligibility of Indian children for a Tribal program does not affect their eligibility for a State program.

Implementation. The NPRM did not discuss implementation timeframes specific to Tribal Lead Agencies. The CCDBG Act of 2014 included effective dates for States and Territories, but these effective dates do not apply to Tribes.

Comment: Many Tribal commenters emphasized that Tribes need an appropriate timeline for implementation of the final rule. The national association of tribal child care programs recommended a 24 to 36 month implementation period.

Response: We agreed with the commenters. Although many Tribes have already begun moving forward, this final rule represents a shift in the Tribal CCDF requirements. ACF will determine compliance with provisions in this final rule through review and approval of the FY 2020–2022 Tribal CCDF Plans that become effective October 1, 2019. Using the next Plan cycle to gage compliance will give Tribes approximately three years (or close to 36 months) to implement the new provisions in the final rule. This will provide more opportunities for consultation and technical assistance to Tribes to assist in development of the CCDF Plan. Tribes may submit Plan amendments, as necessary, if they wish to change their policies prior to the beginning of the next Plan period.

Tribes that have consolidated CCDF with other employment, training and related programs under Public Law (Pub. L. 102–477), are not required to submit separate CCDF Plans, but will be required to submit amendments to their Public Law 102–477 Plans, along with associated documentation, in accordance with this timeframe to demonstrate compliance with the final rule.

Comment: The CCDBG Act of 2014 included phased-in increases to the quality expenditure requirements (§ 98.50(b)(1)), so that States and Territories must spend at least seven percent of their CCDF funds on quality improvement activities starting in FY 2016 and increasing to nine percent by 2020. Starting in FY 2017, States and Territories must also spend three percent on quality improvement activities for infants and toddlers (§ 98.50(b)(2)). Commenters also asked for Tribal-specific implementation timelines to the quality expenditure requirements.

Response: We agreed with the commenters. As the timeframe for States and Territories exists in regulatory language at § 98.50(b), in the final rule, we added new regulatory language at § 98.83(g) to give Tribes a longer phase-in period. As described later in the preamble, all Tribes, regardless of their CCDF allocation amount, are subject to the quality expenditure requirements. Tribes receiving large and medium allocations are also subject to the three percent infant and toddler quality spending requirement.

Because the quality spending requirements are new to Tribes that were previously exempt, ACF is allowing a phased-in timeframe starting with four percent in FY 2017. In FY 2018 and 2019, the quality expenditure requirements will increase to seven percent and then, to eight percent in FY 2020 and 2021. Finally, starting in FY 2022, Tribes will be required to spend nine percent on quality improvement activities. Tribes with large and medium allocations will be subject to the three percent infant and toddler quality requirement starting in FY 2019.

Federal fiscal year	Quality set-aside (all tribes) (percent)	Infant/toddler (large/medium allocations) (percent)	Total quality set-aside for tribes with small allocations (percent)	Total quality set-aside for tribes with large/medium allocations (percent)
FY 2017	4		4	4
FY 2018	7		7	7
FY 2019	7	3	7	10
FY 2020	8	3	8	11
FY 2021	8	3	8	11
FY 2022 (and ongoing)	9	3	9	12

This phase-in mimics timeframes allowed to States and Territories by the CCDBG Act of 2014 and gives Tribes time to plan for the quality increases each year.

Funding. Tribal CCDF funding is comprised of two funding sources: (1) Discretionary Funds, authorized by the Act and annually appropriated by Congress; and (2) Tribal Mandatory Funds, provided under Section 418(a)(4) of the Social Security Act (42 U.S.C. 618(a)(4)). Reauthorization of the Act allows for a potential increase in the Tribal Discretionary funds, but does not affect the Tribal Mandatory funds. Tribes may only be awarded up to two percent of the Mandatory Funds, per the Social Security Act.

Comment: In the NPRM, ACF asked for comment on the Tribal CCDF Discretionary set-aside, including the process to be used to determine the amount of the Discretionary set-aside. We received a number of comments from Tribes and Tribal organizations asking for a Tribal Discretionary set-aside of not less than five percent.

Response: According to Section 658O(a)(2) of the Act, Tribes will receive not less than two percent of the Discretionary CCDF funding. The Secretary may reserve an amount greater than two percent for Tribes if two conditions are met: (1) The amount appropriated is greater than the amount appropriated in FY 2014, and (2) the amount allotted to States is not less than the amount allotted in FY 2014. Given that the Act provides two conditions that must be met in order to raise the Tribal Discretionary set-aside, we cannot permanently raise the set-aside to five percent.

ACF does recognize the needs of Tribal communities and increased the Tribal CCDF Discretionary set-aside from two percent to 2.5 percent in FY 2015 and up to 2.75 percent in FY 2016. These increased set-asides raised the total Tribal CCDF Funding from $107 million in FY 2014 to $134 million in FY 2016. We encouraged Tribes to use the increased funding on activities included in reauthorization, such as health and safety, continuity of care, and consumer education, in order to implement this final rule. ACF will continue consulting with Tribes when determining the Discretionary set-aside each year.

Tribal CCDF framework. Tribes shall be subject to the CCDF requirements in Part 98 and 99 based on the size of their CCDF allocation. CCDF Tribal allocations vary from less than $25,000 to over $12 million. We recognize that Tribes receiving smaller CCDF grants may not have sufficient resources or infrastructure to effectively operate a program that complies with all CCDF requirements. Therefore, in the final rule, there are now three categories of CCDF Tribal grants, with thresholds established by the Secretary: Large allocations, medium allocations, and small allocations. Each category is paired with different levels of CCDF requirements, with those Tribes receiving the largest allocations expected to meet most CCDF requirements. Tribes receiving smaller allocations are exempt from specific provisions in order to account for the size of the grant awards (see table below).

Large allocations	Medium allocations	Small allocations

• Subject to the majority of CCDF requirements.
• Exempt from some requirements, including, but not limited to: Consumer education website, the requirement to have licensing for child care services, market rate survey or alternative methodology (but still required to have rates that support quality), and the training and professional development framework.
• Subject to the monitoring requirements, but allowed the flexibility to propose an alternative monitoring methodology in their Plans.
• Subject to the background check requirements, but allowed to propose an alternative background check approach in their Plans.
	• Allowed the same exemptions as the large allocation category.
	• Exempt from operating a certificate program.
		• Exempt from the majority of CCDF requirements, including those exemptions for large and medium allocation categories.
		• Must spend their funds in alignment with CCDF goals and purposes.
		• Only subject to:
		  • The health and safety requirements;
		  • The monitoring requirements;
		  • The background check requirements;
		  • Quality spending requirements (except the infant and toddler quality spending requirements);
		  • Eligibility definitions of Indian child and Indian reservation/service area;
		  • The 15% admin cap;
		  • Fiscal, audit, and reporting requirements; and
		  • Any other requirement defined by the Secretary.
		• Submit an abbreviated Plan.

Commenters were generally supportive of the new Tribal CCDF framework that was proposed in the NPRM. Given the broad range in Tribal CCDF allocation amounts, the tribal framework allows CCDF requirements to be better scaled to the size of a Tribe's allocation.

Comment: In the NPRM, ACF proposed that grants over $1 million would be considered large allocations. Grants between $250,000 and $1 million would be considered medium allocations. Finally, grants of less than $250,000 would be considered small allocations. We did not propose to set the allocation thresholds through regulation so that they could be updated or revised at a later date through consultation and notice. A few commenters recommended lower dollar thresholds than the NPRM had proposed for the delineations among small, medium, and large allocations.

Response: Although we considered lowering the thresholds between the allocation amounts, we are not making changes to the allocation thresholds in this final rule. Using the FY 2016 Tribal allocations, large allocations (CCDF grants over $1 million) include 34 Tribal grantees; medium allocations (CCDF grants between $250,000 and $1 million) include 72 Tribal grantees; and small allocations (CCDF grants less than $250,000) include 153 Tribal grantees. Although these thresholds are not regulatory and can be adjusted in the future, we wanted to set thresholds that could be stable over time as the program grows.

Comment: ACF received several questions from commenters asking how Tribes will transition between allocation amounts if their CCDF allocation increases from a small allocation to a medium allocation or a medium allocation to a large allocation.

Response: In the past, Tribes have been given one year from the time they receive their grant award to make programmatic changes and to submit Plan amendments to transition from exempt to non-exempt. But because there are significantly more requirements between the allocation thresholds (particularly between small and medium allocations), Tribes will need more time to make programmatic changes to comply with the new requirements.

If a Tribe's allocation increases enough to move from a small allocation to a medium allocation (or a medium allocation to a large allocation), the Tribe will be informed, as before, through their grant award letter. In most cases, the Tribe will have until the next Plan cycle to make changes and submit a new Plan that reflects the allocation threshold. The Tribe may also submit Plan amendments in order to make these changes more quickly. Tribes that cross an allocation threshold during the last year of a Plan cycle will have a transition period of at least one year and therefore, if necessary, may come into compliance through Plan amendments after the next Plan cycle has started. During this transition period, ACF will work closely with the Tribal Lead Agency to provide technical assistance and support.

Comment: Several commenters asked for clarity in how the new framework would apply to Tribal consortia. Some commenters asked that consortia, regardless of the size of their allocation, be held to the same standard as Tribes receiving large allocations. Other commenters emphasized that because consortia divide their funds among participating Tribes or Native villages, the allocation size does not necessarily correlate with the capacity of the participating Tribes.

Response: We declined to set separate requirements for Tribal consortia. The framework will apply to consortia in the same way that it applies to other Tribes and Tribal organizations. Requirements are set by CCDF allocation size.

Comment: A couple commenters asked for additional requirements for Tribes receiving small allocations. One commenter wrote that Tribes receiving small allocations should be required "to establish some basic eligibility criteria for families receiving CCDF funded child care. We encourage OCC to clearly indicate that, even within these flexible eligibility parameters, including children from all federally recognized Tribes in the definition of 'Indian children' for child count purposes and then prioritizing services to members of the Tribal Lead Agency's Tribe would not be allowable."

Response: We agreed with the comments. As described later in the preamble, Tribes receiving small allocations are exempt from the majority of the CCDF eligibility requirements, but if they are providing direct services, they will need to describe their eligibility criteria in their Plans. In addition, at § 98.83(f)(8), we are requiring them to define the terms "Indian child" and "Indian reservation or tribal service area" for purposes of determining eligibility.

Definition of homelessness. In the final rule, Tribes are subject to the regulatory definition at § 98.2 of a child experiencing homelessness, as well as the requirement at § 98.46(a)(3) to give priority for services to children experiencing homelessness.

Comment: Many commenters asked that Tribes be given flexibility to define homelessness for their communities because the definition in the McKinney-Vento Act, which is used in these regulations, may not meet the needs of Tribal communities. One Tribe wrote recommending "that Tribes should self-determine the definition of 'homeless' allowing for informal custody of family members without court guardianship documents."

Response: We understand that homelessness and lack of adequate housing are significant concerns in many Tribal communities. However, the definition from the McKinney-Vento Act is broad that therefore already allows significant flexibility for prioritizing CCDF services. Using the McKinney-Vento definition will make it easier to align with other programs, like Head Start or the State CCDF, that already use McKinney-Vento as the standard.

Eligibility for services. Tribal Lead Agencies receiving large or medium allocations are subject to the new and revised provisions around eligibility for services in Subpart C of this final rule—including, but not limited to, changes regarding: The 12-month re-determination periods at § 98.21(a); the continued assistance provisions at § 98.21(a)(2); and the graduated phase-out at § 98.21(b).

Comment: In the NPRM, we proposed that Tribes receiving large or medium allocations would be subject to the requirement at § 98.21(a) establishing that all Lead Agencies shall re-determine a child's eligibility for child care services no sooner than 12 months following the initial determination or most recent re-determination. Tribal comments were divided around this issue. Several commenters voiced concerns about the 12-month re-determination periods, and many commenters explained that Tribes need more flexibility to best serve their communities.

However, other commenters praised the 12-month re-determination requirements. One tribal child care program wrote, "I applaud the minimum 12-month eligibility change; our program adopted this in 2015, and it has allowed enrolled children to maintain consistency in their child care settings. Parents have expressed relief that they are not in danger of losing their child care benefits if they move or experience a change in employment, school, or job training. Additionally, this change has removed burdensome and invasive tracking of parents' status by eligibility staff and the resulting withdrawal and re-enrollment of families." Another tribal child care program wrote, "12-month eligibility periods with payments to child care providers on a regular basis will accomplish the intent of the law. If Tribes use the 3-months of job search, it should not significantly affect wait lists. It should save staff time of CCDF grantees to not process the paperwork for a more frequent eligibility period, allowing more funding for direct services.''

Response: We recognize that there are unique circumstances in Tribal communities; however, the importance of continuity of care and reducing the administrative burden on families served outweighs the commenters' concerns. As discussed earlier in Subpart C, 12-month re-determination periods provide stability and continuity in the program that benefits both children and families. Continuity of subsidy receipt not only supports financial self-sufficiency by offering working families stability to establish a strong financial foundation, it also prepares children for school by creating stable conditions necessary for healthy child development and early learning. We know that the relationship between children and their caregivers is an essential aspect of quality, and policies that minimize temporary disruption to subsidy receipt also support stability in a child's care arrangement.

As described earlier in Subpart C, during the minimum 12-month eligibility period, Tribal Lead Agencies may not end or suspend child care authorizations or provider payments due to a temporary change in a parent's work, training, or education status, which includes seasonal work. In other words, once determined eligible, children are expected to receive a minimum of 12 months of child care services, unless family income rises above 85 percent Grantee Median Income (GMI) or, at Lead Agency option, the family experiences a non-temporary cessation of work, education, or training.

We note that Tribal Lead Agencies are also subject to the continued assistance provision at § 98.21(a)(2) so that if a parent experiences a non-temporary job loss or cessation of education or training, Tribal Lead Agencies have the option—but are not required—to terminate assistance prior to 12 months. Prior to terminating assistance, the Tribal Lead Agency must provide a period of continued assistance of at least three months to allow parents to engage in job search activities. This provision is described in greater detail in Subpart C.

Comment: Tribes receiving large or medium allocations are subject to the requirement at § 98.21(b) for a graduated phase-out. This requirement applies to Tribal Lead Agencies that set their initial income eligibility level below 85 percent of GMI. In those instances, the Tribal Lead Agency will be required to establish two-tiered eligibility thresholds, with the second tier of eligibility set at 85 percent of SMI or a family of the same size, but with the option of establishing a second tier lower than 85% of SMI as long as that level is above the Lead Agency's initial eligibility threshold, takes into account the typical household budget of a low income family, and provides justification that the eligibility threshold is (1) sufficient to accommodate increases in family income that promote and support family economic stability; and (2) reasonably allows a family to continue accessing child care services without unnecessary disruption. Therefore, at redetermination, children who meet all other non-income related eligibility criteria would be considered eligible for a CCDF subsidy if their income exceeds the initial eligibility threshold but is still below the second eligibility threshold. This is discussed in greater detail above in the preamble discussion on graduated phase-out at § 98.21(b). We only received one comment on this provision from a Tribe who asked us to limit the graduated phase-out period to three months to mirror the period for job search.

Response: We declined to make any Tribal-specific changes to graduated phase-out provision. Income eligibility policies play an important role in promoting pathways to financial stability for families. In addition, the vast majority of Tribes already set their initial income eligibility levels at 85 percent of GMI. For these Tribes, the graduated phase-out provision does not apply.

Consumer Education. Tribal Lead Agencies receiving large or medium allocations are generally subject to the new and revised provisions around consumer education in Subpart D of this final rule—including, but not limited to, changes regarding: The parental complaint hotline at § 98.32(a) and the consumer education provisions at § 98.33.

Many Tribal commenters recommended that Tribal Lead Agencies be allowed to use a method for accepting and resolving parental complaints other than through a parental complaint hotline. These commenters believe that a hotline will create an administrative and financial burden, and especially because in smaller communities, there are issues with unfounded accusations and confidentiality issues.

Response: We strongly encourage Tribal Lead Agencies to establish policies that provide for thorough tribally-directed investigations, confidentiality protections, and due process related to accepting and resolving parent complaints. Tribal Lead Agencies should partner with other Tribal agencies that may have jurisdiction or expertise. Concerns about the possibility of ultimately unfounded accusations and confidentiality do not overcome the need to have a system in place to ensure children are safe, secure, and healthy. Parents should know who to contact if they have a concern, particularly if they feel there is an imminent threat that could result in danger to a child or children. Having a hotline ensures that parents have a reliable mechanism to report complaints. Although ACF encourages it, the hotline is not required to be operated for 24 hours or in multiple languages.

In the final rule, we also allow Lead Agencies to use similar reporting processes, like a secure Web site or email address, to collect parental complaints. In addition to providing an accessible mechanism for parental complaints, the Tribal Lead Agency must take appropriate and timely actions to investigate and resolve complaints. Tribes may continue to receive written complaints in addition to a hotline or Web site. Simply making the phone number of the Tribal child care office widely available and documentation of responses to parental complaints is adequate. Other than more widely publicizing the phone number, in some situations, no other action may be required. Tribes also have the option of coordinating with States to use the State-designated hotline for parental complaints.

Comment: One commenter worried that requiring Tribes receiving large or medium allocations to collect and disseminate consumer education as required at § 98.33 would be a significant administrative burden.

Response: We declined to exempt Tribes with large or medium allocations from the consumer education requirements. As discussed in Subpart D, parents often lack information regarding specific requirements that individual child care providers may or may not meet. Parents choosing a provider should be able to do so with access to any relevant information that the Tribe may have about that provider, including any health and safety, licensing or regulatory requirements met by the provider, the date the provider was last inspected, and history of violations, and compliance actions taken against a provider.

As proposed in the NPRM and discussed later in the preamble, all Tribes are exempt from the consumer education Web site and all requirements that specifically relate to the Web site. Tribal Lead Agencies have the flexibility to use a variety of approaches to disseminate consumer education, including the use of brochures, Tribal newsletters, or social media. Consumer education services should be directly included as part of the intake and eligibility process for families applying for child care assistance.

Health and Safety. In keeping with the goals of this final rule and the intent of the Act, ensuring the health and safety of children in child care and promoting quality to support child development are of the utmost importance. As such, all Tribes, including those with small allocations, are subject to the health and safety requirements at § 98.41 (as well as the monitoring and background check requirements, discussed later in this preamble), and all Tribes are required to meet the quality spending requirements at § 98.83(g) and § 98.53.

All Tribes are required to meet the requirements at § 98.41(a), which include requirements around a list of health and safety topics; health and safety training; setting group size limits and ratios; and compliance with child abuse reporting requirements. These health and safety requirements create a baseline essential to protecting children in child care. (In addition, as discussed below, all Tribes are subject to the immunization requirements that previously only applied to States and Territories.)

In the NPRM, we proposed to require Tribes receiving small allocations to be subject to the health and safety requirements, only if they were providing direct services. However, in the final rule, we are removing the reference to direct services. Regardless of whether they are providing direct services, Tribal Lead Agencies need to ensure any child care program receiving CCDF dollars meets the health and safety standards at § 98.41 (as well as the monitoring and background check requirements.)

The Act, at Section 658O(c)(2)(D) of the Act continues to require HHS to develop minimum child care standards for Indian Tribes and Tribal organizations receiving funds under CCDF. After three years of consultation with Tribes, Tribal organizations, and Tribal child care programs, health and safety standards were first published in 2000. The standards were updated and reissued in 2005. The HHS minimum standards are voluntary guidelines that represent the baseline from which all programs should operate to ensure that children are cared for in healthy and safe environments and that their basic needs are met. Many Tribes already exceed the minimum Tribal standards issued by HHS, and some have used the minimum standards as the starting point for developing their own more specific standards. These minimum standards will need to be revised and updated to align with new requirements of the Act and this final rule. In the preamble to Subpart E, ACF recommends that Lead Agencies consult the recently published *Caring for Our Children Basics (CfoC Basics)* for guidance on establishing health and safety standards.

Comment: In the NPRM, we requested comment on whether the *CfoC Basics* should replace the current HHS minimum standards as the new health and safety guidelines for Tribes. Commenters agreed that the HHS minimum standards need to be updated but emphasized that the standards should not be updated without Tribal consultation. In addition, several commenters asked that Tribes be given the flexibility to incorporate customs and traditions into care, standards, and caregiver trainings.

Response: ACF is committed to consultation with Tribes and will not release revised minimum standards without first consulting Tribes. We have begun the process of revising the standards with guidance from a workgroup composed of Tribal CCDF health and safety experts. The group is reviewing *CfoC Basics* and adding Tribal customs and traditions, such as the use of cradleboards. We will use these revised standards to consult with Tribes and hope to reissue them shortly.

Comment: Overall, the commenters were supportive of the new requirements around health and safety. One commenter asked that individual Tribes be granted exemptions to specific requirements if the Tribe provides an adequate plan for addressing health and safety with limited resources.

Response: We declined to allow Tribes to request exemptions to the health and safety requirements at § 98.41. As stated earlier, we view these requirements to be a baseline for health and safety. Health and safety is the foundation of quality in child care, and health promotion in child care settings can improve children's development. These changes will make significant strides in strengthening standards to ensure the basic safety, health, and well-being of children receiving a child care subsidy.

Comment: One commenter wrote recommending that "States be required to communicate, coordinate and collaborate with any Tribe in their jurisdiction for training opportunities and professional development, and provide documentation of the same. States should fund participation as much as possible." The commenter also asked that Tribal monitoring inspectors also have access to the State inspectors' training opportunities.

Response: The Act already requires States to make training and professional development opportunities accessible to Tribal caregivers, teachers, and directors. The training should also be appropriate for Native American children. These requirements, located in Subpart E at §§ 98.44(b)(2)(vi) and 98.44(b)(2)(iv)(D), give States the obligation to communicate, coordinate, and collaborate with Tribes on training opportunities. We also strongly encourage States to make training opportunities accessible to Tribal monitoring inspectors, when appropriate. States and Tribal Lead Agencies should document this collaboration in the CCDF Plans.

§ 98.80 General Procedures and Requirements

Section 98.80 provides an introduction to the general procedures and requirements for CCDF Tribal grantees. As discussed above, ACF modified § 98.80(a) so that Tribes are subject to CCDF requirements based on the size of their total CCDF allocation. Please see the earlier discussion of the Tribal CCDF Framework for more information and a discussion of the comments received.

§ 98.81 Application and Plan Procedures

Section 98.81 addresses the application and Plan procedures for Tribal CCDF grantees, and much of the new regulatory language in this section, particularly the Plan exemptions listed at § 98.81(b)(6) and § 98.81(b)(9), reflects the changes made in Section 98.80 (General procedures and requirements) and Section 98.83 (Requirements for Tribal programs). These exemptions will be discussed in greater detail later in the preamble. Tribes receiving large or medium allocations will continue to fill out a traditional Tribal CCDF Plan, described at § 98.81(b), and Tribes receiving small allocations will fill out an abbreviated Plan, described at § 98.81(c). The Plan periods will now be three years, as required by the Act.

Categorical eligibility. At § 98.81(b)(1), the regulations require that the Plan filled out by Tribes receiving large or medium allocations must include the basis for determining family eligibility. The final rule adds language at § 98.81(b)(1)(i) to allow a Tribe, whose Tribal Median Income (TMI) is below a level established by the Secretary, the option of considering any Indian child in the Tribe's service area to be eligible to receive CCDF funds, regardless of the family's income, work, or training status, provided that provision for services still goes to those with the highest need. We are setting the threshold at 85 percent of State Median Income (SMI). Using 85 percent of SMI mirrors other thresholds set by the Act and allows the majority of CCDF Tribes to exercise this option, if they choose. We are not setting this threshold through regulation to allow the level to be updated in the future though consultation and notice.

Comment: We received mixed support for the categorical eligibility provision. NICCA commented that they appreciated ". . . the flexibility this provides to Tribes to determine how to provide quality, consistent early childhood services to best meet their communities' needs." Other commenters worried that this provision would increase waitlists and would increase the potential for fraud or the prioritization of Tribal Council members' children.

Response: If Tribes choose to take advantage of this option, then they can create opportunities to align CCDF programs with other Tribal early childhood programs, including Tribal home visiting, Early Head Start, and Head Start. This provision also allows Tribes to better take advantage of Early Head Start-Child Care Partnership grants. There are limited resources in Tribal communities, and we wanted to create the flexibility within the CCDF program to more easily align with other early childhood programs.

However, we do acknowledge the commenters' concerns. In response, the final rule requires Tribes that take this option ensure that provision for services still goes to those with the highest need. Tribal Lead Agencies will describe in their Plans how they are ensuring those families with the greatest need are receiving CCDF services. We also note that, while Tribes can determine any Indian child eligible regardless of the family's income, work, or training status, other requirements, such as the sliding fee scale, still apply.

In addition, if a Tribe chooses to take this option, the Tribe's CCDF Plan must show a comparison of TMI and SMI by family size. The Tribe will also need to include in the Plan the documentation of the TMI data source. Tribes may use tribally-collected income data, but we strongly recommend that Tribes use Census data. The data should be the most recent TMI and SMI data available. We will provide technical assistance in documenting the Tribe's TMI to Tribes that choose this option.

Income eligibility. The final rule moves previously-existing regulatory language from § 98.80(f) to § 98.81(b)(1)(ii). Under this revised provision, if a Tribe chooses not to exercise the option for categorical eligibility at § 98.81(b)(1)(i) or has a TMI higher than 85 percent of SMI, then the Tribe would determine eligibility for services in accordance with § 98.20(a)(2). That is, Tribes will set income eligibility requirements that do not exceed 85 percent of SMI or TMI. Tribes will continue to have the option of using either 85 percent of SMI or 85 percent of TMI.

Comment: Several Tribes and tribal organizations were worried that moving this provision would limit Tribes' flexibility to make decisions about income eligibility.

Response: Moving this provision does not affect current policy. Tribes continue to have the flexibility to set income eligibility requirements for their program and communities. In accordance with § 98.20(a)(2), a family's income may not exceed 85 percent of SMI or TMI.

Payment rates. The final rule exempts all Tribes from the requirement to use a market rate survey or alternative methodology to set provider payment rates (discussed later in this preamble). However, at § 98.81(b)(5), we require that Plans submitted by Tribes receiving large or medium allocations include a description of the Tribe's payment rates; how they are established; and how they support quality, and where applicable, cultural and linguistic appropriateness. While market rate surveys or alternative methodologies do not necessarily make sense for Tribal communities, it is important for Tribal Lead Agencies to have rates sufficient to provide equal access to the full range of child care services, including high-quality child care. We did not receive comments on this provision.

Plan exemptions. At § 98.81(b)(6), ACF adds eight new Plan exemptions for Tribes receiving large or medium allocations. In the NPRM, we proposed that such Tribal Lead Agencies would be exempt from including in their Plans descriptions of the market rate survey or alternative methodology; the licensing requirements applicable to child care services; and the early learning guidelines. We are keeping these three exemptions in the final rule, as well as adding five additional exemptions. Tribal Lead Agencies are also exempt from including in their Plans the certification to develop the CCDF Plan in consultation with the State Advisory Council; the identification of the public or private entities designated to receive private funds; the descriptions relating to Matching funds; and the description of how the Lead Agency prioritizes increasing access to high-quality child care in areas with high concentrations of poverty. These requirements do not apply to Tribal communities, and these exemptions mirror changes made in Section 98.83. They are discussed in further detail later in the preamble.

At § 98.81(b)(9), Plans for Tribes receiving medium allocations are exempt from the requirements relating to a description of the child care certificate program, unless the Tribe choses to include those services. This exemption corresponds with the exemption in Section 98.83(e) discussed later in the preamble.

Plans for Tribes receiving small allocations. Tribes receiving small allocations (less than $250,000) are exempt from the majority of CCDF requirements. These Tribes are only subject to core CCDF requirements, described later in Section 98.83(f). As such, at § 98.81(c), we require that these Tribes fill out an abbreviated CCDF Plan, tailored to these core requirements. A shorter Plan application is more aligned with the level of funding that these Tribes receive. All of the Plan exemptions described in § 98.81(b) for Tribes receiving large or medium allocations will also apply to Tribes receiving small allocations. ACF will release a Program Instruction defining the elements that will be included in the abbreviated Plan for Tribes receiving small allocations.

§ 98.82 Coordination

Section 98.82 requires Tribal Lead Agencies to coordinate with State CCDF programs and with other Federal, State, local, and Tribal child care and child development programs. Tribal Lead Agencies must also coordinate with the entities listed at § 98.12 and § 98.14.

Comment: One commenter asked us to clarify in the regulatory language that Tribal Lead Agencies need to coordinate, to the extent practicable, with the entities listed at § 98.12 and § 98.14.

Response: We agreed with the commenter. The preamble language from our NPRM made it clear that our expectation is that Tribal Lead Agencies should coordinate to the extent practicable, so we added the regulatory language to clarify this expectation in the final rule. This addition does not change pre-existing policy; it serves as a clarification of the regulatory language.

The regulations at § 98.82 require Tribal Lead Agencies to coordinate with the entities described at § 98.14 in the development of their Plans and the provision of services, to the extent practicable. This list includes newly added child care licensing, Head Start collaboration, State Advisory Councils on Early Childhood Education and Care or similar coordinating bodies, statewide afterschool networks, emergency management and response, CACFP, services for children experiencing homelessness, Medicaid, and mental health services. We do recognize that Tribes may not always have access or connections with these entities. Many of these agencies, especially the State Advisory Councils and the statewide afterschool networks, interact primarily on the State level. Others, including child care licensing and Head Start, may not exist in the Tribe's service area.

Tribes should coordinate with these agencies to the extent possible. The Tribal Plan pre-print will ask Tribes to describe their efforts to coordinate with all the entities listed at § 98.14, but if coordination is not applicable, then the Tribes may simply say so in their Plans. We will support Tribal Lead Agency efforts to coordinate with these entities and plan to provide technical assistance to both Tribes and States to promote Tribal access and participation.

Tribes should also take note of two new provisions in the Act, reiterated in this final rule, which require State coordination with Tribes. First, at § 98.10(f), State Lead Agencies must collaborate and coordinate with the Tribes, at the Tribes' option, in a timely manner in the development of the State Plan. States must be proactive in reaching out to the Tribal officials for collaboration and are required to describe how they collaborated and coordinated with Tribes in their State Plans.

Second, State Lead Agencies must have training and professional development in place designed to enable child care providers to promote the social, emotional, physical, and cognitive development of children and to improve the knowledge and skills of child care caregivers, teachers, and directors in working with children and their parents. Section 98.44(b)(2)(vi) requires that this training and professional development be accessible to caregivers, teachers, and directors of CCDF child care providers supported through Indian Tribes or Tribal organizations. Section 98.44(b)(2)(iv)(D) provides that the training and professional development should also, to the extent practicable, be appropriate for Native American children. Tribes should work with States to help ensure that these statutory requirements are met. Tribal CCDF programs should also coordinate with other childhood development programs located in the Tribal service area, including any programs that support the preservation and maintenance of native languages.

§ 98.83 Requirements for Tribal Programs

Section 98.83 addresses specific requirements for Tribal CCDF programs. In recognition of the unique social and economic circumstances in many Tribal communities, Tribal Lead Agencies are exempt from a number of CCDF requirements. At paragraph (d)(1), we exempt all Tribes, regardless of allocation size, from: A consumer education Web site at § 98.33(a); the requirements for licensing applicable to child care services at § 98.40; the professional development framework at § 98.44(a); the market rate survey or alternative methodology and the related requirements at § 98.45(b)(2); the requirement that Lead Agencies prioritize increasing access to high-quality child care in areas of high concentrations of poverty; and the quality progress report at § 98.53(f). Tribes that receive medium or small CCDF allocations are also exempt from the requirements of operating a certificate program at § 98.30(a) and (d). Tribes that receive small allocations are exempt from the majority of the new CCDF requirements to give these Tribes more flexibility in how they spend their CCDF funds. Finally, two provisions apply to all Tribes, unless the Tribe describes an alternative in its Plan: Monitoring of child care providers and facilities at § 98.42(b)(2) and conducting background checks at § 98.43.

We are also removing previously-existing language on immunizations so that Tribes must now assure that children receiving CCDF services are age-appropriately immunized. We added regulatory language to add clarity to the previously-existing exemptions; this language does not change the previous policy. ACF added two new paragraphs at (d)(2) and (d)(3) giving Tribes more flexibility around the monitoring inspections requirements and the requirement for comprehensive background checks. At paragraph (e), ACF exempts Tribes receiving medium or small CCDF allocations from the requirement to operate a certificate program. At paragraph (f), ACF adds more flexibility for Tribes receiving small allocations by only subjecting them to core CCDF requirements.

Service area. The final rule includes a technical addition at § 98.83(b) to clarify that Tribes (with the exception of Tribes without reservations located in Alaska, California, or Oklahoma) must operate their CCDF programs on or near Indian reservations. Long-standing ACF policy guidance clarifies that a Tribe's service area must be "on or near the reservation," and therefore must be within a reasonably close geographic proximity to the delineated borders of a Tribe's reservation. Tribes that do not have reservations must establish service areas within reasonably close geographic proximity to the area where the Tribe's population resides. ACF will not approve an entire State as a Tribe's service area. This policy clarification does not affect States' jurisdiction over child care licensing. Tribal service areas are also addressed in the regulations at § 98.81(b)(2)(ii), and the same policy guidance applies.

Comment: One commenter asked ACF to delete the exception for Alaska, California, and Oklahoma because several Tribes in these States now have reservations.

Response: We declined to remove this exception from the regulatory language. Although there are reservations in Alaska, California, and Oklahoma, the majority of Tribes in these States do not have reservations. Tribes located in these three States that have an established reservation area should define their service area to be "on or near" the reservation.

Consumer education Web site. All Tribes are exempt from the requirement for a consumer education Web site at § 98.33(a) because of the administrative cost of building a Web site, as well as the lack of reliable high-speed internet in some Tribal areas. Furthermore, in some instances, the small number of child care providers in the Tribe's service area may not warrant the development and maintenance of a Web site. However, where appropriate, we encourage Tribes to implement Web sites for consumer education and to work with entities, such as States or child care resource and referral agencies that maintain provider-specific information on a Web site. For example, in cases where Tribal child care providers are licensed by the State, information about compliance with health and safety requirements should be available on the State's Web site. We did not receive any comments on this exemption.

Licensing for child care services. ACF is exempting all Tribes from the requirement to have in effect licensing requirements applicable to child care services at § 98.40. This is a pre-existing statutory and regulatory requirement that was re-affirmed by the reauthorized Act. The majority of CCDF Tribal grantees do not have their own licensing requirements. Many Tribes certify in their Plans that they have adopted their State's licensing standards, but these requirements may not be appropriate for Tribal communities. In addition, requiring Tribes to have licensing requirements is counter to Section 658O(c)(2)(D) of the Act, which requires that in lieu of any licensing and regulatory requirements under State or local law, the Secretary, in consultation with Indian Tribes and Tribal organizations, shall develop minimum child care standards that shall be applicable to Indian Tribes and Tribal organization receiving assistance under this subchapter. Tribes may instead use the voluntary guidelines issued by HHS, described earlier in the preamble. We did not receive any comments on this exemption.

Training and professional development framework. We are exempting Tribes from the requirement at § 98.44(a) to describe in their CCDF Plan the State framework for professional development. This requirement is State-specific and not relevant for Tribes.

We do note, as discussed in greater detail earlier in the preamble, that States are required to communicate, coordinate, and collaborate with Tribes around training and professional development opportunities to make sure that tribal providers have access to training opportunities. Ongoing State professional development must be accessible to caregivers supported through Indian Tribes and Tribal organizations. The trainings must also be, to the extent practicable, appropriate for populations of Native American and Native Hawaiian children.

Market rate survey or alternative methodology. Section 98.83(d)(1)(iv) of the final rule exempts all Tribes from conducting a market rate survey or alternative methodology and all of the related requirements. In many Tribal communities, the child care market is extremely limited. Also, many Tribes are located in rural, isolated areas, making a market rate survey or alternative methodology difficult. Furthermore, § 98.83(e) of the final rule exempts Tribes receiving CCDF allocations of $1 million or less (medium and small allocations) from operating a certificate program. Therefore, these Tribes are not required to offer the full range of child care services. For these Tribes especially, market rate surveys are not relevant. Despite exempting Tribes from these requirements, setting payment rates to support quality is essential to providing equal access to child care services. Tribes receiving large or medium allocations will be asked in their Plans how rates were set and how these rates support quality. We did not receive any comments on this exemption.

Increasing access to high-quality in concentrations of poverty. The final rule exempts all Tribes from the requirement at § 98.46(b) to prioritize increasing access to high-quality child care and development services for children and families in areas that have significant concentrations of poverty and unemployment and that do not have a sufficient number of such programs.

Comment: In the NPRM, Tribes were subject to this requirement, and several commenters did not believe that it was appropriate for Tribal communities.

Response: We agreed with the commenters. Given the poverty that exists on many Tribal reservations and service areas, we decided this requirement was redundant for Tribes. In addition, this exemption aligns with another pre-existing policy that exempts Tribes from the requirement to give priority for services to children of families with very low family income.

Although Tribes are exempt from this requirement, we note that Tribes receiving large and medium allocations are subject to the requirements at § 98.46(a)(2) and (3). These Tribal Lead Agencies must give priority for services to children with special needs, which may include any vulnerable populations as define by the Lead Agency and to children experiencing homelessness.

Quality Progress Report. At § 98.83(d)(1)(vii), Tribal Lead Agencies are exempt from completing the Quality Progress Report (QPR) at § 98.53(f), which is a revised version of the former Plan appendix, the Quality Performance Report. In the future, we are planning to add additional questions on quality improvement activities to the Tribal Plan, ACF–700, and ACF–696T, but we will discuss these changes with Tribes and provide opportunity for public comment.

The QPR includes a report describing any changes to State regulations, enforcement mechanisms, or other policies addressing health and safety based on an annual review and assessment of serious child injuries and any deaths occurring in child care programs. Under this provision, Tribes are exempt from completing the QPR, including the review and assessment of serious injuries and deaths. Notwithstanding, we encourage Tribal Lead Agencies to complete a similar process to the one described in the QPR and to review the reported serious injuries or deaths and make policy or programmatic changes that could potentially save a child's life.

Immunization requirement. Consistent with the final rule's overall focus on promoting high-quality care that supports children's learning and development, § 98.83(d) of the final rule removes the reference to § 98.41(a)(1)(i). This change extends coverage of CCDF health and safety requirements related to immunization so that the requirements apply to Tribes, whereas previously Tribes were exempt. At the time the previous regulations were issued in 1998, minimum Tribal health and safety standards had not yet been developed and released by HHS. However, the minimum Tribal standards have subsequently been developed and released, and the standards address immunization in a manner that is consistent with the requirements at § 98.41(a)(1)(i). As a result, there is no longer a compelling reason to continue to exempt Tribes from this regulatory requirement. Many Tribes have already moved forward with implementing immunization requirements for children receiving CCDF assistance. By extending the requirement to Tribes, we will ensure that Indian children receiving CCDF assistance are age-appropriately immunized as part of efforts to prevent and control infectious diseases.

Comment: Commenters expressed concern about the new immunization requirement and asked for grace period to implement the requirement.

Response: As described earlier in the preamble, ACF will not be begin determining compliance with the final rule until the next Plan cycle with the FY 2020–2022 CCDF Plans. Tribal Lead Agencies will be able to use that time before that Plan cycle to work toward implementing the immunization requirements. In addition, as with States and Territories, Tribes have flexibility to determine the method to implement the immunization requirement. For example, they may require parents to provide proof of immunization as part of CCDF eligibility determinations, or they may require child care providers to maintain proof of immunization for children enrolled in their care. We also note, as indicated in the regulation, Lead Agencies have the option to exempt the following groups: (1) Children who are cared for by relatives; (2) children who receive care in their own homes; (3) children whose parents object on religious grounds; and (4) children whose medical condition requires that immunizations not be given. In determining which immunizations will be required, a Tribal Lead Agency has flexibility to apply its own immunization recommendations or standards. Many Tribes may choose to adopt recommendations from the Indian Health Service or the State's public health agency.

Monitoring inspections. In the final rule, all Tribes, regardless of allocation size, are subject to the monitoring requirements at § 98.42(b)(2), which reflect the requirements in the Act. However, we allow Tribal Lead Agencies to describe an alternative monitoring approach in their Plans, subject to ACF approval, and must provide adequate justification for the approach. Section 658E(c)(2)(K) of the Act requires at least one pre-licensure inspection and annual unannounced monitoring for licensed child care providers. License-exempt providers are subject to annual monitoring on health, safety, and fire standards. The rule also allows Lead Agencies to use differential monitoring strategies and to develop alternate monitoring requirements for care provided in the child's home.

Comment: Commenters expressed support for the flexibility to propose an alternative approach and to partner with other agencies to conduct monitoring.

Response: In our 2013 NPRM, we also proposed that Tribal Lead Agencies would be subject to monitoring requirements, and we received many comments asking for more flexibility for Tribes. As with the 2013 NPRM, the monitoring requirements in the Act and the additional requirements described in this rule may not be culturally appropriate for some Tribal communities. By allowing Tribes to describe alternative monitoring strategies in their Plans, we intend to give Tribal Lead Agencies some flexibility in determining which monitoring requirements should apply to child care providers. Tribes cannot use this flexibility to bypass the monitoring requirement altogether, but may introduce a monitoring strategy that is culturally appropriate or more financially feasible for their communities. Tribes may also use this flexibility to partner with other agencies that may already be conducting monitoring visits, such as State Lead Agencies, the Indian Health Service, or the Child and Adult Care Food Program. Coordinating and partnering with existing agencies can help lessen the financial and administrative burden.

Comment: One comment asked for clarity around how the monitoring requirement for licensed and licensed-exempt child care providers would apply to Tribes. The commenter noted that most Tribes do not have licensing requirements in place.

Response: We declined to make any Tribal-specific changes to how the monitoring requirements apply to licensed or license-exempt child care providers. If a Tribal child care provider is licensed by the State or by the Tribe, then that provider shall be required to receive at least one pre-licensure visit and an annual unannounced monitoring inspection, provided that the Tribe has not proposed an alternative strategy in the Plan. On the other hand, if the Tribal child care provider is not licensed by the State or the Tribe, then that provider is subject to annual monitoring on health, safety, and fire standards. These monitoring requirements are discussed in greater detail in Subpart E of the preamble.

Comprehensive background checks. Tribal Lead Agencies are subject to the background check requirements at § 98.43. A comprehensive background check includes: An FBI fingerprint check; a search of the National Crime Information Center's National Sex Offender Registry; and a search of the following registries in the State where the child care staff member lives and each State where the staff member has lived for the past five years: State criminal registry using fingerprints, State sex offender registry, and the State child abuse and neglect registry, as described at § 98.43(b).

We note that, in order to conduct an FBI fingerprint check using Next Generation Identification, Lead Agencies must act under an authority granted by a Federal statute. States, as described in Subpart E, may choose among three federal laws that grant authority for FBI background checks for child care staff. These three statutes are: The Act, Public Law 92–544, and the National Child Protection Act/Volunteers for Children Act. These three laws give States the authority to conduct FBI fingerprint checks, but none of them specifically grant that same authority to Tribes. In order for Tribes to conduct FBI background checks, they may use the Indian Child Protection and Family Violence Prevention Act, which, to date, only covers those individuals who are being considered for employment by the Tribe in positions that have regular contact with, or control over, Indian children. Otherwise, Tribes will need to work with States to complete the FBI background check using a State's authority under an approved Public Law 92–544 statute or under procedures established pursuant to the National Child Protection Act/Volunteers for Children Act (NCPA/VCA). We understand that this may present difficulties for Tribes, especially for those that do not currently have a partnership with the State. Therefore, in the final rule at § 98.83(d)(3), we are allowing Tribes to describe an alternative background check approach in their Plans, subject to ACF approval, and must describe an adequate justification for the approach.

Comment: Commenters were very supportive of the requirements for background checks for child care staff members. One Tribe wrote that it "supports criminal background checks performed on all types of child care providers and household members over 18 years of age. We think in the safety of our children and persons responsible for their care."

Commenters also described the substantial amounts of time and money needed to complete the checks. They worried about jurisdictional issues between Tribes and States, making it difficult for Tribes to gain access to all of the required checks. In addition, other commenters felt that particular elements, such as some of the disqualifying crimes may not be appropriate for Tribes. One Tribe said, "Tribes should . . . determine whether providers meet qualifications and as sovereign nations, should have the flexibility to implement a waiver and appeals process for some of the crimes listed in § 98.43(c)(1)."

Response: We agree with the commenters that comprehensive background checks are important for ensuring children's health and safety in child care. We applaud the commenters' support of these requirements. However, we also acknowledge the significant challenges that face Tribes in being able to comply. As such, Tribes will be allowed to describe an alternative approach in their Plans and describe how the approach continues to protect the health and safety of children.

ACF will not approve approaches with blanket exemptions or waivers to the background check requirements. We expect to allow some flexibility around the components of a comprehensive background check, particularly when there are jurisdictional issues between States and Tribes or when conducting background checks on other adults residing in family child care homes. Tribes should coordinate with States as much as possible in order to obtain access to the FBI and State databases. However, without an authorizing statute, we felt that Tribes may need flexibility to propose alternative checks that ensure children's health and safety.

When a Tribe is conducting background checks on other adults in a family child care home, we have heard through our consultation sessions that many Tribal families reside in households with several generations. Requiring all members of the household to complete all five components of a comprehensive background check could be burdensome for the family and for the Tribal Lead Agency. Therefore, the Tribal Lead Agency could also use an alternative strategy to conduct background checks on other individuals in a family child care home. ACF expects that Tribal Lead Agencies will conduct some components of a background check for these individuals.

We may also grant flexibility to Tribes around the disqualifying crimes. We will not approve any approaches that ask for flexibility around violent crimes or crimes against children. Tribes may also request flexibility around the requirement to carry out background check requests within 45 days. In many cases, Tribes must rely on State systems, which may extend the background check process.

We expect Tribes to comply with the background check requirements to the best of their abilities and will continue to work with Tribes to provide guidance, support, and technical assistance. Background checks continue to be a vital instrument in safeguarding children's health and safety. Tribal alternative approaches must be able to justify how they are appropriately comprehensive and protect the health and safety of children in child care.

Certificate program. At § 98.83(e) of this final rule, Tribes that receive medium or small allocations are exempt from operating a certificate program. We recognize that small Tribal grantees may not have sufficient resources or infrastructure to effectively operate a certificate program. In addition, many smaller Tribes are located in less-populated, rural communities that frequently lack the well-developed child care market and supply of providers that is necessary for a certificate program. Tribes that receive large allocations will still be required to offer all categories of care through a certificate program.

Under the previous regulations, Tribes receiving smaller CCDF grants were exempt from operating a certificate program. The dollar threshold for determining which Tribes were exempt from operating a certificate program was established by the Secretary. It was set at $500,000 in 1998 and has not changed. By exempting Tribes receiving medium or small allocations from operating a certificate program, we are effectively raising the dollar threshold to $1 million. As discussed earlier, we consider medium allocations to be grants between $250,000 and $1 million and small allocations to be grants of less than $250,000. This expands the number of Tribes that are exempt from operating a certificate program. This higher threshold will allow Tribes with smaller CCDF allocations to focus on implementing the new requirements in this final rule, specifically concentrating on the health and safety and quality requirements. Please see the earlier discussion of the Tribal CCDF framework for more information and a discussion of the comments received.

Small allocations requirements. Tribes receiving the smallest CCDF allocations should not be subject to the same requirements as the Tribes receiving larger grant awards. Therefore, in this final rule, ACF is exempting Tribes receiving small allocations (less than $250,000) from the majority of the CCDF requirements to give these Tribes more flexibility in how they spend their CCDF funds and to focus these funds on health and safety and quality spending. At § 98.83(f), we require that Tribal Lead Agencies receiving small allocations spend their CCDF funds in alignment with the goals and purposes of CCDF as described in § 98.1. These Tribal Lead Agencies must also comply with the health and safety requirements, monitoring requirements, background checks requirements, and quality spending requirements. The regulatory language at § 98.83(f) defines the only CCDF provisions that apply to Tribes with small allocations.

These limited requirements allow Tribes with small allocations the flexibility to spend their CCDF funds in ways that would most benefit their communities. Tribes could choose to spend all of their CCDF funds on quality activities, or they could invest all of their funds into a Tribal CCDF-operated center. These Tribes are also required to meet the health and safety requirements, including the monitoring and background check requirements, as discussed earlier. In addition, Tribes with small allocations need to define Indian child and Indian reservation or tribal service area as they relate to eligibility. Tribes that receive small allocations also continue to be required to meet the fiscal, audit, and reporting requirements in the rule. To align with these limited CCDF requirements, Tribes with small allocations will complete an abbreviated Plan, as discussed earlier. This approach balances increased flexibility with accountability, and ACF encourages these Tribes to focus their CCDF spending on ensuring health and safety and quality for children in child care.

Comment: One commenter asked ACF to remove language at § 98.83(f)(11) that allows ACF to require "any other requirement established by the Secretary."

Response: We declined to remove this regulatory language from the final rule. We reserve the option to require additional requirements described in this final rule. If ACF chooses to exercise this option, we will inform Tribes in advance and will engage in formal consultation.

Quality improvement activities. All Tribes and Tribal organizations are subject to the quality spending and quality improvement activities requirements described at § 98.83(g) and § 98.53. The old regulations at § 98.83(f) exempted Tribes and Tribal organizations with smaller allocations (total CCDF allocations less than $500,000) from the requirement to spend four percent on quality activities. We amended § 98.83(f) by deleting paragraph (3) so that all Tribes, regardless of their allocation size, are now required to meet quality spending requirements included at § 98.83(g).

The Act requires State and Territory Lead Agencies to spend increasing minimum amounts on quality activities, reaching nine percent in FY 2020. As described earlier, Tribal Lead Agencies have a slightly different phase-in period, so that Tribes will be spending increasing amounts to reach nine percent by FY 2022. In addition, Tribal Lead Agencies receiving large or medium allocations must spend at least three percent on quality activities to support infants and toddlers. Tribes with small allocations are exempt from this requirement. The minimum quality expenditures are considered baselines; Tribal Lead Agencies may spend a larger percentage of funds on quality, as described at § 98.83(g)(3).

Comment: Overall, Tribal commenters supported the quality spending requirements. A couple of commenters were concerned that spending increasing percentages of CCDF funds on quality improvement activities would limit the funds for direct services and suggested that the minimum quality percentages should be based on the size of a Tribe's allocation.

Response: We are pleased that Tribal commenters were supportive of this new requirement. A primary goal of this final rule is to promote high-quality child care to support children's learning and development. We want to ensure that Indian children and Tribes benefit from the increased recognition of the importance of high-quality child care. As such, we will not be limiting the quality spending percentages based on the size of the Tribe's allocation. Because the quality requirement is applied as a percentage of the Tribe's CCDF expenditures, the amount required will be relatively small for Tribes with small allocations.

There are a wide range of quality improvement activities that Tribes have the flexibility to implement, and the scope of these efforts can be adjusted based on the resources available so that even smaller Tribal Lead Agencies can effectively promote the quality of child care. Most Tribal Lead Agencies are likely already engaged in activities that count as quality improvement. We will provide technical assistance to help Tribes identify current activities that may count towards meeting the quality spending requirement, as well as appropriate new opportunities for quality spending.

The revisions to § 98.53 (Activities to Improve the Quality of Child Care), discussed earlier in this preamble, provide a systemic framework for organizing, guiding, and measuring progress of quality improvement activities. We recognize that this systemic framework may be more relevant for States than for many Tribes, given the unique circumstances of Tribal communities. However, Tribes may implement selected components of the quality framework at § 98.53, such as training for caregivers, teachers, and directors or grants to improve health and safety.

The revisions to § 98.53 in no way restrict Tribes' ability to spend CCDF quality dollars on a wide range of quality improvement activities. As is currently the case, these activities could include: Child care resource and referral activities; consumer education; grants or loans to assist providers; training and technical assistance for providers and caregivers; improving salaries of caregivers, teachers and directors; monitoring or enforcement of health and safety standards; and other activities to improve the quality of child care, including native language lessons and cultural curriculum development. While Tribes have broad flexibility, to the degree possible, Tribes should plan strategically and systemically when implementing their quality initiatives in order to maximize the effectiveness of those efforts.

In addition, we encourage strong Tribal-State partnerships that promote Tribal participation in States' systemic initiatives, as well as State support for Tribal initiatives. For example, Tribes and States can work together to ensure that quality initiatives in the State are culturally relevant and appropriate for Tribes, and to encourage Tribal child care providers to participate in State initiatives, such as QRIS and professional development systems.

Comment: Two commenters suggested that Tribes should be exempt from the three percent infant and toddler quality spending requirement because some Tribes only deliver after-school or school age services.

Response: In the final rule, Tribes receiving large and medium allocations are subject to the requirement to spend three percent on quality activities for infants and toddlers. Tribes have previously been exempt from the targeted fund requirement relating to infants and toddlers under annual appropriations law. However, infants and toddlers are an underserved population, and therefore, it is important that quality dollars are directed to increase the quality of their care. In addition, in accordance with § 98.16(x), Tribes receiving large and medium allocations are expected to describe in their Plans the strategies used to increase supply and improve the quality of child care services for children in underserved areas, infants and toddlers, children with disabilities, and children who receive care during nontraditional hours. Tribal Lead Agencies can use infant and toddler quality dollars as a strategy to increase supply and improve the quality of child care service for infants and toddlers.

The final rule exempts small allocation Tribes from this requirement because many of these Tribes have built programs around school age and after-school care. However, we do strongly encourage these Tribes to consider spending quality funds to support infants and toddlers.

Base amount. In the NPRM, OCC proposed to increase the base amount from $20,000 to $30,000, starting in FY 2017, to account for inflation that has eroded the value of the base amount since it was originally established in 1998. Each year, Tribal CCDF grantees' CCDF allocations are based on a Discretionary base amount, as well as a Discretionary and Mandatory amount based on the number of children submitted in the child count.

Comment: We received mixed comments on whether the base amount should be raised to $30,000. Several commenters suggested that a cap should be placed on the total base amount that Tribal consortia can receive in order for a more equitable distribution of funds. Other commenters were concerned that the increased base amount would decrease the per child amount.

Response: We will be going forward with our proposal to increase the base amount starting in FY 2017. Tribal commenters were correct that an increase in the Discretionary base amount will result in a lower Discretionary per child amount than would occur without the change in base amount. An increase in the base amount benefits smaller Tribes and consortia. Larger Tribes will receive less funding then they would have in the absence of this change.

We also intend, to the extent possible, to increase the Tribal set-aside to hold all Tribes harmless so that no Tribe will receive a decrease in funds.

The base amount is not included in regulation and does not require regulatory change. ACF may continue to adjust the base amount in the future, following consultation with Tribes.

Comment: Commenters asked for clarification in how the Discretionary base amount interacts with the new requirement that Tribes receiving large and medium allocations must spend 70 percent of their CCDF Discretionary funds (after reserving the required amount for quality activities) on direct services.

Response: The final rule includes language at § 98.83(h) exempting the base amount from the 70 percent direct services requirement. In addition, pre-existing policy exempts the base amount from the administrative cost limitation and the quality expenditure requirements.

As noted by the commenters, Tribes receiving large and medium allocations are subject to the requirement at § 98.50(f) that requires Lead Agencies to reserve from their CCDF Discretionary funds the required minimum quality expenditures. From the leftover funds, these Tribal Lead Agencies must spend not less than 70 percent to fund direct services. This requirement is described at greater length in the preamble of Subpart F. Tribes receiving small allocations are exempt from this requirement.

§ 98.84 Construction and Renovation of Child Care Facilities

Section 98.84 describes the procedures and requirements around Tribal construction or renovation of child care facilities. The CCDBG Act of 2014 reaffirmed Tribes' ability to request to use CCDF funds for construction or renovation purposes. Section 658O(c)(6)(C) of the Act continues to disallow the use of CCDF funds for construction or renovation if it will result in a decrease in the level of child care services. However, the Act now allows for a waiver for this clause if the decrease in the level of child care services is temporary. A Tribe will also need to submit a plan to ACF demonstrating that, after the construction or renovation is completed, the level of child care services will increase or the quality of child care services will improve. In order for a Tribe to use CCDF funds on construction or renovation while decreasing the level of direct services, the Tribe must certify that, after the construction is completed, the number of children served will increase or the quality of care will increase. The final rule reiterates this language from the Act at § 98.84(b)(3).

Comment: One commenter asked ACF to define through regulation a definition for the length of time that a decrease in direct services may be considered temporary.

Response: We declined to define a temporary decrease in the level of direct services in this final rule. ACF will issue a revised Program Instruction to describe the application process for using CCDF funds on construction or renovation. This Program Instruction will also be updated to reflect the new requirements in the Act and will address the length of time that a decrease in direct services may be considered temporary. The Program Instruction is used by ACF to expand upon and further describe the statutory and regulatory requirements. In the event that the CCDF regulations do not address a specific issue, then we look to Head Start and HHS's generally-accepted construction and renovation guidelines.

Subpart J—Monitoring, Non-Compliance, and Complaints

Subpart J contains provisions regarding HHS monitoring of Lead Agencies to ensure compliance with CCDF requirements, processes for examining complaints and for determining non-compliance, and penalties and sanctions for non-compliance. In this final rule we added several technical changes at § 98.92 to align the regulations with the penalties and sanctions requirements in effect for determining non-compliance.

§ 98.92 Penalties and Sanctions

Previously-existing regulations allow HHS to impose penalties and other appropriate sanctions for a Lead Agency's failure to substantially comply with the Act, the implementing regulations, or the Plan. Such penalties and sanctions may include the disallowance or withholding of CCDF funds in accordance with § 98.92. These regulations remain in effect.

In addition, the final rule adds a new provision at § 98.92(b) in accordance with two penalties added by the reauthorization of the Act. New section 658E(c)(3)(B)(ii) requires HHS to annually prepare a report that contains a determination about whether each Lead Agency uses CCDF funding in accordance with priority for services provisions. These priority provisions are reiterated at § 98.46(a) of these regulations, and require Lead Agencies to give priority to children with special needs, children from families with very low incomes, and children experiencing homelessness. The Act requires HHS to impose a penalty on any Lead Agency failing to meet the priority for services requirements. A new regulatory provision at § 98.92(b)(3) implements this penalty.

In accordance with the Act, the final rule provides that a penalty of five percent of the CCDF Discretionary Funds shall be withheld for any Fiscal Year the Secretary determines that the Lead Agency has failed to give priority for service in accordance with § 98.44. This penalty will be withheld no earlier than the first full Fiscal Year following the determination to apply the penalty, and the penalty will not be applied if the Lead Agency corrects its failure to comply and amends its CCDF Plan within six months of being notified of the failure. The Secretary may waive a penalty for one year in the event of extraordinary circumstances, such as a natural disaster. The second new penalty was added by section 658H(j)(3) of the Act and is related to the new criminal background check requirements. This final rule adds this penalty through new regulatory language at § 98.92(b)(4). In accordance with the Act, the final rule provides that a penalty of five percent of the CCDF Discretionary Funds for a Fiscal Year shall be withheld if the Secretary determines that the State, Territory, or Tribe has failed to comply substantially with the criminal background check requirements at § 98.43. This penalty will be withheld no earlier than the first full Fiscal Year following the determination to apply the penalty, and this penalty will not be applied if the State, Territory or Tribe corrects the failure before the penalty is to be applied or if it submits a plan for corrective action that is acceptable to the Secretary.

Subpart K—Error Rate Reporting

On September 5, 2007, ACF published a Final Rule that added subpart K to the CCDF regulations. This subpart established requirements for the reporting of error rates in the expenditure of CCDF grant funds by the 50 States, the District of Columbia, and Puerto Rico. The error reports are designed to implement provisions of the Improper Payments Information Act of 2002 (Pub. L. 107–300) and the subsequent Improper Payments Elimination and Recovery Act (Pub. L. 111–204). This final rule retains the error reporting requirements at subpart K. In addition to the regulatory requirements at subpart K, details regarding the error rate reporting requirements are contained in forms and instructions that are established through the Office of Management and Budget's (OMB) information collection process. These program integrity efforts help ensure that limited program dollars are going to low-income eligible families for which assistance is attended.

§ 98.100 Error Rate Reporting

Interaction with eligibility requirements. This final rule includes regulatory language at § 98.100(d) defining an improper payment to clarify that, because a child meeting eligibility requirements at the most recent eligibility determination or redetermination is considered eligible between redeterminations as described in § 98.20(a)(1), any payment for such a child shall not be considered an error or improper payment due to a change in the family's circumstances, as set forth at § 98.21(a) and (b). Several State commenters supported this provision. We added the reference to § 98.21(b) in the final rule to include the graduated phase-out period. If a State chooses to adjust co-payments during the graduated phase-out, failure to properly do so may potentially result in improper payments.

Corrective action plan. This final rule adds § 98.102(c) to require that any Lead Agency with an improper payment rate that exceeds a threshold established by the Secretary must submit a comprehensive corrective action plan, as well as subsequent reports describing progress in implementing the plan. This is a conforming change to match new requirements for corrective action plans that were contained in the recent revisions to the forms and instructions. The corrective action plan must be submitted within 60-days of the deadline for submission of the Lead Agency's standard error rate report required by § 98.102(b).

VI. Regulatory Process Matters

a. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act, (5 U.S.C. 605(b)) requires federal agencies to determine, to the extent feasible, a rule's economic impact on small entities, explore regulatory options for reducing any significant economic impact on a substantial number of such entities, and explain their regulatory approach. This final rule will not result in a significant economic impact on a substantial number of small entities. This rule is intended to implement provisions of the Act, and is not duplicative of other requirements. The reauthorization of the Act and these implementing regulations are intended to better balance the dual purposes of the CCDF program by adding provisions that ensure that healthy, successful child development is a consideration for the CCDF program (*e.g.*, preserving continuity in child care arrangements; ensuring that child care providers meet basic standards for ensuring the safety of children, etc.).

The primary impact of the Act and this final rule is on State, Territory, and Tribal CCDF grantees because the rule articulates a set of expectations for how grantees are to satisfy certain requirements in the Act. To a lesser extent the rule would indirectly affect small businesses and organizations, particularly family child care providers, as discussed in more detail in the Regulatory Impact Analysis below. In particular, requirements for comprehensive criminal background checks and health and safety training in areas such as first-aid and CPR may have an impact on child care providers caring for children receiving CCDF subsidies. However, the rule will not have a significant economic impact on a substantial number of child care providers.

The estimated cost of a comprehensive criminal background check is $55 per check. For the required health and safety training, a number of low-cost or free training options are available. Many States use CCDF quality dollars or other funding to fully or partially cover the costs of background checks and trainings. The health and safety provisions in the rule will primarily affect those CCDF providers currently exempt from State licensing that are not relatives—which account for only about 22 percent of CCDF providers nationally. Finally, we note that the final rule contains many provisions that will benefit child care providers by providing more stable funding through the subsidy program (*e.g.*, eligibility provisions that promote continuity and improved payment practices).

b. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct federal agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The Orders require federal agencies to submit significant regulatory actions to the Office of Management and Budget (OMB) for approval. Section 3(f)(1) of Executive Order 12866 defines "significant regulatory actions", generally as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

We estimate that the reauthorized Act and this NPRM will have an annual effect on the economy of more than $100 million. Therefore, this final rule represents a significant regulatory action within the meaning of section 3(f)(1) of Executive Order 12866. Given both the directives of Executive Orders 12866 and 13563 and the importance of understanding the benefits, costs, and savings associated with these proposed changes, we describe the costs and benefits associated with the proposed changes and available regulatory alternatives below in the Regulatory Impact Analysis.

c. Regulatory Impact Analysis

We have conducted a Regulatory Impact Analysis (RIA) to estimate and describe expected costs and benefits resulting from the reauthorized Act and this final rule. This included evaluating State-by-State policies in major areas of policy change, including monitoring and inspections (including a hotline for parental complaints), background checks, training and professional development, consumer education (including Web site and consumer statement), quality spending, minimum 12-month eligibility and related provisions, increased subsidies, and supply building (see Table 1).

The State policies described in this RIA, including information from the FY 2014–2015 CCDF Plans, represent policies that were in place prior to the reauthorization of the Act. This is consistent with Office of Management and Budget (OMB) Circular A–4 which indicates that in cases where substantial portions of a rule simply restate statutory requirements that would be self-implementing, even in the absence of the regulatory action, the RIA should use a pre-statute baseline (*i.e.*, comparison point for determining impacts).

In conducting the analysis, we also took into account the statutory effective dates for various provisions. A number of States have already begun changing their policies toward compliance with the CCDBG Act of 2014, which was enacted in November of 2014, but data on those changes is not yet available and are not factored into this analysis.

TABLE 1—OVERVIEW OF MAJOR PROVISIONS

	Relevant provisions of CCDBG Act	Provisions of final rule
Health and Safety		
Background checks	658H	§ 98.43.
Monitoring and inspections (including a hotline for parental complaints)	658E(c)(2)(J), 658E(c)(2)(C)	§ 98.42, § 98.32.
Training and Professional Development (Pre-service, orientation, and ongoing training).	658E(c)(2)(G), 658E(c)(2)(I)	§ 98.44.
Consumer Education		
Consumer education website	658E(c)(2)(D), 658E(c)(2)(E)	§ 98.33.
Consumer statement	658E(c)(2)(D), 658E(c)(2)(E)	§ 98.33.

TABLE 1—OVERVIEW OF MAJOR PROVISIONS—Continued

	Relevant provisions of CCDBG Act	Provisions of final rule
Quality Spending		
Quality, infant and toddler spending	658G	§§ 98.53, 98.50(b).
Continuity of Care		
Minimum 12-month eligibility and related provisions	658E(c)(2)(N)	§§ 98.20, 98.21.
Increased subsidy and supply building		
Increased subsidy	658E(c)(4), 658(c)(2)(S)	§ 98.45.

Need for regulatory action. CCDF has far reaching implications for America's low-income children, and the reauthorized Act and this final rule shine a new light on the role that child care plays in child development and making sure children are ready for school. The Act and this final rule take important steps toward ensuring that children's health and safety is being protected in child care settings. Both the Department of Health and Human Services' (HHS) Office of Inspector General (OIG) and the Government Accountability Office (GAO) have identified serious deficiencies with health and safety protections for children in child care. Prior to reauthorization of the Act, there was a wide range of health and safety standards across States. For example, ten States lacked even the most basic first aid and CPR training requirements, and in some cases, this approach to health and safety did not include vital standards in areas such as safe sleep practices and recognition and reporting of suspected child abuse and neglect.

In addition, without any federal monitoring requirement prior to CCDBG reauthorization, 24 States allowed license-exempt family child care providers to self-certify that they met health and safety requirements without any documentation or other verification. As mentioned earlier, the importance of monitoring was highlighted in a recent series of Department of Health and Human Services' (HHS) Office of Inspector General (OIG) audits that identified deficiencies with health and safety protections for children in child care with CCDF providers in several States, including in Arizona, Connecticut, Florida, Louisiana, Maine, Michigan, Minnesota, Pennsylvania, Puerto Rico, and South Carolina. As discussed throughout this final rule, minimum health and safety standards included in the reauthorized Act and this rule are essential to help prevent children from being exposed to child care settings that put their health and safety at risk. The importance of such standards and the inherent risks are discussed at length in *Caring for Our Children* (*Caring for Our Children: National Health and Safety Performance Standards; Guidelines for Early Care and Education Programs, 3rd Edition,* which was produced with the expertise of researchers, physicians, and practitioners. (American Academy of Pediatrics, American Public Health Association, National Resource Center for Health and Safety in Child Care and Early Education. (2011).

Parental choice is a foundational tenet of the CCDF program—to ensure parents are empowered to make their own decisions regarding the child care that best meets their family's needs. Prior to reauthorization, CCDF rules required Lead Agencies to promote informed child care choices by collecting and disseminating consumer education information to parents and the general public. Over the years, economists have researched and written about the problem of information asymmetry in the child care market and the resulting impact both on the supply of high-quality care and a parent's ability to access high-quality care. (Blau, D., The Child Care Problem: An Economic Analysis, 2001; Mocan, N., The Market for Child Care, National Bureau of Economic Research, 2002) In order for parental choice to be meaningful, parents need to have access to information about the choices available to them in the child care market and have some way to gauge the level of quality of providers. The Act and this final rule strengthen consumer education requirements to make information about child care providers more accessible and transparent for parents and the general public.

Stable relationships between a child and their caregiver are an essential aspect of quality. Yet, under current policies, clients may "churn" on and off of CCDF assistance every few months, even when they remain eligible. Some studies show that many families appear to remain eligible for the subsidies after they leave the program, suggesting that child care subsidy durations also are likely influenced by factors unrelated to employment (Grobe, D., R.B. Weber and E.E. Davis (2006). Why do they leave?: Child care subsidy use in Oregon.). Congress and ACF are concerned that State subsidy policies can make it overly burdensome for parents to keep their subsidy, or are not flexible enough to allow for temporary or minor changes in a family's circumstances. This is supported by a study that featured a series of interviews with State and local child care administrators and identified a number of administrative practices that appear to reduce the duration of child care subsidy usage (Adams, G., K. Snyder and J.R. Sandfort, Navigating the child care subsidy system: Policies and practices that affect access and retention. Urban Institute, 2002) Through interviews with "state and local child care administrators and key experts, and focus groups with caseworkers, parents, and providers" in 12 States, the study found that families often faced considerable administrative burden when trying to apply for or recertify their eligibility status. For example, families sometimes had to interact with more than one agency during the application process, had to make more than one trip to an administrative office, and sometimes had to wait for weeks or months to get an appointment with a social worker. In addition, families receiving Temporary Assistance for Needy Families (TANF) sometimes had additional difficulties with redetermination because of the temporary nature of their employment or training activities. The study also found that agencies had different policies regarding the ways in which families could recertify their eligibility status including mail, phone, or fax. Parents often find it difficult to navigate administrative processes and paperwork required to maintain their eligibility when policies are inflexible to changes in a family's circumstances. Policies that make it difficult for parents to keep their subsidy threaten the employment stability of parents and can disrupt children's continuity of care. This final rule establishes a number of family-friendly policies that benefit CCDF families by promoting continuity in subsidy receipt and child care arrangements.

Changes made by the CCDBG Act of 2014 and this final rule, consistent with the revised purposes of the Act, are needed to: Protect the health and safety of children in child care; help parents make informed consumer choices and access information to support child development; provide equal access to stable, high-quality child care for low-income children; and enhance the quality of child care and the early childhood workforce.

Commenters on the proposed rule who had overall reservations about the cost of the Act were typically concerned with the impact of redirecting limited funds to new requirements, including the potential loss of child care slots if funding is diverted from direct services. One commenter said that "few States have a budget environment capable of absorbing the estimated costs of compliance." Others pointed to a need for additional resources in order to fully realize the expectations of the CCDBG reauthorized Act and this final rule. One commenter representing a State child care program said that "in order to advance the worthy goals of the CCDBG Act of 2014, the federal government must either provide sufficient federal resources to fund the envisioned transformation in a prescriptive manner, incrementally increase prescriptive compliance as adequate funds become available to reach the goals or allow States to use available resources with maximum flexibility to achieve results." Some States did submit their own cost calculations and some focused on the financial impact of providing minimum 12-month eligibility and other family-friendly policies. While we do address the potential impact of these policies below, these are not considered costs for the purposes of this analysis, but rather are considered a reallocation of resources rather than a new cost.

A number of national organizations expressed these funding concerns indicating that "achieving the goals of the CCDBG Act to improve the health, safety, and quality of child care and the stability of child care assistance will require additional resources. Congress made a down payment on funding in the recent FY 2016 omnibus budget; however, additional investments will be necessary to ensure the success of the new law and to address the gaps that already exist in the system."

Concerns about costs and tradeoffs are vital to the conversation about implementing the Act and this regulation. Throughout this final rule, we address the individual concerns raised about specific provisions and make adjustments where necessary. Whereas all policies have been discussed in detail in the body of the preamble above, this Regulatory Impact Analysis focuses on quantifying those policies that would have an impact on the overall cost to society of the Act and the final rule. As detailed below, the large majority of costs are related to items explicitly required by the Act. There are places in the final rule where we clarify language from the Act to ensure that the program is implemented in a way that is consistent with the intent of the law.

For the purposes of estimating the costs of these new requirements, the analysis makes a number of assumptions. In the proposed rule, we welcomed comment on all aspects of the analysis, but throughout the narrative, we specifically requested comment in areas where there is uncertainty. While, as stated above, a number of commenters did express general concerns about the overall cost of the proposal, few provided specific comments on the assumptions made by the Regulatory Impact Analysis. Those specific comments that we did receive are included in the analysis below and largely supported the underlying assumptions of our original analysis.

One overarching assumption that is consistent across all the estimates is that we are assuming that the current caseload of children in the CCDF program (which is a monthly average of approximately 1.4 million children) remains constant. Due to inflation and the potential for erosion in the value of the subsidy over time, funding increases will be necessary to maintain the caseload and avoid slot loss; however, those changes are not reflected in this RIA since they are not directly associated with the Act or the final rule.

While the estimate cannot fully predict how States and Territories will design policies in response to these new requirements or who would be responsible for paying certain costs, we do recognize that absent additional funding, these costs will impact the CCDF caseload. This point is discussed in greater detail below.

A. Analysis of Costs

In our analysis of costs, we considered any claims on resources that would be made that would not have occurred absent the rule. This includes new requirements that are merely reiterating changes made in the reauthorized CCDBG Act of 2014, which were effective upon the date of enactment of November 19, 2014. This RIA discusses the potential impact of the following major provisions in the statute and in the final rule:

- Monitoring and inspections (including State hotlines for parental complaints);
- background checks;
- health and safety training;
- consumer education (Web site and consumer statement);
- minimum 12-month eligibility periods;
- administrative and IT/infrastructure costs; and
- increased subsidy rates per child associated with improving continuity and equal access.

We conducted a State-by-State analysis of these major provisions. It should be noted that due to insufficient data, the health and safety portions of this cost estimate in the NPRM did not include Territories and Tribes. This omission was not meant to minimize the fact that requirements of the Act and the final rule will still have a significant programmatic and financial impact on Territories and Tribes. In the proposed rule, we invited public comment on the anticipated financial impact of the Act and the proposed rule on Territories and Tribes, but did not receive enough additional information to conduct a thorough analysis of costs for Territories and Tribes. However, to account for these costs in the RIA, we estimating the cost using the percentage of funding allocated to Territories and Tribes and applying that percentage to the cost estimate for States. For Territories, their funding allocation amounts to 0.5 percent and for Tribes, this is 2.0 percent of CCDF funding. By applying these percentages to the cost estimate for States, we are assuming that the combined cost of meeting the new requirement for Territories and Tribes also equals approximately 2.5% of the cost for States. It should be noted that the overall Tribal allocations amounts to slightly more than 2.0 percent due to funding level changes included in the CCDBG Act, but given that Tribes are not subject to all new requirements and have significant flexibility in some areas (particularly for medium and small allocation Tribes), we believe that 2.0 percent is a reasonable percentage to use for this estimate. The total annual money and opportunity cost for Territories and Tribes (using a 3 percent discount rate) is approximately $7.5 million. This is an estimated total of $66 million dollars over the full ten year period of the cost estimate. Additionally, for Territories and Tribes the estimated transfer costs related to increased supply building would be $20.9 million per year (using a 3 percent discount rate) or an estimated total of $184.3 million over the full ten year period of the cost estimate.

In order to determine State practices prior to the passage of the CCDBG Act of 2014, we relied on information from State-submitted FY 2014–2015 CCDF Plans, as well as the *2011–13 Child Care Licensing Study* (prepared by the National Association for Regulatory Administration). We used data on requirements within a State by child care setting type (center, family home, group home, child's home) and licensing status, to project costs based on specific features of a State's requirements as reported at the time. If a State already met or exceeded an individual requirement, we assumed no additional cost associated with the final rule. When possible, if a State partially met the requirement we applied a partial implementation cost. For example, a State that has an annual monitoring requirement for its licensed centers would be assigned no additional cost to implement that specific part of the regulatory requirement.

For example, some States already conduct comprehensive background checks that include all components of a comprehensive background check required by law except an FBI fingerprint check. Prorated costs were assigned accordingly (assumptions about partial costs are explained in greater detail in the discussions below). The final rule offers significant flexibility in implementing various provisions, therefore in the RIA we identified a range of implementation options to establish lower and upper bound estimates and chose a middle-of-the-road approach in assessing costs.

This RIA takes statutory effective dates into account within a 10-year window. The analysis and accounting statements distinguish between average annual costs in years 1–5 during which some of the provisions will be in varying stages of implementation and the average annual ongoing costs in years 6–10 when all the requirements would be fully implemented (10-year annualized costs and total present value costs will also be presented throughout). Some costs will be higher during the initial period due to start-up costs, such as building a consumer Web site, and costs associated with bringing current child care providers into compliance with health and safety requirements. However, significant costs, such as the requirement to renew background checks every five years, would not be realized until later. These compounding requirements, including the cost of increasing subsidy rates, account for the escalation in costs in the out years of the analysis.

Throughout this RIA, we calculate two kinds of costs: *Money costs* and *opportunity costs* (Note: The analysis also considers "transfers", which are discussed in the section on Estimated Impacts of Increased Subsidy; see Table 8 below for additional details). Any new requirements that have budgetary impacts on States or involve an actual financial transaction are referred to as *money costs*. For example, there is a fee associated with conducting a background check, which is a money cost regardless of who pays for the fee. For purposes of this analysis, we examined what additional resource claims would be made as a result of the reauthorized Act and final rule regardless of who incurs the cost or from what source it is paid (which varies widely by State). In some instances, money costs will be incurred by the State and may require States to redistribute how they use CCDF funds in a way that has a budgetary impact. In other cases, money costs will be incurred by child care providers or parents.

Alternatively, claims that are made for resources where no exchange of money occurs are identified as *opportunity costs*. Opportunity costs are monetized based on foregone earnings and would include, for example, a caregiver's time to attend health and safety trainings when they might otherwise be working.

Each year, more than $5 billion in federal funding is allocated to State, Territory, and Tribal CCDF grantees. Activities in the final rule are all allowable costs within the CCDF program and we expect many activities to be paid for using CCDF funds. For example, although some States may supplement funding, others may choose to redistribute funding from a current use to address start-up costs or new priorities. As discussed above, we received a number of comments from States in response to the proposed rule that, in the absence of additional funding, meeting requirements in the final rule would result in a reduction in the CCDF caseload. Therefore, we anticipate some money costs will result in this type of re-distributive budgetary impact within the CCDF program.

However, to make the costs of the rule concrete, we provide analysis on the economic impact of the rule if the child care caseload were to remain constant. While we recognize that there may be a decrease in caseload due to the financial realities of the new requirements, applying that decrease in caseload to underlying assumptions of this analysis would only lessen the estimated cost, which would result in a probable underestimate. While the costs estimated in this analysis represent the costs required, (regardless of who pays for the requirement) to meet the new requirements for the current monthly caseload of 1.4 million children, it is not, and should not be interpreted as, our projection of future caseload.

Overall, based on our analysis, annualized costs associated with these provisions averaged over a ten year window, are $235.2 million (plus an additional $59.2 million in opportunity costs) and the annualized amount of transfers is approximately $839.1 million (all estimated using a 3 percent discount rate), which amounts to a total annualized impact on States, Territories, and Tribes of approximately $1.16 billion.

This RIA represents all of the changes made between the NPRM and the final rule and other methodological refinements—with some changes increasing costs (follow-up monitoring visits, adding in an estimate for Tribes and Territories) and others decreasing the costs (removing the required use of grants and contracts). The result is an estimated increase of about $33 million per year in money costs and an increase in total annual impact from $1.1 billion in the NPRM to $1.16 billion in the final rule.

Of that amount, approximately $1.15 billion is directly attributable to the statute, with only an annualized cost of approximately $4 million (or approximately 0.3% of the total estimated impact) directly attributable to the discretionary provision of this regulation that extends the background check requirement. This RIA includes an additional estimated cost of $38 million per year for follow-up monitoring visits that was not accounted for in the version of the RIA that appeared in the NPRM. However, this is considered a natural outgrowth of the statutorily-required inspections and therefore not included in the discretionary amount because it is not attributable to a new requirement in the regulation. Compliance with these requirements will be determined through the CCDF State Plan process. Therefore, throughout this analysis we have phased in these discretionary requirements with the full costs taking effect in FY 2019 (to align with the next round of plans, which will become effective October 2018).

While this analysis does not attempt to fully quantify the many benefits of the reauthorization and this final rule, we describe the benefits qualitatively in detail and conduct a breakeven analysis to compare requirements clarified through this regulation against a potential reduction in child fatalities and injuries. Further detail and explanation on the impact of each of the provisions is available below.

1. Health and Safety Provisions

Per the new requirements in the Act, this final rule includes several provisions focused on improving the health and safety of child care. We estimated costs associated with the following three requirements: Monitoring and inspections at § 98.42; comprehensive background checks at § 98.43; and health and safety training at § 98.41(a)(2).

Implementation costs of health and safety provisions, specifically the start-up costs, will depend primarily on the number of child care providers in a State and current State practice in areas covered by the final rule. We used data from the FY 2014 ACF–800 administrative data report to estimate that approximately 269,000 providers caring for children receiving CCDF subsidies would be subject to CCDF health and safety requirements. In addition to these CCDF providers, this analysis also includes approximately 110,000 licensed providers who are not currently receiving CCDF subsidies but would be subject to the monitoring (added in the final rule) and background check and certain reporting requirements.

These figures exclude relative care providers since States may exempt these providers from CCDF health and safety requirements. According to OCC's 2014 administrative data, there are approximately 115,000 relative care providers receiving CCDF assistance. States vary widely on what they require of relatives, with 18 States/Territories requiring that relative providers meet all health and safety requirements, 4 exempting relatives for all requirements, and 34 indicating that relative providers were exempt from some but not all requirements.

It is difficult to forecast State behavior in response to new requirements since Lead Agencies have the option to exempt relatives from these requirements. Even those States that currently apply requirements to relatives may keep those requirements at current levels rather than expanding to meet new requirements. As a hypothetical, if States were to apply half of all the new health and safety requirements to half of the current number of relative providers, the annualized cost (using a 3% discount rate) would be approximately $40 million (averaged over a 10 year window). However, since applying the new requirements to relatives is not a legal requirement and we anticipate that many States will choose to maintain their relative exemptions, we are not including costs associated with relative providers in the accounting statement for this regulatory impact analysis. We did request comment on the extent to which Lead Agencies anticipate applying new requirements to relative providers and only one State responded to this request, indicating that they did "not plan to extend the new requirements to those homes where an exemption already exists."

It should be noted that, based on a longitudinal analysis of OCC's administrative data, the number of child care providers serving CCDF children has declined by nearly 50 percent between 2004 and 2014, an average decrease of 4 percent per year. The greatest decline occurred in settings legally operating without regulation, specifically family child care; however, both regulated and license-exempt child care centers also saw declines. This analysis is based on current provider counts, but assuming that the number of CCDF providers will continue to steadily decrease, this estimate of the number of providers, and resulting costs associated with implementing health and safety provisions, may be an overestimate.

Many States' licensing requirements for child care providers already meet or exceed certain components of the minimal health and safety requirements for CCDF providers in this final rule. For example, training in first-aid and CPR and background checks are commonly included as part of State licensing, with approximately 40 States already meeting this requirement for licensed providers (centers, group home, and family child care).

Many licensed CCDF providers already meet many of the other health and safety requirements as well. For example, more than 40 States already require annual monitoring of all their licensed providers, with even more already requiring pre-inspections of their licensed providers. In the case of licensed centers, more than 45 States already require pre-inspections. For those States whose licensing requirements do not meet CCDF health and safety requirements, there will be costs incurred. However, the largest cost will be incurred for those CCDF providers that are currently exempt from State licensing that are not relatives—approximately 85,000 providers nationally. (Table 2 below provides a national picture of the types of CCDF providers.) We used an expanded State-by-State version of this table to estimate costs for meeting health and safety requirements. As stated above, the final rule allows States to exempt relatives from health and safety requirements, including background checks, health and safety training, and monitoring. Therefore, ACF did not attribute any cost associated with these requirements to relative CCDF providers.

TABLE 2—SUMMARY OF CCDF PROVIDERS

[FY2014] *

Licensed CCDF providers			CCDF providers legally operating without regulation (license-exempt)					Total
Centers	Family home	Group home	Child's home (in-home)		Family and group home		Centers	
			Relative	Non-relative	Relative	Non-relative		
81,352	70,165	32,130	38,670	27,739	77,958	50,330	7,355	385,699

* Source: ACF–800, Report 13.

Monitoring and pre-inspections. The Act requires that States conduct monitoring visits for all CCDF providers including all license-exempt providers (except, at Lead Agency option, those that serve relatives). While States must have monitoring policies and practices in effect (for both licensed and license-exempt CCDF providers) no later than

November 19, 2016, the full cost of this requirement will not be in effect until 2017. Therefore, we are projecting some period of phase-in, with 25% of providers subject to monitoring in 2015 and an additional 50% (a total of 75%) subject to monitoring requirements in 2016. The costs of these requirements will be fully realized from 2017 on.

The Act specified different monitoring requirements for providers who are licensed and providers who are license-exempt.

- *For Licensed CCDF Child Care Providers*—States must conduct one pre-licensure inspection for health, safety, and fire standards and at least annual, unannounced inspections for licensed CCDF providers.
- *For License-Exempt Providers (except, at Lead Agency option, those serving relatives)*—States must conduct at least annual inspections for license-exempt CCDF providers for compliance with health, safety, and fire standards at a time determined by the State.

For this estimate, if a State reported that they conduct at least one annual monitoring visit for licensed CCDF providers (pre-licensure inspections are discussed separately below), we assumed no additional cost for those providers because it met or exceeded the frequency required by the Act and final rule. The majority of States already monitor licensed CCDF providers annually (more than 40 across all settings—centers, family child care, and group homes). A subset of States that currently have annual monitoring requirements do not conduct unannounced visits. However, we did not assign a cost for States changing their policy from announced to unannounced monitoring. We acknowledge that there may be an administrative cost to such a change, but for the purposes of this estimate, we consider that to be included in the overall administrative cost allocation discussed below. We asked for public comment on specific costs associated with moving from announced to unannounced inspections, but did not receive any.

This cost estimate takes into account three major components of the new monitoring requirements: (1) Annual monitoring of both licensed and license-exempt CCDF providers, (2) Pre-inspections for licensed CCDF providers, and (3) a Hotline for parental complaints.

The annual monitoring estimate includes the following variables analyzed on a State-by-State basis:

- *Current State Practice:* We collected State-level data from the 2014–15 CCDF State plans and the *NARA 2011–13 Child Care Licensing Study* to determine which States already met annual inspection requirements. Data was collected for the following settings: Licensed CCDF providers (family, group home, and centers) and license-exempt CCDF providers (non-relative).
- *Current Provider Counts:* Using 2014 CCDF administrative data, we collected the number of CCDF providers within each setting for each State.

Using these data we arrived at an estimate of the number of CCDF providers within each State that would newly require an annual monitoring visit. We then estimated the number of new licensing inspectors and supervisors that would be required to monitor the projected number of providers newly subject to monitoring, based on a projected caseload of child care providers for each licensing staff. To estimate the actual cost, we calculated the cost of employing (salary and overhead) the estimated number of necessary new licensing staff (inspectors and supervisors).

The Act requires States to have a ratio of licensing inspectors to child care providers and facilities that is sufficient to conduct effective inspections on a timely basis, but there is no federally required ratio. The current range of annual caseloads per licensing inspector is large, from 1:33 to 1:231. We used the following range to estimate the impact:

- *Lower bound:* 50th percentile of current licensing caseloads (weighted by the number of providers in each State), which produced an adjusted caseload of 1:126 providers per monitoring staff.
- *Upper bound:* A 1:50 ratio of providers to monitoring staff, as recommended by the National Association of Regulatory Administration.

Our final cost estimate represents the midpoint between the lower and upper bound estimate. To calculate the number of required supervisory staff, we assumed a ratio of one supervisor per seven monitoring staff, which is the current average across States as reported in the *NARA 2011–13 Child Care Licensing Study.*

To generate the actual cost associated with this staffing increase, we multiplied the number of new staff by salary and overhead costs for full-time equivalent (FTE) staff based on Bureau of Labor Statistics (BLS) data from the *National Occupation and Wage Estimates* from May 2013. The same FTE costs were applied to all States. The salary applied was $42,690 for each monitoring line staff (see Community and Social Service Specialists, All Other: Code 21–1099) and $65,750 for each supervisor (see Social and Community Service Managers: Code 11–9151), which was then multiplied by 2 to account for benefits and overhead. (Data from the Bureau of Economic Analysis's *National Income and Product Accounts* shows that in 2013, wages and salaries are approximately 50 percent of total compensation.). Using this methodology, the annualized money cost of meeting the annual monitoring requirements is $172.9 million, estimated using a 3 percent discount rate. The estimated present value cost of meeting this requirement over the 10 year period examined in this rule, using a 3% discount rate, is approximately $1.5 billion.

While not required by the Act or the final rule, we anticipate that annual monitoring in States could result in additional follow-up visits if problems were identified in the initial visit. Because we did not have data on this with which to estimate potential impacts, we asked for comment in the NPRM on the percentage of providers that would require a follow-up visit as a result of new annual monitoring visits. In response to this request, one State estimated that approximately 23% of all providers would require a new annual visit once the annual monitoring visit requirement goes into effect and another estimated that "approximately 20% of new annual monitoring inspections" would result in follow-up inspections. Despite not being an explicit requirement of the rule or statute, we believe that follow-up visits would be a natural result of the new statutory inspection requirements and are therefore including this potential cost in the final cost estimate. Assuming a 20% follow-up rate, the associated costs could be approximately $40.6 million per year (estimated using a 3% discount rate).

Opportunity costs for the monitoring requirements account for the fact that to successfully pass a monitoring visit, there would presumably be a number of administrative costs (in terms of time; an opportunity cost) for providers and caregivers. For example, providers must read the new rules, change their current practices to comply, and obtain and track paperwork to make sure they are in compliance. For the purposes of this following analysis, we made several assumptions about the amount of time required to prepare for and comply with the monitoring requirement, but we welcome comment on these assumptions. To calculate the opportunity cost of these visits, we assumed that time spent doing administrative tasks equals the length of the monitoring visit plus an additional 1.5 and 2.0 hours of preparation per hour of the visit, for family child care and center providers respectively.

Based on one State reporting that their monitoring visits for licensure took between 2.5 and 5 hours, we used 2.5 hours as the basis for our lower bound and 4 hours as the basis for our upper bound. We used 4 hours instead of 5 for our upper bound estimate because 5 hours is the amount reported for a licensing visit, but what is required in the final rule is generally less extensive than what is generally required for licensure. As such, our lower bound estimate uses 6.25 and 7.5 hours of preparation for family child care and center providers, respectively, and our upper bound uses 10 and 12 hours of preparation for family child care and center providers, respectively.

Two States provided their estimated time spent on monitoring. One State estimated that they currently "expend 10 hours of staff time per visit" and another cited a study they conducted in 2006 that found "day care licensing staff indicates that an average of 9.35 hours is spent preparing for, traveling to, and conducting a monitoring inspection." Since both of these figures are within the range of the assumptions used for our analysis, we are keeping the assumptions the same for the final rule.

According to BLS, for child care workers, one hour equals $18.80 after accounting for benefits and overhead (we include overhead because administrative preparation time would most likely occur during work hours). We estimated the opportunity cost of preparation time for monitoring to be an average of $8.1 million annually (estimated using a 3% discount rate) during the two-year phase-in period (assumes States begin to ramp-up monitoring, but not fully implemented) and an annualized opportunity cost of $14.3 million (estimated using a 3% discount rate) over the entire 10 year window. Note that the phase-in period discussed here covers a two year period and is different from the phase in period in the table below, which shows a phase-in period of 5 years (after which *all* requirements would be fully implemented).

Some proportion of providers will require remedial work to meet CCDF health and safety requirements after an annual visit. For example, a provider may be out of compliance with building safety or not have up-to-date immunization records, and costs in terms of time as well as material resources would be necessary to come into compliance. However, it is difficult to quantify these effects because the specific remediation required will vary by provider and other circumstances. Therefore, we did not attempt to monetize the cost of providers' remediation efforts. In addition, there are also benefits to be reaped (in terms of child health and safety) as providers makes changes to come into compliance with health and safety requirements as a result of this rule, but that are not quantified in this analysis.

Next we estimate cost of pre-licensure inspections required of licensed CCDF providers by the Act. Using the same methodology that we used for annual monitoring, we determined how many States already met this requirement and used CCDF administrative data to determine the number of licensed providers (by setting type) that did not previously but would now require pre-licensure visits. The final rule allows States to grandfather all existing providers—thus there is no start-up cost or backlog of providers that need a pre-inspection. There are not good data to estimate how many new providers a State would need to pre-inspect on an annual basis, but anecdotal evidence suggests the number is relatively small. Of the States that do not currently require pre-inspections (1 for centers, 6 for group homes, and 7 for family child care), we estimated (based on information shared by a few States) that a lower bound of five percent of family child care and four percent of center care would be new each year (lower bound). For the upper bound, we estimate that 12 percent of family child care and 7 percent of child care centers would be new each year.

Using a caseload of 88 providers per monitoring staff (the midpoint of the 50th percentile of current caseload data and the recommended caseload of 50:1), and using the same salary and benefits data as the monitoring estimates, the ongoing average annual pre-inspection costs are estimated to be approximately $0.7 million (estimated using a 3% discount rate), but would not begin until 2017. The estimated present value cost of meeting this requirement over the 10 year period examined in this rule, using a 3% discount rate, is approximately $6.2 million.

Monetized caregiver time to prepare for pre-inspections is considered an opportunity cost and is estimated to be approximately $200,000 annually, a relatively small amount because this only applies to new licensed providers in the few States that don't already require pre-licensure inspections. Though some of the opportunity cost would be incurred prior to the actual inspection visit, for the purposes of this estimate, we considered all costs for pre-inspections as beginning after the end of the phase-in period. We used the same methodology used to calculate annual inspections to determine the opportunity cost of pre-inspections.

However, recognizing that preparing for an initial licensing inspection may require additional time, we used the midpoint of the estimate time for an annual visit and doubled it for an estimated 16.25 hours for family child care and group homes and 19.5 hours for centers. We asked for comment on these assumptions, but did not receive specific information on the amount of time required to prepare for and participate in a pre-inspection (rather than a regular inspection).

This cost analysis also includes the "parental complaint hotline" as part of the monitoring requirements. The final rule requires at § 98.32(a) that Lead Agencies establish or designate a hotline or similar reporting method for parents to submit complaints about child care providers. Lead Agencies have flexibility in how they implement this requirement, including whether the system is telephonic or through a similar reporting process, whether the hotline is toll-free, and whether the hotline is managed at the State or local level. Based on an examination of several States that already have comparable hotlines in place, this estimate for the parental complaint hotline includes multiple components that might be associated with the implementation and maintenance of a telephonic hotline.

These components include the one-time purchase of an automatic call distribution (ACD) system at $45,000; the use of a digital channel on a T1 line ranging from $204 to $756 per year; 2,000 minutes of incoming call time at $0.06 per minute; and salary and benefits for one FTE to manage the hotline at $67,000. States vary in how they collect parental complaints. According to an analysis of the FY 2014–2015 CCDF Plans and review of State child care and licensing Web sites, 18 States/Territories have a parental complaint hotline that covers all CCDF providers, 22 States/Territories have a parental complaint hotline that covers some child care providers, and 16 States/Territories do not have a parental complaint hotline. (Note that unlike the other health and safety provisions, this estimate does include Territories).

States that had hotlines for both licensing and CCDF were considered as meeting the full requirement for a parental complaint hotline and had no additional costs. States that only had one hotline (*e.g.*, only for licensed providers) were considered as partially meeting the requirement for the hotline and had 0.5 FTEs applied. The full amount was applied to States that did not have anything in place that met the requirements of the hotline.

We used a range of options to estimate the impact of the parental complaint hotline requirement based on the cost of the TI line and whether the hotline is toll-free and chose the mid-point as the primary estimate. Using this methodology, the estimated present value cost of meeting this requirement over the 10 year period examined in this rule, using a 3% discount rate, is approximately $16.6 million. Average annual costs during the phase-in period are estimated to be approximately $2.6 million during the first year (different than the phase-in figure in Table 3 below) and an average of $1.8 million for each year after. The estimate assumed slightly higher startup costs during the first year because States and Territories may need to purchase and install an ACD system.

TABLE 3—ESTIMATED IMPACTS OF MONITORING PROVISIONS

[$ in millions]

	Phase-in annual average (years 1–5)	Ongoing annual average (years 6–10)	Annualized cost (over 10 years)			Total present value (over 10 years)		
			Undiscounted	Discounted		Undiscounted	Discounted	
				3%	7%		3%	7%
Money Costs ($ in millions)								
Annual monitoring	155.9	194.9	175.4	172.9	169.4	1,753.8	1,518.7	1,272.8
Preinspection new facilities	0.5	0.9	0.7	0.7	0.7	7.3	6.2	5.1
Hotline	2.0	1.8	1.9	1.9	1.9	18.8	16.6	14.3
Subtotal	158.4	197.6	178.0	175.4	171.9	1,779.9	1,541.5	1,292.2
Opportunity Costs ($ in millions)								
Annual monitoring	12.9	16.2	14.6	14.3	14.1	145.5	126.0	105.6
Preinspection new facilities	0.1	0.2	0.2	0.2	0.2	1.9	1.6	1.3
Subtotal	13.1	16.4	14.7	14.5	14.2	147.4	127.6	106.9
Total	171.5	214.0	192.7	189.9	186.1	1,927.3	1,669.1	1,399.1

Comprehensive background checks. The CCDBG Act of 2014 added a new section at 658H on requirements for comprehensive, criminal background checks that draw on federal and State information sources. The Act outlines five components of a criminal background check, which we restate in § 98.43 of the final rule. There are several aspects of the background check requirements that must be taken into account in a cost estimate. This includes the background checks for existing child care staff members (who do not already have them), the new federal requirement that child care staff members receive a background check every five years, background checks for other adults living in family child care homes, and checks with other States if a child care staff member has lived in another State. This cost estimate does not take into account the cost of the requirement at § 98.43(b)(2) for a search of the National Sex Offender Registry (NSOR) file of the National Crime Information Center (NCIC). ACF is currently in discussions with the FBI to determine the logistics behind States meeting this requirement and plans to issue guidance about how States, Territories, and Tribes can search the NSOR file. We asked for comment on the cost of meeting this requirement and one State estimated a one-time cost of $3 million to meet this requirement. Another State noted that "the amount of security that will be required and the system changes that will be necessary to meet these security requirements has not been specifically identified" but that "automation would be costly, and the labor cost for a non-automated solution would be very high as well." While helpful, we did not feel that we received sufficient information to extrapolate across a nationwide analysis, so are retaining the caveat that this cost estimate does not include a search of the NSOR file of the NCIC.

Similar to the methodology used for monitoring, the first step of the cost estimate was to determine current State practice. This is important because there would not be a new cost for States with requirements in place. One State provided a related comment, stating that since they already require FBI fingerprint checks of employees in child care centers, they do "not anticipate that the additional types of background checks will result in a significant increase in the number of persons being flagged as risky." This State's current requirements also include checks for family child care homes, but since this was a recently implemented requirement, they acknowledge that "child care homes will feel the financial impact of running background checks on additional applicants more significantly than a center-based operation."

To account for existing State practice such as the one mentioned above and the resulting variation in cost, we used CCDF 2014–15 State Plan data (which included State-by-State data on four distinct background check components organized by provider type) to determine which States already met certain components of the background check requirement. After identifying the areas where States would need to implement new requirements we applied the provider counts to determine the number of child care staff members that would need to meet these new background check requirements.

Because our administrative data on the number of CCDF providers represent the number of child care programs serving CCDF children, not the individual child care staff members in these settings that would need to receive a background check, we estimate the number of individual child care staff members that would be affected by this provision by applying a multiplier to each provider type (centers, family home, and group home).

We are requiring individuals, age 18 or older, residing in a family child care home be subject to background checks because it is reasonable to assume that these individuals may have unsupervised access to children. Because we are including these individuals in the definition of child care staff members, they will be subject to the same requirements and will be allowed the same appeals process as employees.

To generate an estimated number of staff per child care center, we used data from the *National Survey of Early Care and Education (NSECE)*, which indicated that the median number of children per center nationally is approximately 50. We then used the following data sources: (1) ACF–801 CCDF administrative data, which provides a detailed breakdown of the number of CCDF children by age group; and (2) *Caring for our Children*, which has a recommended staff-child ratio for centers by age group. (*Caring for Our Children's* recommended staff-child ratios are an overestimate because not all States have adopted the standard.) Using these figures, a weighted average was generated that takes into account the national age-distribution of CCDF children served and recommended child-staff ratios for an average center and a baseline multiplier of 11 staff members per child care center receiving CCDF-funded subsidies, 8 of whom are caregivers and 3 are additional staff members or individuals who may have unsupervised contact with children.

We estimated the number of other adult household members residing in family child care homes (persons other than the caregiver) and relevant staff members and added this to our cost estimate. We assumed each family child care and group home provider had an average of 1 additional household member. (This assumption is informed by consultation with State administrators, who stated that most frequently there is 1 other adult over the age of 18 in a family child care home that must undergo a background check).

Using these multipliers, we estimated the cost for background checks for staff members newly subject to the requirements. This includes both the cost of obtaining the background check and the opportunity cost for child care staff members to meet the required components. The opportunity cost represents the value of time (measured as foregone earnings) of child care staff members during the time, they spend to complete a background check.

Many States already require some, if not most, of the background check components. To determine the existing need, we compared the requirements described in this final rule against current background check requirements, as reported in the CCDF 2014–2015 Plans. According to the Plan information, nearly 30 States require that licensed child care center staff undergo a State criminal background check that includes a fingerprint. More States already have requirements for a State criminal background check without a fingerprint, but for this estimate, we only counted States that required a fingerprint as meeting the requirement. For licensed centers, more than 40 already require an FBI fingerprint check, nearly all already require a check with a child abuse and neglect registry, and more than 35 require a check with a sex offender registry. Nearly 30 States require licensed family child providers to have a State criminal background check that includes a fingerprint, more than 40 already require an FBI fingerprint check, more than 30 require a check with the child abuse and neglect registry, and more than 35 require a check against a sex offender registry.

Fewer States meet the background check requirements for unlicensed CCDF providers. According to our State Plan data, only fewer than 25 States already have FBI fingerprint check requirements in place for its unlicensed providers and only six require those providers to have a State background check that includes a fingerprint.

Using this data, we identified gaps in existing State policies as compared to the newly-required background check components. These gaps were matched with CCDF ACF–800 administrative data showing the number of providers per setting type by State, and then using the methodology above calculated the number of child care staff members requiring background checks.

As mentioned above, there are two costs of a background check: The fee to conduct the check and the time it takes for individuals to get the check. With regard to the fee, Lead Agencies have flexibility to determine who pays for background checks. According to the FY 2014–2015 CCDF Plans, approximately 30 States require the child care provider to pay for the background check, approximately 10 States indicated the cost was split, and fewer than 10 States indicated they pay the fees associated with the cost of conducting a background check. However, regardless of how costs are assigned, an impact analysis must include the overall monetary and opportunity cost impacts.

While we do anticipate that there will be costs associated with enhancing or building systems to process background checks and appeals, we believe that this cost is accounted for here in two areas: (1) The cost estimate is based on a fee for conducting the background check, which is applied to each individual. This fee includes costs associated with processing the background check; and (2) We applied a 5% administrative cost and a 5% information technology (IT) startup cost to all of these new requirements (discussed below). Between these two items, we think that this estimate sufficiently accounts for potential costs of running the background check system.

In their CCDF Plans, Lead Agencies described their costs associated with conducting background checks, including cost information on individual components of the background check. This information, combined with information we received from the FBI regarding costs of FBI fingerprint checks, was used to derive an estimated average cost of each background check component for a total of $55 for each set of four background checks. We applied this cost (or a partial cost) to the number of individuals in need of some or all of the background check components, determined after identifying State-by-State practices for different types of providers

Next, we estimated the average annual ongoing cost of administering background checks to new child care staff members (as opposed to start-up costs associated with bringing existing staff members into compliance). Child care provider departure rates cited in the literature vary widely from as low as 10 percent to 20 percent (*The Early Childhood Care and Education Workforce: Challenges and Opportunities*, Institute of Medicine and the National Research Council, 2012). We used these as the lower and upper bounds, respectively for our estimated turnover rate. We then reduced this estimate by another 10 percent to account for the fact that the Act requires some portability of background checks for certain staff members in a State, meaning that if a staff member has already passed a background check within the past five years, then that individual is not required to get another background check when changing employment from one child care provider to another.

Based on this approach, the estimated present value cost of meeting these background check requirements (for existing and new providers) over the 10 year period examined in this rule, using a 3% discount rate, is approximately $58.6 million. ACF estimated that during the three year phase-in period background check fees would have an average annual money cost of $10.8 million (also estimated using a 3% discount rate), as States bring existing providers into compliance. (Note again that this phase-in period is different than the five year period indicated in the table below). We estimate the average annual ongoing money costs associated with background checks for new staff members of approximately $4 million (estimated using a 3% discount rate).

The Act requires that all child care staff members receive a background check every five years. Through the 2014–15 CCDF State Plans, States report on how frequently licensed providers are required to receive each component of the background check. This data was available both by individual background check component and by provider type. If a State already required that a particular background check be renewed every five years (or more frequently), we did not include it in this cost estimate. While we know that States have similar policies in place for unlicensed providers, we do not have data for this subset of the provider population. Therefore, we considered the renewal of background checks for unlicensed providers to be a fully new cost to all States, understanding that this is more likely than not an overestimate.

Since not all background checks will be conducted in the same year, we spread these costs evenly over a five year period to show that the costs would not be incurred all at once. We recognize that in practice these costs may not be evenly distributed over the five year period, depending on how States choose to conduct background checks during the initial implementation period. However, any uneven distribution of costs over time only negligibly affects the total dollar amount. The estimated present value cost of renewing background checks for all individuals over the 10 year period examined in this rule, using a 3% discount rate, is approximately $55.4 million, with the average annual ongoing money costs of this five year renewal requirement (once it begins in year six of the ten year window) to be $6.3 million. However, since provider counts have been in steady decline (as discussed earlier), this may be an over-estimate.

Another feature of the background check requirement is that States are required to check the State-based criminal, sex offender, and child abuse and neglect registries for any States where an individual resided during the preceding five years. One State specifically noted that they did "anticipate that there will be additional costs associated with background checks for out-of-State providers, particularly when obtaining out-of-State information," and that in their case, "that cost would be passed down to the provider, therefore some providers may opt out of participating in the subsidized child care program." It should be restated, however, that while this analysis estimates the cost of each requirement, it does not take into account who will ultimately assume the cost.

To estimate how many individuals would require an additional State background check, we used data from the U.S. Census Bureau, which conducts a Current Population Survey that includes data on Migration and Geographic Mobility (*Current Population Survey Data on Migration/Geographic Mobility,* U.S. Census Bureau). Mobility data on *employed* individuals (inclusive of all races and genders) ages 25 to 64 show an out of State mobility rate of approximately two percent. Given that this data measures mobility in a given year and our requirement is for a five year window, we use a 10% mobility rate for this calculation. We assume that 10% of all child care staff members will require a check with another State and assign a prorated cost of the background checks minus the FBI check accordingly. We estimate the average annual ongoing money costs of this requirement to check other States to be less than a million dollars. Next, to estimate opportunity cost, we monetized child care staff member time spent obtaining a comprehensive background check, such as completing paperwork or other activities necessary to complete the check. We assumed that a check of the child abuse neglect registry takes 30 minutes, and that the other three components of a comprehensive background check take 1 hour combined (or 20 minutes each) for a total of 1.5 hours. We also assumed that each hour is worth $12.80, assuming $10 per hour for a child care staff member multiplied by 1.28 to account for benefits. (We derived these hours and benefit rates from the *Employer Cost for Employee Compensation database,* Bureau of Labor Statistics, which we then adjusted to reflect the number of child care providers that are self-employed) ACF estimated average annual opportunity costs (using a 3% discount rate) for all the background check components of $6.3 million during the 3 year phase in period and an annualized cost of $ 7.1 million over the 10 year window. This is a total present value of approximately $62.4 million over ten years (using a 3% discount rate).

More extensive background checks will lead to greater numbers of job applicants and other associated people being flagged as risky, thus leading to additional types of cost. For example, a hiring search would need to be extended if the otherwise top candidate is revealed by a background check to be unsuitable to work with children. These costs that result from background checks are correlated with benefits; indeed, if this category of costs is zero, then the background check provisions of this final rule would have no benefits. However, due to lack of data, we have not attempted to quantify either this type of costs or the associated benefits.

TABLE 4—ESTIMATED IMPACTS OF BACKGROUND CHECK PROVISIONS

[$ in millions]

	Phase-in annual average (years 1–5)	Ongoing annual average (years 6–10)	Annualized cost (over 10 years)			Total present value (over 10 years)		
			Undiscounted	Discounted		Undiscounted	Discounted	
				3%	7%		3%	7%
Money Costs ($ in millions)								
Background Checks	8.4	4.5	6.5	6.7	6.9	64.6	58.6	52.2
Background Check Renewals	0.0	13.6	6.8	6.3	5.7	68.1	55.4	42.6
Background Checks with Other States	0.5	0.8	0.7	0.6	0.6	6.5	5.7	4.8
Subtotal	9.0	18.9	13.9	13.6	13.3	139.2	119.7	99.6
Opportunity Costs ($ in millions)								
Background Checks	5.8	3.1	4.4	4.6	4.8	44.4	40.3	35.9
Background Check Renewals	0.0	4.4	2.2	2.0	1.8	22.1	18.0	13.8
Background Checks with Other States	0.5	0.4	0.5	0.5	0.5	4.7	4.1	3.6

TABLE 4—ESTIMATED IMPACTS OF BACKGROUND CHECK PROVISIONS—Continued

[$ in millions]

	Phase-in annual average (years 1–5)	Ongoing annual average (years 6–10)	Annualized cost (over 10 years)			Total present value (over 10 years)		
			Undiscounted	Discounted		Undiscounted	Discounted	
				3%	7%		3%	7%
Subtotal	6.3	7.9	7.1	7.1	7.1	71.1	62.4	53.3
Total	15.3	26.8	21.0	20.7	20.4	210.3	182.1	152.9

Caregiver, teacher and director training. The Act and this final rule require Lead Agencies to establish training requirements for caregivers, teachers, and directors of CCDF providers. The Act (section 658E(c)(2)(I)) and the final rule (§ 98.41(a)(1)) require pre-service or orientation training and on-going training in health and safety topics, including first aid and CPR, safe sleep practices, and other specified areas. In addition, the Act (section 658E(c)(2)(G)) and final rule (§ 98.44) require training and professional development, including training on child development.

For this analysis, we estimated costs in the following areas: Current number of CCDF caregivers, teachers, and directors (using FY 2014 data) to meet new pre-service or orientation training requirements; on-going training for caregivers, teachers, and directors (which includes new incoming caregivers); and pre-service or orientation training for new caregivers, teachers, and directors.

To establish a baseline, ACF used information reported by States in their FY 2014–2015 CCDF Plans and information from the *2011–13 Child Care Licensing Study* to determine—for each of the training areas—which trainings were already required by State policy for the following providers: Centers, family homes, and group homes. The available data allowed us to distinguish between requirements for licensed providers and unlicensed providers, allowing us to further refine the cost estimate. Once current requirements for each State were identified, we were able to determine which new trainings would be required, and then apply the cost of receiving the balance of trainings.

We reviewed the health and safety training delivery models in multiple States with a range of available training requirements to get a better sense of the range of costs for training. We found a wide range, from training provided at no-cost, to training packages that cost up to $170. Using these figures as a basis, a lower bound of $60 and an upper bound of $140 was established for the total training package per caregiver. This range is informed by the fact that many no-cost online training courses have already been developed, and thus are truly no cost, but even States taking advantage of no-cost online trainings would most likely have to use additional trainings with costs associated in order to meet all the requirements.

Training costs were broken into three components: First-aid & CPR training, child development training, and then a package of all other basic health and safety requirements. For the purposes of this estimate, we created these groupings to better reflect the available cost information that we gathered through our research. First-aid and CPR are the most commonly offered trainings, so their costs were easier to identify. One State did point to these particular trainings as an area of concern due to the ongoing costs that they think "would be paid by providers." We discuss our rationale for these trainings (which are required by statute) in the preamble above, but do recognize that there is a cost to this requirement and this cost estimate reflects such costs.

We separated child development training from the rest of the package to reflect the fact that the delivery of trainings in this area are more likely to be tied to broader on-going professional development curricula or programs, and may have a higher cost. Breaking the trainings down in this way allowed us to apply a prorated amount, based on what was currently required by States.

This training requirement only applies to child care providers receiving CCDF subsidies. However, as with the background check estimate, another factor in the calculation was the number of caregivers, teachers and directors per provider that would need to receive the training, since the ACF–800 data captures the number of child care providers serving CCDF children not individual caregivers, teachers, or directors in these settings that would need to receive training. To compensate we applied a multiplier to each setting type (centers, family home, and group home). We used the same methodology described in the background check section above (based on data from the NSECE, ACF–801, and *Caring for our Children* child-staff ratios), to create a weighted average of nine caregivers/teachers/directors per child care center. Unlike the background check requirement, the training would only apply to those providing care for children. For family child care homes, we estimate that one caregiver per site would be required to receive training, and two caregivers per group home.

Next, we assumed that some caregivers, teachers, and directors may already have training in some of the topics, though they were not previously required, and reduced the total estimate by 10 percent. After applying these assumptions, to gaps in current State practice, we were able to estimate the present value cost of compliance with the new pre-service and orientation training requirement. A basic explanation of the calculation is the number of trainings required for compliance (by State and by provider type) multiplied by number of individuals trained multiplied by the cost per training (up to $140 per individual). We also assumed that some portion of individuals will have already received trainings that could apply to the new requirements, so we reduced the final estimate by ten percent. Using a 3% discount rate, the estimated cost is an annualized value of $7 million, or a total of approximately $61 million over the 10 year period examined in this rule. We estimated that during the phase-in period, the required pre-service or orientation health and safety training has an average annual money cost of $18.8 million for the initial two year phase-in period and $3.0 million in subsequent years. The higher cost in the initial years is due to the high cost of bringing current providers into compliance during the phase-in period while in subsequent years, the pre-service and orientation trainings would only apply to new providers.

To estimate the ongoing cost of providing health and safety training in the required topic areas pursuant to the Act to newly entering caregivers, teachers, and directors of CCDF providers who would not otherwise have been required to receive training, we had to predict turnover within the provider population. We took the midpoint of the turnover number we used for background checks—15 percent. Since, according to the NSECE, many caregivers new to a care setting are not new to the profession, we further reduced that estimate by 20 percent to account for the fact that some new caregivers, teachers, and directors will be coming from other CCDF care settings, and thus bring their training credentials with them. (*Number and Characteristics of Early Care and Education (ECE) Teachers and Caregivers: Initial Findings from the National Survey of Early Care and Education (NSECE),* OPRE Report #2013–38)

To generate a cost of ongoing training, based on anecdotal evidence from State administrators, we assumed that ongoing trainings (*e.g.,* maintaining competencies and certificates) would be the equivalent of approximately 20% of the total cost of pre-service and orientation training to the entire CCDF provider population and used that as our annual estimate. We estimated that on an ongoing basis, average annualized money costs for training would be $6.2 million (estimated using a 3% discount rate). The estimated present value cost of this requirement over the 10 year period examined in this rule is approximately $54 million (again using a 3% discount rate).

Next we monetized caregiver/teacher/director time spent completing the requisite health and safety trainings (opportunity costs). *The National Center on Child Care Professional Development Systems and Workforce Initiatives* funded by ACF reported that the training topics together would require a minimum of 20 hours. However, most caregivers will require only a subset of the training topics (*e.g.,* SIDS training is only for caregivers that serve infants; transportation and child passenger safety is only as applicable). Using that as a baseline, for the purposes of this calculation we used a lower bound estimate of 15 hours and an upper bound of 30 hours to complete the required trainings. We used the midpoint of these two estimates for the final estimate. We assumed that each hour of staff time equals $12.80, the same as we did for background checks ($10 for child care caregivers multiplied by 1.28 to account for benefits, but not overhead). (*Employer Cost for Employee Compensation database,* Bureau of Labor Statistics, adjusted to reflect the number of child care providers that are self-employed)

We then applied a 10 percent reduction to those figures to account for caregivers who have fulfilled some training requirements that were not previously required. Using these assumptions, during the initial two year phase-in period (different than the 5 year phase-in period indicated in the table below) the average annual opportunity cost of monetized caregiver time on trainings is estimated to be approximately $63.2 million. The average annual opportunity cost for the entire 10 year period is estimated to be 37.6 million, with a total present value of $330.0 million over the 10 year period (using a 3% discount rate).

TABLE 5—ESTIMATED IMPACTS OF TRAINING PROVISIONS

[$ in millions]

	Phase-in annual average (years 1–5)	Ongoing annual average (years 6–10)	Annualized cost (over 10 years)			Total present value (over 10 years)		
			Undiscounted	Discounted		Undiscounted	Discounted	
				3%	7%		3%	7%
Money Costs ($ in millions)								
Pre-Service & Orientation	9.8	3.5	6.6	7.0	7.5	66.4	61.4	56.0
On-going (existing providers)	5.6	7.0	6.3	6.2	6.1	62.9	54.4	45.5
Subtotal	15.4	10.5	12.9	13.2	13.5	129.3	115.8	101.5
Opportunity Costs ($ in millions)								
Pre-Service & Orientation	27.9	10.0	18.9	19.9	21.2	189.2	174.9	159.5
On-going (existing providers)	15.9	19.9	17.9	17.6	17.3	179.2	155.0	129.7
Subtotal	43.8	29.9	36.8	37.6	38.5	368.4	330.0	289.3
Total	59.2	40.4	49.7	50.8	52.0	497.7	445.8	390.8

Administrative and information technology (IT) startup. Compliance with these health and safety provisions will require States to incur administrative costs and develop or expand their information technology systems and capacity. One State noted in their comment that the new requirements "will require significant modifications to our licensing system. This significant burden on our IT resources will require more staff resources than we have available and will also require State monetary resources that are not currently available."

Given that there will be significant variation at the State level on these costs, rather than attempt to quantify the related costs for each provision, we applied a percentage of the total health and safety money costs (minus the costs for the hotline for parental complaints, which already includes administrative and IT costs in its calculation) to estimate the costs of both administrative and IT/infrastructure costs. This analysis assumes 5 percent for administrative costs and an additional 5 percent for IT/Infrastructure costs. Since the annualized amount of all total health and safety money costs (minus the hotline for parental complaint) is approximately $202.2 million, five percent of that would be approximately $10.0 million per year (using a 3% discount rate).

Our 5 percent estimate for Administrative costs is based on Sec. 658E(c)(3)(C) of the Act, which places a 5 percent limit on administrative costs, by stating that not more than 5 percent of the aggregate amount of funds available to the State to carry out this subchapter by a State in each fiscal year may be expended for administrative costs incurred by such State to carry out all of its functions and duties under this subchapter. According to the most recently available data collected through the ACF–696 financial reports, of the 56 States and Territories, only 4 were using the full 5 percent allowed for administrative costs.

The 5 percent estimate for IT/Infrastructure costs is based on OCC's expenditure data (ACF–696), which shows that Lead Agencies reported using a total of $68 million or approximately 1 percent of expenditures on computer information systems. Given the expected increase in IT costs associated with implementing the new rule, including possible costs associated with consultation, we increased that to 5 percent, which we considered a reasonable estimate given current expenditure levels.

The estimated present value cost of both administrative costs and IT/Infrastructure costs amounts to an annualized cost of approximately $10.0 million each, which would result in a cost of $88.2 million over the 10 year period examined in this rule, using a 3% discount rate.

TABLE 6—ESTIMATED IMPACTS OF HEALTH AND SAFETY PROVISIONS

[$ in millions]

	Phase-in annual average (years 1–5)	Ongoing annual average (years 6–10)	Annualized cost (over 10 years)			Total present value (over 10 years)		
			Undiscounted	Discounted		Undiscounted	Discounted	
				3%	7%		3%	7%
Money Costs ($ in millions)								
Monitoring	158.4	197.6	178.0	175.4	171.9	1,779.9	1,541.5	1,292.2
Background Checks	9.0	18.9	13.9	13.6	13.3	139.2	119.7	99.6
Training	15.4	10.5	12.9	13.2	13.5	129.3	115.8	101.5
Admin	9.1	11.3	10.2	10.0	9.9	101.7	88.2	74.2
IT & Infrastructure	9.1	11.3	10.2	10.0	9.9	101.7	88.2	74.2
Subtotal	201.0	249.6	225.2	222.2	218.5	2,251.8	1,953.4	1,641.7
Opportunity Cost ($ in millions)								
Monitoring	13.1	16.4	14.7	14.5	14.2	147.4	127.6	106.9
Background Checks	6.3	7.9	7.1	7.1	7.1	71.1	62.4	53.3
Training	43.8	29.9	36.8	37.6	38.5	368.4	330.0	289.3
Subtotal	63.2	54.2	58.6	59.2	59.8	586.9	520.0	449.5
Total	264.2	303.8	283.8	281.4	278.3	2,838.7	2,473.4	2,091.2

2. Consumer Education Provisions

The Act and the final rule includes several provisions related to improving transparency for parents and helping them to make better informed child care choices. Some of these provisions may require new investments by the States, Territories, and Tribes, including a consumer education Web site at § 98.33(a) and a consumer statement at § 98.33(d). Greater discussion of each of the provisions can be found at Subpart D. All costs associated with implementation of consumer education requirements are considered money costs (as opposed to opportunity costs) since they would involve an actual money transaction.

Consumer education Web site. The final rule, per the Act, amends paragraph (a) of § 98.33 to require Lead Agencies to create a consumer-friendly and easily accessible Web site as part of their consumer education activities. The Web site must at a minimum include six main components: (1) Lead Agency policies and procedures, (2) provider-specific information for all licensed child care providers, and at the discretion of the Lead Agency, all eligible child care providers (other than an individual who is related to all children for whom child care services are provided), (3) results of monitoring and inspection reports for all eligible child care providers (other than an individual who is related to all children for whom services are provided), (4) aggregate number of deaths, serious injuries, and instances of substantiated child abuse in child care settings each year for eligible providers, (5) referral to local child care resource and referral organizations, and (6) directions on how parents can contact the Lead Agency, or its designee, and other programs to help the parent understand information included on the Web site. We established our estimate based on current State practice and the market price of building a Web site that fulfills the requirements in this final rule.

ACF conducted a comprehensive review of State Web sites and found 35 States and Territories already have Web sites that meet at least some of the new requirements. Based on an analysis of current State consumer education Web sites, we assumed that any of the States that did not meet any of the new requirements would have all new costs. For States that met some of the requirements, we determined the percentage of work needed for the Web site to meet the requirements and multiplied the percentage of work needed by the cost estimate for building and implementing a consumer education Web site. Components of a Web site that we looked for and included in our estimate were: The scope of the Web site in terms of which providers were included; health and safety requirements; posting the date of last inspection, including any history of violations or compliance actions taken against a provider; information on the quality of the provider; and aggregate data on number of fatalities, serious injuries, and substantiated cases of child abuse that occurred in child care. From this review, we determined the amount of work needed for all States and Territories to build and implement the requirements of the consumer education Web site. We also consulted several organizations familiar with building Web sites to establish an upper and lower bounds for the estimate based on the final rule that covered the full range of implementation, from planning and initial set-up to beta testing. The upper and lower bound estimates include features that would make the Web site more user-friendly but may not be included in the final rule, including advanced search functions, such as a map feature, to make it easier for parents to find care.

Building and implementing a new Web site requires some start-up costs, so the cumulative estimated costs are higher during the initial five-year phase-in period. We established a lower bound estimate to include the web developer costs of planning, creating supporting documentation, site and infrastructure set-up, static page creation, initial data imports, the creation of basic and advanced search functions and data management systems, and testing. The upper bound adds development and improvement activities to modernize the Web site as technologies change. Ongoing annual costs include quality control and maintenance, providing customer support, and monthly data updates to the Web site. All of these estimates include salaries and overhead for the Web site developers and staff, weighted by the number of CCDF providers in each State.

Based on our research, we used the same salary and overhead information ($67,000 for line staff) for all States. However, there will be different levels of effort depending on the number of providers in a State, so we assumed different FTEs based on the total number of child care providers in a State: States with more than 8,000 providers (3.0 FTE), States with between 3,000 and 8,000 providers (2.50 FTE), and States with less than 3,000 providers (2.0 FTE). 11 States had over 8,000 providers; 16 States and Territories had between 3,000 and 8,000 providers; and 29 States and Territories had fewer than 3,000 providers.

Over the five-year phase-in period, we estimated an average annual money cost (estimated using a 3% discount rate) for just the building and maintenance of Web sites of $12.8 million and ongoing money costs of $11.8 million annually thereafter.

The consumer education Web site requires a list of available providers and provider-specific monitoring reports, including any corrective actions taken. The costs associated with collecting the information necessary to provide this information on the Web site is included in other parts of this RIA. For example, this RIA includes an estimate for the cost of implementing monitoring and inspection requirements. There may also be effort associated with translating information from monitoring and inspection reports for an online format. However, since the monitoring cost assumes the full salary for monitoring staff and supervisors, it is reasonable to assume that the duties of these employees would include processing licensing information/findings.

However, one of the components of the consumer education Web site at § 98.33(a)(2)(ii) is information about the quality of the provider as determined by the State through a QRIS or other transparent system of quality indicators, if the information is available for the provider. For Lead Agencies that do not currently have a means for differentiating quality of care, there may be new money costs associated with creating the system of quality indicators necessary to obtain quality information on providers. Therefore, we are incorporating the cost of implementing a system of quality indicators into the cost estimate for the consumer education Web site.

In order to estimate the costs of implementing the transparent system of quality indicators for the consumer education Web site, we modeled a sample system of quality indicators using the QRIS Cost Estimation Model (developed by the National Center on Child Care Quality Improvement funded by ACF). Costs were associated with the following components included in the cost estimation model: Quality assessment, monitoring and administration, and data and other systems administration. For each State, we identified the components of the sample system of quality indicators that each individual State or territory was missing. Costs were applied only in the areas that were lacking for States and territories with partial compliance.

States and Territories not meeting any of the components of the model had all new costs associated with each component. Using information from the CCDF FY 2014–2015 State Plans and the National Center on Child Care Quality Improvement, ACF determined which States had a system for differentiating the quality of care available in the State, which States could then use to provide information on the consumer education Web site. In order for States to be considered as already meeting this requirement, the State needed to have reported having a means for measuring and differentiating quality between child care providers. ACF recommends this system be a QRIS that meets high-quality benchmarks, but as this rule does not require a QRIS, we counted other systems of quality indicators, such as tiered reimbursement based on quality, as meeting the components of the consumer Web site. More than 45 States have sufficient means for differentiating quality and therefore we assumed no cost for those States.

ACF estimates that during the five-year phase-in period the total national cost associated with implementing transparent systems of quality indicators has an average annual cost of $2.2 million. This estimate has been included in the cost of designing and implementing the consumer education Web site, which was discussed above. The total estimated present value cost (using a 3% discount rate) of the Web site requirement over the 10 year period examined in this rule is $108.6 million, with an annualized cost of $12.4 million.

Consumer statement. The final rule at § 98.33(d) requires Lead Agencies to provide parents receiving CCDF subsidies with a consumer statement that includes information specific to the child care provider they select. The consumer statement must include health and safety, licensing or regulatory requirements met by the provider, the date the provider was last inspected, any history of violations, and any voluntary quality standards met by the provider. It also must disclose the number for the hotline for parents to submit complaints about child care providers, as well as contact information for local resource and referral agencies or other community-based supports that can assist parents in finding and enrolling in quality child care.

The information included in the consumer statement overlaps with much of the information required on the consumer education Web site. In their FY 2014–2015 CCDF Plans, 42 States and Territories report using their Web sites to convey consumer education information to parents about how their child care certificate permits them to choose from a variety of child care categories. Since many States and Territories are already using their Web sites to make available provider-specific information, this final rule does not require Lead Agencies to create a whole new document or information item. Rather, the Lead Agency can point parents to the provider's profile on the Web site or print it out for a parent that may be doing intake in person. We assumed the consumer education Web site already includes the majority of information required in the consumer statement, including, if available, information about provider quality. However, commenters noted that there may be additional staff time needed to provide additional information to parents receiving subsidies. Therefore, this cost estimate takes into account labor costs associates with the consumer statement. This estimate also takes into account the number of providers in each State or Territory. During the five-year phase-in period, we estimated an average annual cost of the consumer statement provisions to be approximately $1 million and an average ongoing cost of $775,000 annually.

TABLE 7—ESTIMATED IMPACTS OF CONSUMER EDUCATION PROVISIONS

[$ in millions]

	Phase-in annual average (years 1–5)	Ongoing annual average (years 6–10)	Annualized cost (over 10 years)			Total present value (over 10 years)		
			Undiscounted	Discounted		Undiscounted	Discounted	
				3%	7%		3%	7%
Money Costs ($ in millions)								
Consumer education Web site	12.8	11.8	12.3	12.4	12.5	123.0	108.6	93.6
Consumer statement	0.5	0.8	0.7	0.6	0.6	6.5	5.5	4.5
Total	13.3	12.6	13.0	13.0	13.1	129.5	114.1	98.1

3. Increased Average Subsidy per Child

The reauthorized statute and this final rule include several policies aimed at increasing access to quality care for low-income children, as well as creating a fairer system for child care providers. As Lead Agencies implement these new policies, we expect that there will be an increase in the amount paid to child care providers, representing a budget impact on Lead Agencies. While we expect these changes to cause an increase in payments, we lack specific data on the amounts associated with each of these policies. We requested comments about whether Lead Agencies expect these policies to cause an increase in the subsidy payment rates, but did not receive any comments with specific information to further inform the cost estimate.

We expect the following policies and practices to impose budget impacts (which are characterized in this analysis as transfers) on Lead Agencies:

- Setting payment rates based on the most recent market rate survey (or alternative methodology) and at least at a level to cover health, safety, quality, and staffing requirements in the rule (though some of the impact related to health and safety may already be accounted for in the health and safety sections of the RIA). Lead Agencies must also take into consideration the cost of providing higher-quality child care services (§ 98.45(f));
- Delinking provider payments from a child's occasional absences by either paying based on a child's enrollment, providing full payment if a child attends at least 85 percent of authorized time, or providing full payment if a child is absent for five or fewer days in a month (§ 98.45(l)(2)); and,
- Adopting the generally-accepted payment practices of child care providers who do not receive CCDF subsidies, including paying on a part-time or full-time basis (rather than paying for hours of service or smaller increments of time) and paying for reasonable mandatory registration fees that the provider charges to private-paying parents (§ 98.45(l)(3)).

Lead Agencies are required to implement each of these policies; however, several of them have a few options from which Lead Agencies may choose. We do not know which options Lead Agencies will choose, and therefore are not certain of which policies will impose budget impacts on which Lead Agencies. These impacts will also vary by Lead Agency depending on how many of the policies the Lead Agency adopted prior to this final rule. We requested comment on how Lead Agencies may choose to implement these different payment policies and practices and included this in the preamble discussion of § 98.45 above.

Because of the multiple policy options available to Lead Agencies and limited data on the effects of individual policies, it is difficult to estimate new impacts associated with each policy listed. However, we recognize that implementing these new policies will impact Lead Agency budgets and contribute to an increase in the amount of cost per child of child care assistance per child. Therefore, despite our uncertainty regarding specific effects, we would be overlooking a potentially significant new impact if we did not include an analysis of payment policies and practices in this RIA.

These payment policies and practices will each have varying effects, but once they are put together, one likely outcome is an increase in the average annual subsidy amount per child. Therefore, in order to estimate the possible payment effects associated with these policies, we are bundling them together and estimating their total impact on the average annual subsidy per child. The actual impact will depend on how many of the policies the Lead Agency currently has in place and how the Lead Agency chooses to implement these new policies.

The average annual subsidy rate per child in FY 2014 was $4,824. This amount is the starting point for our estimate. The average annual subsidy rate per child has historically increased each year and would continue to do so regardless of the new law or regulation. Therefore, we have built in a 2.59% increase for each of the ten years included in this cost estimate. This increase represents the historical increases in the average annual subsidy per child that we estimate would occur without this rule.

This subsidy amount, including the increase that would be expected to happen regardless of reauthorization and this final rule, provides the baseline for our ten year estimate. This average represents all settings, all types of care, all ages, and all localities, which masks great variation across the States/Territories based on different costs of living or the higher costs associated with providing care to infants and toddlers. For example, the highest average annual subsidy per child paid by a State/Territory was $9,4088 in FY 2014, while the lowest average annual subsidy per child paid by a State/Territory was $1,944. States/Territories with subsidy payments substantially lower than the average subsidy payment are likely to see higher increases in the subsidy rate than States/Territories with subsidy payments closer to the average.

To calculate the impacts, we estimated a phased-in increase in the average annual subsidy per child above the baseline, which includes the expected increase in the average annual subsidy per child regardless of this final rule. We expect that there will be a phase-in of the subsidy increase as Lead Agencies phase-in the new policies in reauthorization and this final rule. The phase-in is expected from FY 2016 to FY 2018, with the increase in the subsidy being $165 in FY 2016, $265 in FY 2017, and $515 in FY 2018, respectively, each comparable to the current baseline. This represents the increase on top of the regular annual average subsidy per child, and not the estimated subsidy itself. Following the new market rate survey or alternative methodology that may lead to setting higher payment rates, we estimate the subsidy would increase by $765 in FY 2019, and stay steady in FY 2020 and FY 2021. With the new market rate survey or alternative methodology in FY 2022, we expect an additional increase in the subsidy of $250 (or a total increase of $1,015 above the baseline), and estimate the subsidy will stay steady in FY 2023 and FY 2024.

These estimated increases to average annual subsidy are based on our assumptions about how quickly Lead Agencies may implement the policies, and the reality that the average annual subsidy will likely grow incrementally. Because of limited data, we chose to estimate a modest increase to the average annual subsidy per child. However, given the uncertainty regarding exactly how much the average annual subsidy per child may increase each year, we requested comments and estimates regarding these new costs and how they may impact the subsidy rate in each State/Territory. However, we did not receive comment in this area, so absent additional information we are keeping these cost assumptions for the final rule.

The estimated increases included in this RIA are not recommendations for what ACF proposes to be appropriate levels to set rates in States/Territories and should not be considered as the amount needed to provide an acceptable level of health and safety, or to provide high-quality care. As mentioned earlier in this rule, ACF is very concerned about States'/Territories' current low payment rates. ACF continues to stand behind the 75th percentile of current market rates, which remains an important benchmark for gauging equal access for children receiving CCDF-funded child care.

The per child calculations used here are not recommendations for a per child subsidy, but rather represent an estimated cost of increasing the current national average annual subsidy per child as a result of these new policies. This is likely an underestimate of the payment amounts necessary to raise provider payment rates to a level that supports access to high-quality child care for low-income children. We requested comments on what provider payment rates may be necessary to support high-quality child care. While one State did comment to note that they anticipate that "it may be necessary for providers to increase their rates in order to comply with additional health and safety training requirements," we did not receive comments with specific information on projected costs related to this analysis.

To calculate the estimated total increase in the average annual subsidy per child and the impacts associated with the new payment policies in this final rule, we multiplied the estimated increase in the average annual subsidy per child (described above) by the FY 2014 CCDF caseload of 1.4 million children. Based on this formula, we estimate the average annual impact to be $478.8 million during the initial five year period, with the estimated present value over the subsequent 5 year period of $839.1 million (estimated using a 3% discount rate). This would be a total present value of approximately $7.4 billion over 10 years (using a 3% discount rate).

As discussed above, there is a high level of uncertainty associated with this estimate. However, not including an estimate of the Lead Agency budget impacts associated with these policies would overlook significant policies in the legislation and this final rule and fail to give an accurate picture of the costs associated with them.

OMB Circular A–4 notes the importance of distinguishing between costs to society as a whole and transfers of value between entities in society. The increases in subsidy payments just described impose budget impacts on Lead Agencies, but from a society-wide perspective, they only generate costs to the extent that they lead to new resources being devoted to quantity or quality of child care. Although we acknowledge this potential increase in resource use, for the technical purposes of this regulatory impact analysis, we will refer to the estimated subsidy payment impacts as transfers from Lead Agencies to entities bearing the existing cost burden (mostly child care providers who typically have low earnings), rather than societal costs.

TABLE 8—ESTIMATED IMPACTS OF INCREASED SUBSIDY

[$ in millions]

	Phase-in annual average (years 1–5)	Ongoing annual average (years 6–10)	Annualized cost (over 10 years)			Total present value (over 10 years)		
			Undiscounted	Discounted		Undiscounted	Discounted	
				3%	7%		3%	7%
Transfers From Lead Agencies to Child Care Providers ($ in millions)								
Increased Subsidy	478.8	1,281.0	879.9	839.1	786.1	8,799.0	7,372.4	5,907.7
Total (Transfers and Costs)	478.8	1,281.0	879.9	839.1	786.1	8,799.0	7,372.4	5,907.7

B. Analysis of Benefits

The changes made by the CCDBG Act of 2014 and the final rule have three primary beneficiaries: Children in care funded by CCDF (currently approximately 1.4 million), their families who need the assistance to work, pursue education or to go to school/training, and the roughly 415,000 child care providers that care for and educate these children. But the effect of these changes will go far beyond those children who directly participate in CCDF and will accrue benefits to children, families, and society at large. Many providers who serve children receiving CCDF subsidies also serve private-paying families, and all children in the care of these providers will be safer because of the new CCDF health and safety requirements. Further, the requirements for background checks extend beyond just CCDF providers. The public at large also benefits in cost savings due to greater family work stability when there is stable, high quality child care; lower rates of child morbidity and injury; fewer special education placements and less need for remedial education;

reduced juvenile delinquency; and higher school completion rates.

In 2012, approximately 60 percent of children age 5 and younger not enrolled in kindergarten were in at least one weekly non-parental care arrangement. (U.S. Department of Education, *Early Childhood Program Participation,* from the National Household Education Surveys Program of 2012, August 2013) We know that many child care arrangements are low quality and lack basic safeguards. A 2006 study conducted by the National Institute of Child Health and Development (NICHD) found that, "most child care settings in the United States provide care that is "fair" (between "poor" and "good") and fewer than 10 percent of arrangements were rated as providing very high quality child care." (U.S. Department of Health and Human Services, National Institutes of Health, *Study of Early Child Care and Youth Development,* 2006) More recently, both the Department of Health and Human Services' (HHS) Office of Inspector General (OIG) and the Government Accountability Office (GAO) have identified serious deficiencies with health and safety protections for children in child care settings. (HHS Office of the Inspector General, *Child Care and Development Fund: Monitoring of Licensed Child Care Providers,* OEI–07–10–00230, November 2013) (*Early Alert Memorandum Report: License-Exempt Child Care Providers in the Child Care and Development Fund Program,* HHS OIG, 2013). (Government Accountability Office, *Overview of Relevant Employment Laws and Cases of Sex Offenders at Child Care Facilities,* GAO–11–757, 2011) We also know from a growing body of research that in addition to the importance of quality to health and safety on a child's immediate and long term future health, quality is important for children's long term success in school and in life (as described elsewhere in this section).

While there are many benefits to children, families, providers and society from affordable, higher-quality child care, there are challenges to quantifying their impact. CCDF provides flexibility to States, Territories, and Tribes in setting health and safety standards, eligibility, payment rates, and quality improvements. As a result, there is much variation in CCDF programs across States. Therefore, we do not have a strong basis for estimating the magnitude of the benefits of the CCDBG Act of 2014 and the final rule in dollar amounts. While we are not quantifying benefits in this analysis, we requested comment on ways to measure the benefit that the Act and the proposed (now final) rule will have on children, families, child care providers, and the public. However, we did not receive comment in this area that would support quantification of these benefits.

As shown in the discussion below, there is evidence that the CCDBG Act of 2014 and final rule's improvements to health and safety, quality of children's experiences, and stability of assistance for parents and providers will have a significant positive return on the public's investment in child care. We discuss these benefits as "packages" of improvements: (1) Health and safety; (2) consumer information and education; (3) family work stability; (4) child outcomes; and (5) provider stability.

1. Health and Safety

One of the most substantial changes made by this final rule is a package of health and safety improvements, including health and safety requirements in specific topic areas, health and safety training, background checks, and monitoring and pre-inspections.

Health and Safety Requirements. The Act requires Lead Agencies to set requirements in baseline areas of health and safety, such as CPR and first aid, and safe sleeping practices for infants. At their core, health and safety standards in this final rule are intended to make child care safer and thus lower the risk of harm to children.

The CCDBG Act of 2014 and the final rule are expected to lead to a reduction in the risk of child morbidity and injuries in child care. The most recent study on fatalities occurring in child care found 1,326 child deaths from 1985 through 2003. The study also showed variation in fatality rates based on strength of licensing requirements and suggested that licensing not only raises standards of quality, but serves as an important mechanism for identifying high-risk facilities that pose the greatest risk to child safety. (Dreby, J., Wrigley, J., Fatalities and the Organization of Child Care in the United States, 1985–2003, American Sociological Review, 2005) ACF collects data about the number of child care injuries and fatalities through the Quality Performance Report (QPR) in the CCDF Plan (ACF–118). In 2014, there were 93 child deaths in child care based on data reported by 50 States and Territories. The number of serious injuries to children in child care in 2014 was 11,047, with 35 States and Territories reporting.

Various media outlets have also conducted investigations of unsafe child care and deaths of children. In Minnesota, the Star Tribune in Minneapolis reported in a series of articles in 2012 that the number of children dying in child care facilities "had risen sharply in the past five years, from incidents that include asphyxia, sudden infant death syndrome (SIDS) and unexplained causes." The report found 51 children died in Minnesota over the five-year period. (Star Tribune, *The Day Care Threat,* 2012) In Indiana, an investigation by the Indianapolis Star found, "21 deaths at Indiana day cares from 2009 to June 2013, and 10 more child deaths have since been reported." (Indianapolis Star, *How Safe are Indiana Day Cares,* 2013) Indiana recently passed legislation that raises standards for child care programs. In Kansas, the high incidence of fatalities prompted the Kansas legislature to implement new procedures to guide investigations of serious injury or sudden, possibly unexplained deaths in child care, particularly infants. (Kansas Blue Ribbon Panel on Infant Mortality, *Road Map for Preventing Infant Mortality in Kansas,* 2011) The case of Lexie Engelman was a rally cry of advocates for better health and safety requirements. The 13-month old child suffered fatal injuries in a registered family child care home in 2004 due to lack of supervision. As a result, Kansas enacted new protections such as requiring all providers to be licensed and regularly inspected, training for providers, and new rules of supervision. Since implementing "Lexie's Law," Kansas jumped from 46th to 3rd in the Child Care Aware of America annual ranking of State policies, and State officials have been able to use data to target regulatory action and provide information to the public in a much more timely way. State officials report that more stringent regulations have greatly enhanced State capacity to protect children.

With respect to morbidity, 20 percent of SIDS deaths occur while children are in child care. (Moon, R.Y., Sprague, B.M., and Patel, K.M., *Stable Prevalence but Changing Risk Factors for Sudden Infant Death Syndrome in Child Care Settings in 2001,* 2005) Many of these deaths are preventable by safe sleep practices. Local review teams in one State found that 83 percent of SIDS deaths could have been prevented. (Arizona Child Fatality Review Program, *Twentieth Annual Report,* November 2013) As part of health and safety training requirements, the Act and final rule require that caregivers, teachers, and directors serving CCDF children receive training in safe sleep practices. According to the FY 2014–2015 CCDF Plans, approximately 27 States and

Territories already have safe sleep and SIDS prevention pre-service training requirements for child care centers, and 26 States and Territories have SIDS prevention pre-service training requirements for family child care homes. Requiring the remaining States and Territories to have safe sleep training for child care providers will likely help change provider practice and lower the risk of SIDS-related deaths for infants.

Health and Safety Training. The final rule codifies the requirement of the Act that CCDF caregivers, teachers, and directors undergo a pre-service or orientation training, as well as receive ongoing training, in the health and safety standards. The final rule also adds child development as a required topic for required training, consistent with the professional development and training provisions of the Act. Knowledge of child development is important to understanding and implementing safety and health practices and conditions. Training in health and safety standards, particularly prevention of SIDS, should reduce child fatalities and injuries in child care. For example, the rate of SIDS in the U.S. has been reduced by more than 50 percent since the campaign in the early 1990s by the American Academy of Pediatrics on safe sleep practices with infants. (National Institutes of Health, Eunice Kennedy Shriver National Institute of Child Health and Human Development. Back to Sleep Public Education Campaign) Only 24 States currently require pre-service or orientation training to include SIDS prevention.

Background Checks. The new background check requirements are expected to prevent individuals with criminal records from working for child care providers. Data from two States show that 5 to 10 percent and 3 to 4 percent, respectively, of background checks result in criminal record "hits" that disqualify the provider. To the extent that these individuals would have otherwise worked in child care settings, thereby increasing the risk of maltreatment or injury to a child, we assume that background checks yield a positive benefit for child health and safety. That is, background checks serve a real purpose in preventing a small proportion of potentially dangerous individuals from providing care to children.

Monitoring. The Act and this final rule require States to conduct monitoring visits for all CCDF providers, including license-exempt providers (except, at the Lead Agency option, those that serve relatives). Licensed CCDF providers must receive a pre-licensure inspection and annual, unannounced inspections. License-exempt CCDF providers (except at the Lead Agency option those that serve relatives) must have annual inspections for health, safety and fire standards. Currently, 15 States do not conduct a licensing pre-inspection visit of family child care; 12 States do not conduct pre-inspections on group homes; and one State does not pre-inspect child care centers. Nineteen States do not inspect family child care providers each year, 22 States do not conduct annual visits for group homes, and 10 States do not visit child care centers on an annual basis. It is reasonable to expect that more stringent health and safety standards and their enforcement through pre-inspections and annual licensing inspections will result in fewer serious injuries and child fatalities in child care.

Child Abuse Reporting and Training. Nationally, there are approximately 12.5 million children in child care settings. With a rate of over 10 children per thousand being victims of substantiated abuse or neglect, there are over 100,000 children estimated to be victims of abuse who are also receiving services in child care settings. This final rule contains a number of provisions designed to prevent child abuse and neglect. Under the Act and this final rule, Lead Agencies must certify that child care caregivers, teachers, and directors comply with child abuse reporting requirements of the Child Abuse Prevention and Treatment Act. The final rule also requires training on "recognition and reporting of suspected child abuse and neglect", which would equip caregivers, teachers, and directors with training necessary to report potential abuse and neglect. The rule also requires training in child development for CCDF caregivers, teachers, and directors. From a protection standpoint, research has shown that improving parental understanding of child development reduces the incidence of child abuse and neglect cases. (Daro, D. and McCurdy, K., *Preventing Child Abuse and Neglect: Programmatic Interventions,* Child Welfare, 1994) (Reppucci, N., Britner, P., and Woodard, J., *Preventing Child Abuse and Neglect Through Parent Education,* Child Welfare, 1997) To the extent that this training would have a similar effect on caregivers, teachers, and directors of CCDF providers, we expect there to be some decrease in child abuse within child care settings.

In addition to the tragedy of injuries and fatalities in child care, there are tangible costs such as medical care, a parent's absence from work to tend to an injured child, the loss for the family, and loss of lifetime potential earnings for society. According to the 2014 Quality Performance Report, there were 11,407 injuries (defined as needing professional medical attention) and 93 fatalities reported in child care. We think these numbers are lower than the actual incidences because some Lead Agencies have difficulty accessing this information collected by other agencies.

2. Consumer Information and Education

As one research study said, "Child care markets would work more effectively if parents had access to more information about program quality and help finding a suitable situation. This would cut the cost of searching for care and increase the likelihood of more comparison shopping by parents." (Helburn, S. and Bergmann, B., *America's Child Care Problem: The Way Out,* 2002) The Act and final rule require the Lead Agency to provide consumer education to parents of eligible children, the general public, and child care providers. This includes a consumer-friendly and easily accessible Web site about relevant Lead Agency processes and provider-specific information. The Act and the final rule also require a range of information for parents, including the availability of child care services and other assistance for which they might be eligible, best practices relating to child development, how to access developmental screening, and policies on social-emotional behavioral health and expulsion. The final rule also requires a consumer statement for families receiving subsidies. Taken together, these provisions should improve parents' ability to make fully informed choices about child care arrangements.

The consumer education package also provides benefits to parents in regards to the value of their time. Most parents want to know about health and safety records, licensing compliance, and quality ratings when deciding on a child care provider. However, this research can be very time consuming because of barriers to accessing the information needed to make a fully informed decision. For example, while all Lead Agencies must make substantiated complaints available to the public, some States previously required that people go to a government office during regular business hours to access these records. It is not reasonable to expect a parent who is working to take that time to navigate these bureaucratic requirements.

The final rule's package of consumer education provisions, including the consumer-friendly Web site, addresses the aforementioned information barrier by helping to provide parents with important resources in a manner that fits their needs.

3. Family Work Stability/Improved Labor Force Productivity

The Act and the final rule promote continuity of care in the CCDF program through family-friendly policies—it requires Lead Agencies to implement minimum 12-month eligibility redetermination periods, ensures that parents who lose their jobs do not immediately lose their subsidy, minimizes requirements for families to report changes in circumstances, and provides more flexibility to serve vulnerable populations, such as children experiencing homelessness, without regard to income or work requirements.

Benefits to employers. There is a strong relationship between the stability of child care and the stability of the workforce for employers. The cost to businesses of employee absenteeism due to disruptions in child care is estimated to be $3 billion annually. (Shellenback, K., *Child Care & Parent Productivity: Making the Business Case,* Cornell University: Ithaca, NY. 2004) The eligibility provisions of the Act and this final rule will allow parents to work for longer stretches without interruptions to their child care subsidy, and will benefit parents by limiting disruptions to their child care arrangements. These policies in turn also provide benefits to employers seeking to maintain a stable workforce.

Studies show a relationship between child care instability and employers' dependability of a stable workforce. In one study, 54 percent of employers reported that child care services had a positive impact on employee absenteeism, reducing missed workdays by as much as 20 to 30 percent. (Friedman, D.E., *Child Care for Employees' Kids,* Harvard Business Review, 1986) In addition, 63 percent of employees surveyed at American Business Collaboration (ABC) companies in 10 communities across the country reported improved productivity when a parent was using high-quality dependent care, and 40 percent of employees reporting spending less time worrying about their families, 35 percent were better able to concentrate on work, and 30 percent had to leave work less often to deal with family situations. (Abt Associates, *National Report on Work and Family,* 2000) A 2010 study examined the impact of child care subsidy receipt by New York City employees and employees of subcontracted agencies in the health care sector. The study looked at the variables of attendance, work performance, productivity, and retention of employees. Results showed that subsidy receipt had a positive impact on work performance; whereas, the loss of the subsidy had a negative effect. After the subsidy period ended and parents were faced with less stable child care arrangements, participants self-reported a decrease in their work performance and in their work productivity coupled with an increase in tardiness and work/family conflict. (Wagner, K.C., *Working Parents for a Working New York Study,* Cornell and New York Child Care Coalition, 2010)

Benefits to parents. The lack of reliable and dependable child care arrangements negatively affects parents' income, hours worked, work performance, and advancement opportunities. To the extent that these new requirements will reduce barriers to retaining child care assistance for CCDF families, the new rule will mitigate some of the disruption currently experienced by low-income families. Studies have shown that many parents face child care issues that can disrupt work, impacting both the parent and their employers. One researcher, using data from the Survey of Income and Program Participation (SIPP), found that 9–12 percent of families reported losing work hours as a result of child care disruptions. (Boushey, H., *Who Cares? The Child Care Choices of Working Mothers, Center for Economic and Policy Research Data,* 2003) Another study showed that 29 percent of parents experienced a breakdown in their child care arrangement in the last 3 months. (Bond, J., Galinsky, E., and Swanberg, J., *The 1997 National Study of the Changing Workforce,* 1998)

These child care disruptions can negatively impact parental employment. For example, a survey of over 200 mothers working in the restaurant industry in five cities: Chicago, Washington, DC, Detroit, Los Angeles, and New York found that instability in child care arrangements negatively affected their ability to work desirable shifts or to move into better paying positions at the restaurant. (Restaurant Opportunities Centers United, et al., *The Third Shift: Child Care Needs And Access For Working Mothers In Restaurants,* Restaurant Opportunities Centers United, 2013)

4. Child Outcomes and Human Capital Development

Beyond implementing health and safety standards, the Act states that two of the purposes of the program are improving child development of participating children and increasing the number and percentage of low-income children in high-quality child care settings. This final rule places significant emphasis on policies that support those goals.

Child care continuity. The eligibility and redetermination provisions benefit children as well as parents and employers. Continuity in child care arrangements can have a positive impact on a child's cognitive and socio-emotional development. (Raikes, H. *Secure Base for Babies: Applying Attachment Theory Concepts to the Infant Care Setting,* Young Children 51, no. 5, 1996) Young children need to have secure relationships with their caregivers in order to thrive. (Schumacher, R. and Hoffmann, E., *Continuity of Care: Charting Progress for Babies in Child Care Research-Based Rationale,* 2008) Children with fewer changes in child care arrangements are less likely to exhibit behavior problems. (de Schipper, J.C., Van Ijzendoorn, M. & Tavecchio, L., *Stability in Center Day Care: Relations with Children's Well-being and Problem Behavior in Day Care,* Social Development, 2004) Conversely, larger numbers of changes have been linked to less outgoing and more aggressive behaviors among four- and five-year-old children. (Howes, C. & Hamilton, *C.E., Children's Relationships with Caregivers: Mothers and Child Care Teachers,* Child Development, 1992) Continuity of care policies support children's ability to develop nurturing, responsive, and continuous relationships with their caregivers. For school-age children, continuity of care is important because it provides additional exposure to programming that can lead to improved school attendance and academic outcomes. (Welsh, M. Russell, C., Willimans, I., *Promoting Learning and School Attendance through After-School Programs,* Policy Studies Associates, 2002.)

Child care quality beyond health and safety. Health and safety form the foundation of quality but are not sufficient for high-quality development and learning experiences. When children have high quality early care and education, there are benefits to the child and to society. (Yoshikawa, H., et al., *Investing in Our Future: The Evidence Base on Preschool Education,* 2013) The North Carolina Abecedarian Project demonstrated both categories of benefits. The Project enrolled very low-income children from infancy to kindergarten in full day, full year child care with high-quality staff, environments, and curricula. A longitudinal study following them through age 21 found significant returns on the investment, such as greater school readiness that led to fewer special education and remedial education placements, higher rates of high school completion and jobs, fewer teen pregnancies, and lower rates of juvenile delinquency. (Masse, Leonard N. and Barnett, Steven W., *A Benefit Cost Analysis of the Abecedarian Early Childhood Intervention,* National Institute for Early Education Research; New Brunswick, NJ). Recent follow-up studies to the well-known Abecedarian Project, which began in 1972 and has followed participants from early childhood through young adulthood, found that adults who participated in a high quality early childhood education program are still benefiting from their early experiences. Abecedarian Project participants had significantly more years of education than their control group peers, were four times more likely to earn college degrees, and had lower risk of cardiovascular and metabolic diseases in their mid-30s. (Campbell, Pungello, Burchinal, et al., *Adult Outcomes as a Function of an Early Childhood Educational Program: An Abecedarian Project Follow-Up,* Frank Porter Graham Child Development Institute, Developmental Psychology, 2012 and Campbell, Conti, Heckman et al, *Early Childhood Investments Substantially Boost Adult Health,* Science 28 March 2014, Vol. 343.)

Other cost-benefit analyses of other publicly funded preschool programs with similarly high-quality standards, such as the Chicago Child Parent Centers, demonstrated a high return to society on the public investment. (“Age 21 Cost-Benefit Analysis of the Title I Chicago Child-Parent Centers.” Educational Evaluation and Policy Analysis, 24(4): 267–303.)

Recognizing the importance of quality as well as access, the Act and this final rule promote efforts to improve the quality of child care. Chief among these changes is the increased portion of the grant that a Lead Agency must use, at a minimum, for quality improvements. The reauthorized Act increases the prior minimum four percent quality spending requirement to nine percent over time. It also requires States to invest in quality by spending an additional 3 percent for infant and toddler quality. States use the quality dollars for a range of activities that benefit children and providers assisted with CCDF funds and for early childhood systems as a whole, such as State early learning guidelines, professional development, technical assistance such as coaching and mentoring as part of the quality rating and improvement system, scholarships for postsecondary education, and upgrades to materials and equipment.

A critical element in the quality of child care is the knowledge and skill of the child care workforce. The Act and the final rule emphasize the importance of States creating and supporting a progression of professional development, starting with pre-service, and which may include postsecondary education. Quality professional development is critical to creating a workforce that can support children’s readiness for success in school and in later years.

As detailed above, there is a growing amount of evidence and recognition that children who experience high-quality early childhood programs are more likely to be better prepared in language, literacy, math and social skills when they enter school, and that these may have lasting positive impacts through adulthood. Because of the strong relationship between early experiences and later success, investments in improving the quality of early childhood and before- and after-school programs can pay large dividends.

5. Provider Stability

The Act and final rule include provisions to strengthen the stability of providers serving CCDF-assisted children. Studies that have interviewed child care providers participating in the subsidy system have shown the importance of policies that improve and stabilize payments to the providers. (Sandstrom, H, Grazi, J., and Henly, J.R., *Clients’ Recommendations for Improving the Child Care Subsidy Program,* Urban Institute: Washington, DC, 2015; Adams, G., Snyder, Katherine, and Tout, Kathryn, *Essential But Often Ignored: Child care providers in the subsidy system,* Urban Institute: Washington, DC 2003; Oliveira, Peg, The Child Care Subsidy Program Policy and Practice: *Connecticut Child Care Providers Identify the Problems,* Connecticut Voices for Children, 2006)

In addition to rates that reflect the cost of providing quality services, the manner in which providers are paid is important to the stability of the child care industry. Provider instability has a domino effect that can lead to parent employment instability, an outcome that undercuts the Act’s core principle of ensuring that CCDF children have equal access to child care that is comparable to non-CCDF families.

The Act and the final rule require Lead Agencies to pay providers in a timely manner based on generally accepted payment practices for non-CCDF providers. Lead Agencies also must de-link provider payments from children’s absences to the extent practicable. Child care providers have many fixed costs, such as salaries, utilities, rent or mortgage.

Surveys and focus groups with child care providers have found that some providers experience problems with late payments, including issues with receiving the full payment on time and difficulties resolving payment disputes. (Adams, G., Rohacek, M., and Snyder, K., *Child Care Voucher Programs: Provider Experiences in Five Counties,* 2008) This research has also found that delayed payments creates significant financial hardships for the impacted providers, and forces some providers to stop serving or limit the number of children receiving child care subsidies. Thus, lack of timely payments and rules on payments that lead to disincentives to taking children with chronic illnesses or other reasons for absences undercut the equal access provision. By addressing these issues, these provisions of the Act and final rule will provide increased stability and benefits for CCDF providers and the families they serve.

Market Rate or Alternative Methodology. The child care market often does not reflect the actual costs of providing child care, let alone the higher costs of quality child care. Financial constraints of low-income parents prevent child care providers from setting their prices to fully cover the cost of care (National Women’s Law Center, *Building Blocks: State Child Care Assistance Policies,* 2015; Child Care Aware, *Parents and the High Cost of Child Care,* 2014. Currently, relative to the cost of providing quality care, CCDF subsidy payment rates are low in many States.

A report from the National Women’s Law Center on State subsidy policies states that, “only one State had reimbursement rates at the federally recommended level in 2014, a slight decrease from the three States with rates at the recommended level in 2013, and a significant decrease from the twenty-two States with rates at the recommended level in 2001. Thirty-seven States had higher reimbursement rates for higher-quality providers in 2014—an increase from thirty-three States in 2013. However, in more than three-quarters of these States, even the higher rates were below the federally recommended level in 2014.” (Turning the Corner: State Child Care Policies 2014. Schulman, K. and Blank, H. National Women’s Law Center, Washington, DC 2014) The Act and the final rule require Lead Agencies to set provider payment rates based on the current, valid market rate survey or alternative methodology.

To allow for equal access, the rule requires that Lead Agencies set base payment rates sufficient to support implementation of the health, safety, quality, and staffing requirements. Establishing base rates at these levels is important to ensure that providers have the resources they need to meet minimum requirements and that providers are not discouraged from serving CCDF children. With subsidy payments higher than the aforementioned base rate, providers can exceed the minimum requirements of health and safety and quality. In doing so, more providers will be able to serve CCDF-assisted children and more quality providers may decide to participate in the subsidy system—giving parents more choices for their children's care. Currently there has been a downward trend in the number of CCDF providers, and providing for a stronger base rate will help mitigate this effect.

C. Distributional Effects

As part of our regulatory analysis, we considered whether changes would disproportionately benefit or harm a particular subpopulation. As discussed above, benefits accrue both directly and indirectly to society. In order to implement the requirements of the CCDBG Act of 2014 and the final rule, States may have to make key decisions about the allocation of resources, and some may shift priorities during the start-up phase and possibly continuing in later years once the State is fully implementing these requirements. The true impact partially depends on the overall funding level. The President's FY2017 Budget request includes additional funding to help States implement the policies required by the reauthorized Act and this final rule, as well as significant new resources across a ten year period to expand access to child care assistance for all eligible families with children under age four years of age. If funding increases sufficiently, both quality and access could be improved.

While, depending on State behavior, there may be some distributional effect related to any cost, below is a discussion of two policy areas that represent specific distributional effects. The first—changes to subsidy policy required by the reauthorized Act—may result (depending on how the State chooses to implement the policy) in families receiving subsidies for a longer period of time, while other families may not be able to access subsidies (absent an increase in funding for the CCDF program). This would be in effect a transfer of subsidy funding that would potentially limit new enrollment for the purposes of keeping existing families enrolled longer. The second area—increased statutory quality spending requirements—may result in a change in which families receive benefits, or how they receive them, by shifting resources away from direct services to quality spending.

Minimum 12-month eligibility and related provisions. In order to reduce administrative burden and to improve the stability and continuity of care in the CCDF program, the CCDBG Act of 2014 and this final rule at §§ 98.20 and 98.21 require Lead Agencies to adopt a number of eligibility policies, including a 12-month minimum period for families to recertify their eligibility. This package of eligibility policies will allow families to maintain their eligibility regardless of temporary changes in work or training/education status or income changes (as long as income remains below 85% of State Median Income). Subsidy receipt is also predictive of more stable child care arrangements. (Brooks, et. al., Impacts of child care subsidies on family and child well-being, Early Childhood Research Quarterly, 2002) Stability of child care arrangements can affect children's healthy development, especially for vulnerable children who may be at special risk of poor developmental outcomes. (Adams, G., and Rohacek, M., *Child Care Instability: Definitions, Context and Policy Implications,* Urban Institute, 2010) Prior to reauthorization, about half the States had eligibility periods less than 12 months—typically providing only six months of eligibility—and families churned on and off the caseload.

Based on qualitative research and discussions with CCDF participants, we expect that longer eligibility periods, and the related policies in the Act and this rule, will increase the average length of time that participating families receive child care subsidies. As part of this RIA, we used CCDF administrative data to model the policy change in the Act and final rule wherein all States would have a minimum of 12-month eligibility periods, to predict whether CCDF families would have longer participation durations and whether there would be any impact on the unduplicated number of families receiving CCDF assistance. The calculations in this estimate are informed by a demonstration project that randomly assigned working Illinois families with moderate incomes (*i.e.,* above the normal eligibility thresholds) to one of three groups. (Michalopoulos, C., Lundquist, E., and Castells, N., *The Effects of Child Care Subsidies for Moderate Income Families in Cook County, Illinois,* MDRC, 2010) Although two of the three groups were both eligible for child care subsidies, one of the groups required recertification every six-months and the other required recertification every 12-months. Over a 24-month follow-up period, the families assigned to 12-month recertification periods received child care subsidies an average of 2.5 months more than families assigned to 6-month recertification periods.

We also examined a "natural experiment" in Georgia, which changed its recertification period from six months to 12 months in April 2009. A preliminary analysis found that families had longer spell lengths after the policy change than families that entered care before the policy change. Although it is uncertain what the driving factor for this was, these findings from Georgia support the hypothesis that longer recertification periods increase the number of months that recipient families participate in the program.

Assuming that States will maintain their average monthly caseloads once they implement the 12-month recertification periods, but will serve fewer unique children over that time period because of longer subsidy participation durations, we estimated the number of families that could be impacted at current funding levels. Decreased churn would not decrease the amount of assistance given, nor would it affect the average monthly caseload, but may result in a decrease in the total number of families served over the course of a given year. We used an analysis of disaggregated CCDF administrative data from FY 2010 to determine the ratio between unique annual counts and average monthly caseloads, which we used for a baseline ratio to apply to the average monthly caseload totals from FY 2012 (which showed 609,800 children being served in an average month in the 25 States with eligibility periods less than 12 months). With this data, we estimated the unique caseload size of each State in FY 2012, which is the last year for which we have caseload estimates and documentation of policies (which showed 1,053,773 unique children received services at some point during the year in the 25 States). Based on these assumptions and using the results from the Illinois study to estimate the impact on length of subsidy receipt, we estimate that the reduction in unique children served in a given year after the policy change could be approximately 162,000 children.

Increase in Quality Set-aside. As discussed above in the analysis of benefits, the increased quality set-aside and the new infant and toddler set-aside required in reauthorization will benefit children and, when coupled with training and higher rates, child care providers. Lead Agencies are not required to use quality funds to support the quality of care for only CCDF children. Thus, quality investments often support the entire child care system in the State, especially because of the high investments in licensing, training, and quality rating and improvement systems. Therefore, these increased investments will have an impact broader than families receiving CCDF assistance, and will continue to improve the quality of care available to all children, regardless of subsidy receipt.

We do not expect the increase in the quality set-aside to have a significant impact on caseload, particularly since the majority of States are already spending more than the new 9% quality set-aside requirement (see Table 9 below). Other States that do not currently spend above this level will have time to phase-in the increases and will likely use these additional increases to cover several of the new health and safety and professional development requirements. Therefore, any caseload impact would have already been included in the costs associated with those provisions. However, we recognize some Lead Agencies will have to reallocate funds currently being used for other activities, including direct services, so we are discussing possible distributional effects here. Currently, about 13 percent of CCDF expenditures are spent on quality improvement activities, including targeted funds included in appropriations. This amount is more than the full percentage to be set aside for the quality and infant and toddler set-asides in FY 2020, once fully phased-in. However, this is a national figure and may not provide a complete picture of how many States and Territories might have to adjust their quality expenditures to meet new requirements.

Using FY 2012 CCDF expenditure data, we did an analysis of the number of States and Territories that will have to increase their quality expenditures in order to meet the requirements in the CCDBG Act of 2014 and incorporated into this final rule at § 98.50(b)(1). (Note: Compliance with spending requirements is determined after a full grant award is complete. States and Territories have three years to complete their grant awards. Therefore, the most recent award year for which we have data is FY 2012.) We included regular quality expenditures as well as the amount of funds spent for the "quality expansion" and "school-age/resource and referral" targeted funds. The infant and toddler targeted funds were not included in this analysis because they have now been incorporated into the statute. Instead, we have a separate analysis of the new infant and toddler set-aside below. Below is a summary of the number of States and Territories at different amounts of quality expenditures:

TABLE 9—QUALITY EXPENDITURES

% Quality expenditures (FY 2012)	Number of states and territories
<7%	6
7% (effective FY 2016 and FY 2017)	6
8% (effective FY 2018 and FY 2019)	5
9% (effective FY 2020 and succeeding years)	3
>9%	36

Based on this data, 39 States will not have to adjust the percent of funds they expend on quality activities, while six States and Territories will have to increase the percent of funds they spend on quality activities by FY 2016. For the other States and Territories, it varies when each will need to change the amount they spend on quality activities—12 States will have to adjust by FY 2018 to meet the eight percent requirement; and 17 States will have to adjust by FY 2020 to meet the nine percent requirement.

In addition to the primary set-aside for quality activities, this final rule incorporates at § 98.50(b)(2) a new requirement of the Act that, beginning in FY 2017 and each succeeding fiscal year, Lead Agencies must expend at least three percent of their full awards (including Discretionary, Mandatory, and Federal and State Matching funds) on activities that relates to the care of infants and toddlers. Since FY 2001, federal appropriations law has included a requirement for Lead Agencies to spend a certain amount of discretionary funds on activities to improve the quality of care for infants and toddlers. In FY 2015, this set-aside was $102 million. The new three percent reservation represents an increase of about $129 million (for a new amount of $231million), based on FY 2012 State and Territory expenditures.

Lead Agencies do not currently report how much of their general quality funds are spent on activities targeted to improving care for infants and toddlers. Therefore, we only have the amount of targeted funds they spent on infant and toddler activities, which for all but five States and Territories is below the new three percent requirement. The increase necessary ranges from State to State, from $38,000 for Idaho to $21 million for New York. The average increase will be $2.5 million per State. However, as these estimates do not include any regular quality funds overestimating the required increases for the majority of States and Territories.

While a small number of States (five) will have to increase their quality expenditures, since the national average quality expenditure is already above the 12% target for the quality and infant and toddler set-asides, we are not attributing a reduction in the number of children served as a result of this policy change.

D. Analysis of Regulatory Alternatives

In developing this final rule, we considered alternative ways to meet the purposes of the reauthorized Act. There are areas of the Act that we are interpreting and clarifying through this rule. Our interpretation of the Act remains within the legal parameters of the statute and is consistent with the goals and purposes of the Act. Below we include a discussion of areas that we clarified through the final rule: (1) Monitoring for licensed non-CCDF providers, (2) background checks for regulated and registered providers and (3) background checks for non-caregivers.

For the purposes of this analysis, we are discussing the costs, benefits, and potential caseload impacts related to meeting these new requirements. However, it is particularly difficult to predict caseload impact due to a variety of unknown factors, including future federal funding levels. Even if we were to assume level federal funding, States could allocate new funds, redirect current quality spending (*e.g.*, by changing quality activities to focus on health & safety), shift costs to parents or providers, or use a combination of these approaches to pay for new requirements. The caseload estimates in the following discussion are based on the assumption that the entire cost of meeting this requirement are covered by redistributing funds that would otherwise be used for direct services. Therefore, these caseload impact figures should be considered upper bound estimates and are mostly likely significant overestimates.

Background Checks for Regulated and Registered Providers: At § 98.43(a)(1)(i), we are applying the background check requirements to all child care staff members (including prospective child care staff members) of all licensed, regulated, or registered child care providers and all child care providers eligible to deliver CCDF services. This language includes all licensed, regulated, or registered providers, regardless of whether they receive CCDF funds and all license-exempt CCDF providers (with the exception of those related to all children in their care).

The alternative to this policy would be to limit background checks to only providers receiving CCDF assistance. While we acknowledge that others may have interpreted the statute differently, there is justification for applying this requirement in the broadest terms for two important reasons. First, it is our strong belief that all parents using child care deserve this basic protection of knowing that those who are trusted with the care of their children do not have criminal backgrounds that may endanger the well-being of their children.

Second, limiting those child care providers who are subject to background checks, has the potential to severely restrict parental choice and equal access for CCDF children. If all child care providers are not subject to comprehensive background checks, providers could opt to not serve CCDF children thereby restricting access. Creating a bifurcated system in which CCDF children have access to only a portion of child care providers who meet applicable standards would be incongruous with the purposes of the Act and would not serve to advance the important goal of serving more low-income children in high-quality care.

Choosing this would present additional costs to the alternative of limiting background checks to only CCDF providers. The cost of the background check requirement for only CCDF providers would be approximately $11.9 million per year (estimated using a 3% discount rate). Using the methodology discussed in detail in the background check section of the preamble, we estimate the additional cost of requiring background checks of all licensed and regulated providers, rather than just those who are eligible to deliver CCDF services, to be approximately $1.7 million annually (estimated using a 3% discount rate), which would amount to an upper bound caseload impact of about 300 fewer children served per year.

Background Checks for Non-Caregivers: The Act defines a child care staff member as someone (unless they are related to *all* children in care) who is employed by the child care provider for compensation or whose activities involve unsupervised access to children who are cared for by the child care provider. This final rule requires individuals, age 18 or older, residing in a family child care home be subject to background checks. The alternative to this would be to not require background checks of other individuals living in the family child care home. However, we chose this policy because it is reasonable to assume that these individuals may have unsupervised access to children. Because we are including these individuals in the definition of child care staff members, they will be subject to the same requirements and will be allowed the same appeals process as employees.

More than forty States require some type of background check of family members 18 years of age or older that reside in the family child care home (*Leaving Child Care to Chance: NACCRRA's Ranking of State Standards and Oversight for Small Family Child Care Homes,* National Association of Child Care Resource and Referral Agencies, 2012).

While the total cost of the background check requirement is approximately $13.6 million, we can isolate the costs of applying the background checks to non-caregiver individuals, we estimate the cost to be approximately $3 million annually (estimated using a 3% discount rate), which would amount to a upper bound caseload impact of approximately 550 fewer children served per year.

E. Break Even Analysis for Reductions in Injuries and Deaths

This section estimates the potential benefits associated with the elimination of injuries and deaths in child care settings in the United States, and the proportion of fatalities and injuries, which, if eliminated by the provisions discussed here, would justify their costs on their own. Standard methods are used to monetize the value of these potential benefits. Although children receiving subsidies through the Child Care and Development Fund (CCDF) are the individuals that will likely benefit most from the rule's overall health and safety provisions, we conduct this break even analysis using data on children in all child care settings since children in non-CCDF arrangements will directly benefit from the extension of background check requirements and may see additional benefits as a result of other health and safety and quality provisions in the final rule. As described above, the primary regulatory alternative in implementing health and safety provisions would be to restrict background checks provisions and monitoring requirements. Therefore, this analysis discusses the costs and benefits of the final rule relative to that alternative.

The benefits estimated for this analysis are derived from voluntary data reporting on fatalities and injuries in the child care setting to ACF in a Quality Performance Report (QPR). These figures are supplemented by data from several other sources. Although many States contribute data to the QPR report, data on fatalities and injuries is not available for all States. To estimate fatalities and injuries in the child care setting at the national level in 2014 using the QPR data, we impute estimated fatalities and injuries for States with incomplete reports. For States with no reported data for 2014, we assume that the injury or fatality rate per provider is equal to the average injury or fatality rate per provider across States with available 2014 data.

To monetize benefits from reductions in injury rates, we rely on data on the cost of injury from the Centers for Disease Control (CDC). In particular, we use CDC data to calculate the cost of non-fatal injuries resulting in emergency room treatment and/or hospitalization for children age 12 and under, which includes medical costs as well as lost productivity costs for caretakers, based on 2012 data.[1] After adjusting for inflation using the Gross Domestic Product (GDP) deflator from the Bureau of Economic Analysis (BEA), the cost per injury for children age 12 and under is $8,095 in 2014 dollars. The benefit of a reduction in the injury rate, then, is the reduction in the medical costs and productivity losses associated with the reduction in injuries. Note that this does not include the dollar value of any changes in health status for the injured individuals, which implies that these estimates understate the value of reductions in injuries in the child care setting. Based on QPR data, we estimate that there were 18,209 injuries in child care settings in 2014. To calculate the monetary value of a reduction in the injury rate in child care settings due to this rule, we multiplied the expected number of avoided injuries in each year by the value of eliminating each injury. For simplicity, we assume that the number of prevented injuries is the same in each year after implementation of the requirements, and that the cost of injury, in 2014 dollars, is constant over time. This method implies that the present value of eliminating all injuries in the child care setting over the period examined in this rule, using a 3% discount rate, is approximately $1.30 billion.

---

[1] CDC provided updated estimates of the cost of injury based on Cost of Injury Reports 2005 and 2012 data on non-fatal injuries. For more information, see *http://www.cdc.gov/injury/wisqars/cost/cost-learn-more.html.*

To monetize the value of reductions in mortality rates, we use estimates of the number of child fatalities in child care settings and information on the value of a statistical life for children. The number of child fatalities in the child care setting is estimated by combining two numbers: (1) The number of fatalities due to Sudden Infant Death Syndrome (SIDS), and (2) the number of fatalities due to causes other than SIDS. These two numbers are estimated separately because SIDS is one type of fatality that is likely to be impacted by the health and safety provisions in the Act and because the Centers for Disease Control (CDC)[2] publishes accurate estimates for this type of death.[3] According to CDC, there were 1,563 deaths due to SIDS in 2011. Research from a study in 2000 estimated that 14.8 percent[4] of SIDS fatalities took place in a family child care or a child care center. After applying the 14.8 percent to the 1,563 SIDS deaths, we estimate that the number of SIDS deaths in child care settings were 231 in 2014.

The number of non-SIDS deaths in 2014 is estimated based on QPR data. Information on cause of death were reported for 18 deaths in the 2014 QPR data, of which 5 were due to SIDS and 13 were due to other causes. Based on this information, we estimate that 72 percent of deaths in child care settings reported in QPR data were due to causes other than SIDS. After adding the 82 fatalities from non-SIDS as reported in the QPR data to the 231 fatalities from SIDS, we arrive at a sum of 313 fatalities in child care settings.

A 2010 study estimates that the value of a statistical life for children to be $12–15 million[5] After taking the mean of this range and adjusting it for inflation using the GDP deflator, we arrive at $14.5 million in 2014 dollars per fatality. For simplicity, we assume that the potential number of lives saved is the same in each year after implementation of the requirements. We follow Department of Transportation (DOT) guidance[6] to adjust the value of a statistical life for real income growth, increasing it by 1.07 percent each year. To calculate the dollar value of reductions in mortality, we calculate the number of statistical lives saved, and multiply that number by the relevant value of a statistical life. This method implies that the present value of eliminating all deaths in the child care setting over the period examined in this rule, using a 3 percent discount rate, is approximately $44.4 billion.

Next, we estimate the proportion of fatalities and injuries which, if eliminated by the provision that extends background checks (approximately $4 million per year), would justify their costs on their own. Based on the assumptions and methodologies described above, the present value of the injury and mortality rate reduction benefits of the rule, using a 3 percent discount rate, would equal the costs of this provision if fatalities and injuries were reduced by approximately 0.08 percent over the period examined in this rule. Note that this does not include other benefits associated with this rule.

F. Accounting Statement—Table of Quantified Money Costs and Opportunity Costs

As required by OMB Circular A–4, we have prepared an accounting statement table showing the classification of the impacts associated with implementation of this final rule.

TABLE 10—QUANTIFIED MONEY COSTS, OPPORTUNITY COSTS, AND TRANSFERS

[$ in millions]

	Phase-in annual average (years 1–5)	On-going annual average (years 6–10)	Annualized cost (over 10 years)			Total present value (over 10 years)		
			Undiscounted	Discounted		Undiscounted	Discounted	
				3%	7%		3%	7%
Money Costs ($ in millions)								
Health and Safety:								
Monitoring	158.4	197.6	178.0	175.4	171.9	1,779.9	1,541.5	1,292.2
Bkgd Checks	9.0	18.9	13.9	13.6	13.3	139.2	119.7	99.6
Training	15.4	10.5	12.9	13.2	13.5	129.3	115.8	101.5
Admin *	9.1	11.3	10.2	10.0	9.9	101.7	88.2	74.2
IT and Infrastructure *	9.1	11.3	10.2	10.0	9.9	101.7	88.2	74.2
Consumer Education:								
Website	12.8	11.8	12.3	12.4	12.5	123.0	108.6	93.6
Statement	0.5	0.8	0.7	0.6	0.6	6.5	5.5	4.5
Money Costs Total	214.3	262.2	238.2	235.2	231.6	2,381.3	2,067.5	1,739.8
Opportunity Costs—Health and Safety ($ in millions)								
Monitoring	13.1	16.4	14.7	14.5	14.2	147.4	127.6	106.9
Bkgd Checks	6.3	7.9	7.1	7.1	7.1	71.1	62.4	53.3
Training	43.8	29.9	36.8	37.6	38.5	368.4	330.0	289.3
Opportunity Costs Total	63.2	54.2	58.6	59.2	59.8	586.9	520.0	449.5
Cost Total	277.5	316.4	296.8	294.4	291.4	2,968.2	2,587.5	2,189.3
Transfers ($ in millions)								
Increased Subsidy	478.8	1,281.0	879.9	839.1	786.1	8,799.0	7,372.4	5,907.7

---

[2] For more information, see *http://wonder.cdc.gov*.

[3] Our review of the QPR data conclude that the number of deaths and injuries reported are likely to be undercounts because some States do not collect data from some types of child care providers.

[4] Moon, Rachel Y., Kantilal M. Patel, and Sarah J. McDermott Shaefer. "Sudden infant death syndrome in child care settings." *Pediatrics* 106.2 (2000): 295–300.

[5] Hammitt, James K., and Kevin Haninger. "Valuing fatal risks to children and adults: Effects of disease, latency, and risk aversion." *Journal of Risk and Uncertainty* 40.1 (2010): 57–83 (estimate derived using stated-preference surveys inquiring about willingness to pay to reduce risks to one's child).

[6] For more information, see *http://www.dot.gov/sites/dot.dev/files/docs/VSL%20Guidance.doc*.

TABLE 10—QUANTIFIED MONEY COSTS, OPPORTUNITY COSTS, AND TRANSFERS—Continued

[$ in millions]

	Phase-in annual average (years 1–5)	On-going annual average (years 6–10)	Annualized cost (over 10 years)			Total present value (over 10 years)		
			Undiscounted	Discounted		Undiscounted	Discounted	
				3%	7%		3%	7%
Transfers Total	478.8	1,281.0	879.9	839.1	786.1	8,799.0	7,372.4	5,907.7
Territories and Tribes ($ in millions)								
2.5%)	18.9	39.9	29.4	28.3	26.9	294.2	249.0	202.4
Grand Total ($ in millions)								
Costs and Transfers	775.2	1,637.3	1,206.1	1,161.8	1,104.4	12,061.4	10,208.9	8,299.4

* Administrative and IT/Infrastructure costs are only applied to Health and Safety requirements. Other costs have administrative costs already built into their cost estimates.

d. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act (UMRA) was enacted to avoid imposing unfunded federal mandates on State, local, and Tribal governments, or on the private sector. Most of UMRA's provisions apply to proposed and final rules for which a general notice of proposed rulemaking was published, and that include a federal mandate that may result in expenditures by State, local, or Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year. The regulatory impact analysis includes information about the costs of this regulation. As explained throughout the preamble to this final rule, ACF has ensured that the rule is based on provisions of the CCDBG Act of 2014. We have provided for Lead Agency flexibility in many areas to limit burden and allow for cost-effective implementation of the statutory requirements. In addition, States, Territories and Tribes receive well over $5 billion annually in federal funding to implement the program.

e. Executive Order 13045 on Protection of Children

Executive Order 13045 applies to economically significant rules under Executive Order 12866 and directs agencies to identify and assess environmental health risks and safety risks that may disproportionately affect children. Agencies shall provide an evaluation of the environmental health or safety effects of the planned regulation on children and an explanation of why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency. This regulatory action has been identified as being economically significant and will positively impact children by lowering health and safety risks in child care settings funded by CCDF. The regulatory impact analysis includes a full explanation of the final rule's expected impact on children and regulatory alternatives considered by the agency.

f. Executive Order 13175 on Consultation With Indian Tribes

Executive Order 13175 requires agencies to consult with Tribal leaders and Tribal officials early in the process of developing regulations and prior to the formal promulgation of the regulations. Agencies also must include a Tribal impact statement, which includes a description of the agency's prior consultation with Tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of Tribal officials have been met. ACF is committed to continued consultation and collaboration with Tribes, and this final rule meets the requirements of Executive Order 13175. The discussion of subpart I in section IV of the preamble serves as the Tribal impact statement and contains a detailed description of the consultation and outreach on this final rule.

g. Paperwork Reduction Act

A number of sections in this final rule refer to collections of information, all of which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501 *et seq.*). In some instances (listed in the table below), the collections of information for the relevant sections of this final rule have been previously approved under a series of OMB control numbers.

CCDF Title/Code	Relevant section in the final rule	OMB Control number	Expiration date
ACF–118 (CCDF State and Territory Plan)	§§ 98.14, 98.15, and 98.16 (and related provisions)	0970–0114	12/31/2018
ACF–800 (Annual Aggregate Data Reporting—States and Territories).	§ 98.71	0970–0150	12/31/2018
ACF–801 (Monthly Case-Level Data Reporting—States and Territories).	§ 98.71	0970–0167	12/31/2018
ACF–403, ACF–404, ACF–405 (Error Rate Reporting)	§§ 98.100 and 98.102	0970–0323	08/31/2018
ACF–700 (Administrative Data Report—Tribes)	§ 98.71	0970–0241	10/31/2016
ACF–696–T (Financial Reporting—Tribes)	§ 98.65	0970–0195	05/31/2016

- *ACF–118 (CCDF State and Territory Plan).* The Act and this final rule add several new requirements that States and Territories must report in the CCDF Plans, including provisions related to health and safety requirements, consumer education, and eligibility policies. State and Territorial compliance with the final rule will be determined in part through the review of CCDF Plans and Plan amendments. We have finalized a revised Plan that reflects requirements under the Act.

- *ACF–800 (Annual Aggregate Data Reporting—States and Territories).* The Act and this final rule add new annual aggregate data reporting requirements. Through the OMB clearance process, we finalized revised forms and instructions reflecting these changes.
- *ACF–801 (Monthly Case-Level Data Reporting—States and Territories).* The Act and this final rule add new case-level data reporting requirements. Through the OMB clearance process, we finalized revised forms and instructions reflecting the majority of these changes.
- *ACF–403, ACF–404, ACF–405 (Error Rate Reporting).* The final rule does not make changes to this information collection, which has been previously approved by OMB.
- *ACF–700 (Administrative Data Report—Tribes).* The final rule provides reduced regulatory specificity regarding the information collection, but does not change the content.
- *ACF–696–T (Financial Reporting-Tribes).* The final rule does not make any changes to this information collection.

In other instances, which are listed below, the final rule modifies several previously-approved information collections, but ACF has not yet initiated the OMB approval process to implement these changes, or the approval process is currently underway but not yet completed. ACF will publish **Federal Register** notices soliciting public comment on specific revisions to these information collections and the associated burden estimates, and will make available the proposed forms and instructions for review.

CCDF Title/Code	Relevant section in the final rule	OMB Control number	Expiration date
ACF–696 (Financial Reporting—States)	§ 98.65	0970–0163	05/31/2016
Quality Progress Report (QPR)—States and Territories.	§ 98.53	0970–0114	05/13/2016
ACF–118–A (CCDF Tribal Plan)	§§ 98.14, 98.16, 98.18, 98.81, and 98.83 (and related sections).	0970–0198	09/30/2019
CCDF–ACF–PI–2013–01 (Tribal Application for Construction Funds).	§ 98.84	0970–0160	03/31/2016

- *ACF–696 (Financial Reporting—States).* The final rule modifies this existing information collection to require States and Territories to report financial data on any sub-categories of quality activities as required by ACF.
- *Quality Progress Report (QPR)—States and Territories.* The final rule amends the existing information collection to require States and Territories to submit reports on quality improvement, measures to evaluate progress, and other information.
- *ACF–118–A (CCDF Tribal Plan)* The final rule changes requirements that Tribes and Tribal organizations are required to report in the CCDF Plans, and indicates that Plan and application requirements will vary based on the size of a Tribe's allocation. Tribal compliance with the final rule will be determined in part through the review of Tribal CCDF Plans and Plan amendments. We are in the process of revising the Tribal Plan to reflect many of the priority areas reflected in the reauthorized Act.
- *CCDF–ACF–PI–2013–01 (Tribal Application for Construction Funds).* The Act and this final rule modify this existing information by changing requirements related to maintaining the level of child care services as a condition of using funds for construction and renovation. We are updating this information collection through the OMB process to reflect the changes.

The table below provides annual burden estimates for the existing information collections that are modified by this final rule. These estimates reflect the total burden of each information collection, including the changes made by the final rule.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Quality Progress Report (QPR)—States and Territories	56	1	50	2800
ACF—696 (Financial Reporting-States)	56	4	5.5	1,232
ACF–118–A (CCDF Tribal Plan)	257	0.33	120	10,177
CCDF–ACF–PI–2013–01 (Tribal Application for Construction Funds)	5	1	20	100

Finally, this final rule contains two new information collection requirements, and the table below provides an annual burden hour estimate for these collections. First, § 98.33 requires Lead Agencies to collect and disseminate consumer education information to parents of eligible children, the general public, and providers through a consumer-friendly and easily accessible Web site. This Web site will include information about State or Territory policies (related to licensing, monitoring, and background checks) as well as provider-specific information, including results of monitoring and inspection reports and, if available, information about quality. This requirement applies to the 50 States, the District of Columbia, and 5 Territories that receive CCDF grants. In estimating the burden estimate, we considered the fact that many States already have existing Web sites. Even in States without an existing Web site, much of the information will be available from licensing agencies, quality rating and improvement systems, and other sources. The burden hour estimate below reflects an average estimate, recognizing that there will be significant State variation. The estimate is annualized to encompass initial data entry as well as updates to the Web site over time.

Second, § 98.42 requires Lead Agencies to establish procedures that require child care providers that care for children receiving CCDF subsidies to report to a designated State, Territorial, or Tribal entity any serious injuries or deaths of children occurring in child care. This is necessary to be able to examine the circumstances leading to serious injury or death of children in child care, and, if necessary, make adjustments to health and safety requirements and enforcement of those requirements in order to prevent any future tragedies. The requirement would potentially apply to the nearly 390,000 child care providers who serve children receiving CCDF subsidies, but only a portion of these providers would need to report, since our burden estimate assumes that no report is required in the absence of serious injury or death.

Using currently available aggregate data on child deaths and injuries, we estimated the average number of provider respondents would be approximately 10,000 annually. In estimating the burden, we considered that more than half the States already have reporting requirements in place as part of their licensing procedures for child care providers. States, Territories, and Tribes have flexibility in specifying the particular reporting requirements, such as timeframes and which serious injuries must be reported. While the reporting procedures will vary by jurisdiction, we anticipate that most providers will need to complete a form or otherwise provide written information.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Consumer Education Website	56 States/Territories	1	300	16,800
Reporting of Serious Injuries and Death	10,000 child care providers	1	1	10,000

We did not receive any public comments on these burden estimates, which were included in the NPRM. The information collection provisions in this final rule were submitted to OMB for review as required by section 3507(d) of the Paperwork Reduction Act and were assigned OMB control number 0970–0473. Before the effective date of this final rule, ACF will publish a notice in the **Federal Register** announcing OMB's decision to approve, modify, or disapprove the information collection provisions in this final rule. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

h. Congressional Review

The Congressional Review Act (CRA) allows Congress to review "major" rules issued by federal agencies before the rules take effect. The CRA defines a major rule as one that has resulted or is likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. This regulation is a major rule because it will likely result in an annual effect of more than $100 million on the economy. Therefore, this final rule is being transmitted to Congress and the Comptroller General for review.

i. Executive Order 13132; Federalism Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations.

Consultations with State and local officials. After passage of the CCDBG Act of 2014, the Office of Child Care (OCC) in the Office of the Deputy Assistant Secretary for Early Childhood Development in ACF conducted outreach to engage with a variety of stakeholders to better understand the implications of its provisions. OCC created a reauthorization page on its Web site to provide public information and a specific email address to submit general questions. OCC received approximately 650 questions and comments through this email address, webinars, inquiries to regional offices, and meetings with grantees. OCC leadership and staff participated in more than 21 listening sessions with approximately 675 people representing diverse national, State, and local stakeholders regarding the reauthorized Act, held webinars and gave presentations at national conferences. Participants included State human services agencies, child care providers, parents with children in child care, child care resource and referral agencies, national and State advocacy groups, national stakeholders including faith-based communities, after-school and school age child care providers, child care researchers, State and local early childhood organizations, provider associations, labor unions, and National Head Start Association members. Furthermore, OCC held five meetings with State and Territory CCDF administrators and a series of consultations with Tribal leaders to describe the updated Act and to gather input from federal grantees with responsibility for operating the CCDF program.

In addition, ACF reviewed the records of comments received after issuing a now withdrawn NPRM for CCDF in May 2013 prior to passage of the CCDBG Act of 2014 by Congress. Many, but not all, of the key components of the Act are in alignment with provisions included in that NPRM.

Finally, we carefully reviewed the nearly 150 comments received on the December 2015 NPRM after widely disseminating the NPRM to solicit comments. We also held a Tribal consultation on the NPRM during the comment period.

Nature of concerns and the need to issue this final rule. State, Territorial and Tribal CCDF Lead Agencies want to provide family friendly child care assistance and support increased quality of child care services, but are concerned about the cost of the reauthorized Act and need for grantee flexibility. We seriously considered these views in developing the final rule. We also completed a regulatory impact analysis to fully assess costs and benefits of the new requirements. We recognize that a number of the new regulatory provisions will require some States, Territories, and Tribal Lead Agencies to re-direct CCDF funds to implement specific provisions.

Extent to which we meet those concerns. Each fiscal year ACF provides to States, Territories, and Tribes $5.7 billion in annual funding to implement the CCDF program. Additionally, the regulatory changes we made to the Act and this final rule are based on policy practices already implemented by many States. Finally, in several areas, the final rule increases the flexibility available to States, Territories, and Tribes in administering the program (*e.g.*, waiving family co-payments, defining protective services).

j. Treasury and General Government Appropriations Act of 1999

Section 654 of the Treasury and General Government Appropriations Act of 1999 (Pub. L. 105–277) requires federal agencies to determine whether a regulation may negatively impact family well-being. If the agency determines a policy or regulation negatively affects family well-being, then the agency must prepare an impact assessment addressing seven criteria specified in the law. This final rule will not have a negative impact on the autonomy or integrity of the family as an institution.

Accordingly, we concluded that it is not necessary to prepare a family policymaking assessment. In fact, the final rule will have positive benefits by improving health and safety protections and the quality of care that children receive, as well as improving transparency for parents about the child care options available to them. The provisions in this final rule will enable parents make more informed child care decisions and increases continuity of care through family-friendly practices.

List of Subjects in 45 CFR Part 98

Child care, Grant programs—social programs.

(Catalog of Federal Domestic Assistance Program Number 93.575, Child Care and Development Block Grant; 93.596, Child Care Mandatory and Matching Funds)

Dated: July 14, 2016.

Mark H. Greenberg,

Acting Assistant Secretary for Children and Families.

Approved: July 18, 2016.

Sylvia M. Burwell,

Secretary.

Accordingly, the Department of Health and Human Services amends 45 CFR part 98 as follows:

PART 98—CHILD CARE AND DEVELOPMENT FUND

■ 1. The authority citation for part 98 continues to read as follows:

Authority: 42 U.S.C. 618, 9858.

■ 2. Revise § 98.1 to read as follows:

§ 98.1 Purposes.

(a) The purposes of the CCDF are:

(1) To allow each State maximum flexibility in developing child care programs and policies that best suit the needs of children and parents within that State;

(2) To promote parental choice to empower working parents to make their own decisions regarding the child care services that best suits their family's needs;

(3) To encourage States to provide consumer education information to help parents make informed choices about child care services and to promote involvement by parents and family members in the development of their children in child care settings;

(4) To assist States in delivering high-quality, coordinated early childhood care and education services to maximize parents' options and support parents trying to achieve independence from public assistance;

(5) To assist States in improving the overall quality of child care services and programs by implementing the health, safety, licensing, training, and oversight standards established in this subchapter and in State law (including State regulations);

(6) To improve child care and development of participating children; and

(7) To increase the number and percentage of low-income children in high-quality child care settings.

(b) The purpose of this part is to provide the basis for administration of the Fund. These regulations provide that State, Territorial, and Tribal Lead Agencies:

(1) Maximize parental choice of safe, healthy and nurturing child care settings through the use of certificates and through grants and contracts, and by providing parents with information about child care programs;

(2) Include in their programs a broad range of child care providers, including center-based care, family child care, in home care, care provided by relatives and sectarian child care providers;

(3) Improve the quality and supply of child care and before- and after-school care services that meet applicable requirements and promote healthy child development and learning and family economic stability;

(4) Coordinate planning and delivery of services at all levels, including Federal, State, Tribal, and local;

(5) Design flexible programs that provide for the changing needs of recipient families and engage families in their children's development and learning;

(6) Administer the CCDF responsibly to ensure that statutory requirements are met and that adequate information regarding the use of public funds is provided;

(7) Design programs that provide uninterrupted service to families and providers, to the extent allowed under the statute, to support parental education, training, and employment and continuity of care that minimizes disruptions to children's learning and development;

(8) Provide a progression of training and professional development opportunities for caregivers, teachers, and directors to increase their effectiveness in supporting children's development and learning and strengthen and retain (including through financial incentives and compensation improvements) the child care workforce.

■ 3. Amend § 98.2 as follows:

■ a. Revise the definition of *Categories of care;*

■ b. Add in alphabetical order definitions for *Child experiencing homelessness, Child with a disability,* and *Director;*

■ c. Revise the definition of *Eligible child care provider;*

■ d. Add in alphabetical order a definition for *English learner;*

■ e. Revise the definition of *Family child care provider;*

■ f. Remove the definition of *Group home child care provider;* and

■ g. Revise the definitions of *Lead Agency, Programs,* and *Sliding fee scale;* and

■ h. Add in alphabetical order a definition for *Teacher.*

The revisions and additions read as follows:

§ 98.2 Definitions.

* * * * *

Categories of care means center-based child care, family child care, and in home care;

* * * * *

Child experiencing homelessness means a child who is homeless as defined in section 725 of Subtitle VII–B of the McKinney-Vento Act (42 U.S.C. 11434a);

Child with a disability means:

(1) A child with a disability, as defined in section 602 of the Individuals

with Disabilities Education Act (20 U.S.C. 1401);

(2) A child who is eligible for early intervention services under part C of the Individuals with Disabilities Education Act (20 U.S.C. 1431 *et seq.*);

(3) A child who is less than 13 years of age and who is eligible for services under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); and

(4) A child with a disability, as defined by the State, Territory or Tribe involved;

* * * * *

Director means a person who has primary responsibility for the daily operations and management for a child care provider, which may include a family child care provider, and which may serve children from birth to kindergarten entry and children in school-age child care;

* * * * *

Eligible child care provider means:

(1) A center-based child care provider, a family child care provider, an in-home child care provider, or other provider of child care services for compensation that—

(i) Is licensed, regulated, or registered under applicable State or local law as described in § 98.40; and

(ii) Satisfies State and local requirements, including those referred to in § 98.41 applicable to the child care services it provides; or

(2) A child care provider who is 18 years of age or older who provides child care services only to eligible children who are, by marriage, blood relationship, or court decree, the grandchild, great grandchild, siblings (if such provider lives in separate residence), niece, or nephew of such provider, and complies with any applicable requirements that govern child care provided by the relative involved;

English learner means an individual who is an English learner, as defined in section 8101 of the Elementary and Secondary Education Act of 1965 or who is limited English proficient, as defined in section 637 of the Head Start Act (42 U.S.C. 9832);

* * * * *

Family child care provider means one or more individual(s) who provide child care services for fewer than 24 hours per day per child, in a private residence other than the child's residence, unless care in excess of 24 hours is due to the nature of the parent(s)' work;

* * * * *

Lead Agency means the State, territorial or tribal entity, or joint interagency office, designated or established under §§ 98.10 and 98.16(a) to which a grant is awarded and that is accountable for the use of the funds provided. The Lead Agency is the entire legal entity even if only a particular component of the entity is designated in the grant award document;

* * * * *

Programs refers generically to all activities under the CCDF, including child care services and other activities pursuant to § 98.50 as well as quality activities pursuant to § 98.53;

* * * * *

Sliding fee scale means a system of cost-sharing by a family based on income and size of the family, in accordance with § 98.45(k);

* * * * *

Teacher means a lead teacher, teacher, teacher assistant, or teacher aide who is employed by a child care provider for compensation on a regular basis, or a family child care provider, and whose responsibilities and activities are to organize, guide, and implement activities in a group or individual basis, or to assist a teacher or lead teacher in such activities, to further the cognitive, social, emotional, and physical development of children from birth to kindergarten entry and children in school-age child care;

* * * * *

■ 4. In § 98.10, revise the introductory text and paragraphs (d) and (e) and add paragraph (f) to read as follows:

§ 98.10 Lead Agency responsibilities.

The Lead Agency (which may be an appropriate collaborative agency), or a joint interagency office, as designated or established by the Governor of the State (or by the appropriate Tribal leader or applicant), shall:

* * * * *

(d) Hold at least one public hearing in accordance with § 98.14(c);

(e) Coordinate CCDF services pursuant to § 98.12; and

(f) Consult, collaborate, and coordinate in the development of the State Plan in a timely manner with Indian Tribes or tribal organizations in the State (at the option of the Tribe or tribal organization).

■ 5. In § 98.11, add a sentence to the end of paragraph (a)(3) and revise paragraph (b)(5) to read as follows:

§ 98.11 Administration under contracts and agreements.

(a) * * *

(3) * * * The contents of the written agreement may vary based on the role the agency is asked to assume or the type of project undertaken, but must include, at a minimum, tasks to be performed, a schedule for completing tasks, a budget which itemizes categorical expenditures consistent with CCDF requirements at § 98.65(h), and indicators or measures to assess performance.

(b) * * *

(5) Oversee the expenditure of funds by subrecipients and contractors, in accordance with 75 CFR parts 351 to 353;

* * * * *

■ 6. In § 98.12, revise paragraph (c) to read as follows:

§ 98.12 Coordination and consultation.

* * * * *

(c) Coordinate, to the maximum extent feasible, per § 98.10(f) with any Indian Tribes in the State receiving CCDF funds in accordance with subpart I of this part.

■ 7. Amend § 98.14 as follows:

■ a. Revise paragraph (a)(1) introductory text;

■ b. Redesignate paragraphs (a)(1)(A) through (D) as paragraphs (a)(1)(i) through (iv);

■ c. Revise newly redesignated paragraphs (a)(1)(iii) and (iv);

■ d. Add paragraphs (a)(1)(v) through (xiv) and (a)(3) and (4);

■ e. Revise paragraph (c)(3); and

■ f. Add paragraph (d).

The revisions and additions read as follows:

§ 98.14 Plan process.

* * * * *

(a)(1) Coordinate the provision of child care services funded under this part with other Federal, State, and local child care and early childhood development programs (including such programs for the benefit of Indian children, infants and toddlers, children with disabilities, children experiencing homelessness, and children in foster care) to expand accessibility and continuity of care as well as full-day services. The Lead Agency shall also coordinate the provision of services with the State, and if applicable, tribal agencies responsible for:

* * * * *

(iii) Public education (including agencies responsible for prekindergarten services, if applicable, and early intervention and preschool services provided under Part B and C of the Individuals with Disabilities Education Act (20 U.S.C. 1400));

(iv) Providing Temporary Assistance for Needy Families;

(v) Child care licensing;

(vi) Head Start collaboration, as authorized by the Head Start Act (42 U.S.C. 9831 *et seq.*);

(vii) State Advisory Council on Early Childhood Education and Care (designated or established pursuant to the Head Start Act (42 U.S.C. 9831 *et seq.*)) or similar coordinating body;

(viii) Statewide after-school network or other coordinating entity for out-of-school time care (if applicable);

(ix) Emergency management and response;

(x) Child and Adult Care Food Program (CACFP) authorized by the National School Lunch Act (42 U.S.C. 1766) and other relevant nutrition programs;

(xi) Services for children experiencing homelessness, including State Coordinators of Education for Homeless Children and Youth (EHCY State Coordinators) and, to the extent practicable, local liaisons designated by Local Educational Agencies (LEAs) in the State as required by the McKinney-Vento Act (42 U.S.C. 11432) and Continuum of Care grantees;

(xii) Medicaid and the State children's health insurance programs (42 U.S.C. 1396 *et seq.*, 1397aa *et seq.*);

(xiii) Mental health services; and

(xiv) Child care resources and referral agencies, child care consumer education organizations, and providers of early childhood education training and professional development.

* * * * *

(3) If the Lead Agency elects to combine funding for CCDF services with any other early childhood program, provide a description in the CCDF Plan of how the Lead Agency will combine and use the funding.

(4) Demonstrate in the CCDF Plan how the State, Territory, or Tribe encourages partnerships among its agencies, other public agencies, Indian Tribes and Tribal organizations, and private entities, including faith-based and community-based organizations, to leverage existing service delivery systems for child care and development services and to increase the supply and quality of child care and development services and to increase the supply and quality of child care services for children who are less than 13 years of age, such as by implementing voluntary shared service alliance models.

* * * * *

(c) * * *

(3) In advance of the hearing required by this section, the Lead Agency shall make available to the public the content of the Plan as described in § 98.16 that it proposes to submit to the Secretary, which shall include posting the Plan content on a Web site.

(d) Make the submitted and final Plan, any Plan amendments, and any approved requests for temporary relief (in accordance with § 98.19) publicly available on a Web site.

■ 8. Amend § 98.15 as follows:
■ a. Revise paragraph (a)(6);
■ b. Add paragraphs (a)(7) through (11); and
■ c. Revise paragraph (b).

The revisions and additions read as follows:

§ 98.15 Assurances and certifications.

(a) * * *

(6) That if expenditures for pre-Kindergarten services are used to meet the maintenance-of-effort requirement, the State has not reduced its level of effort in full-day/full-year child care services, pursuant to § 98.55(h)(1).

(7) Training and professional development requirements comply with § 98.44 and are applicable to caregivers, teaching staff, and directors working for child care providers of services for which assistance is provided under the CCDF.

(8) To the extent practicable, enrollment and eligibility policies support the fixed costs of providing child care services by delinking provider payment rates from an eligible child's occasional absences in accordance with § 98.45(l).

(9) The State will maintain or implement early learning and developmental guidelines that are developmentally appropriate for all children from birth to kindergarten entry, describing what such children should know and be able to do, and covering the essential domains of early childhood development (cognition, including language arts and mathematics; social, emotional and physical development; and approaches toward learning) for use statewide by child care providers and caregivers. Such guidelines shall—

(i) Be research-based and developmentally, culturally, and linguistically appropriate, building in a forward progression, and aligned with entry to kindergarten;

(ii) Be implemented in consultation with the State educational agency and the State Advisory Council on Early Childhood Education and Care (designated or established pursuant to section 642B(b)(I)(A)(i) of the Head Start Act (42 U.S.C. 9837b(b)(1)(A)(i)) or similar coordinating body, and in consultation with child development and content experts; and

(iii) Be updated as determined by the State.

(10) Funds received by the State to carry out this subchapter will not be used to develop or implement an assessment for children that—

(i) Will be the primary or sole basis for a child care provider being determined to be ineligible to participate in the program carried out under this subchapter;

(ii) Will be used as the primary or sole basis to provide a reward or sanction for an individual provider;

(iii) Will be used as the primary or sole method for assessing program effectiveness; or

(iv) Will be used to deny children eligibility to participate in the program carried out under this subchapter.

(11) To the extent practicable and appropriate, any code or software for child care information systems or information technology that a Lead Agency or other agency expends CCDF funds to develop must be made available upon request to other public agencies, including public agencies in other States, for their use in administering child care or related programs.

(b) The Lead Agency shall include the following certifications in its CCDF Plan:

(1) The State has developed the CCDF Plan in consultation with the State Advisory Council on Early Childhood Education and Care (designated or established pursuant to section 642B(b)(I)(A)(i) of the Head Start Act (42 U.S.C. 9837b(b)(1)(A)(i))) or similar coordinating body, pursuant to § 98.14(a)(1)(vii);

(2) In accordance with § 98.31, the Lead Agency has procedures in place to ensure that providers of child care services for which assistance is provided under the CCDF, afford parents unlimited access to their children and to the providers caring for their children, during the normal hours of operations and whenever such children are in the care of such providers;

(3) As required by § 98.32, the State maintains a record of substantiated parental complaints and makes information regarding such complaints available to the public on request;

(4) It will collect and disseminate to parents of eligible children, the general public and, where applicable, child care providers, consumer education information that will promote informed child care choices, information on access to other programs for which families may be eligible, and information on developmental screenings, as required by § 98.33;

(5) In accordance with § 98.33(a), that the State makes public, through a consumer-friendly and easily accessible Web site, the results of monitoring and inspection reports, as well as the number of deaths, serious injuries, and instances of substantiated child abuse that occurred in child care settings;

(6) There are in effect licensing requirements applicable to child care services provided within the State, pursuant to § 98.40;

(7) There are in effect within the State (or other area served by the Lead Agency), under State or local (or tribal) law, requirements designed to protect the health and safety of children that are applicable to child care providers that provide services for which assistance is made available under the CCDF, pursuant to § 98.41;

(8) In accordance with § 98.42(a), procedures are in effect to ensure that child care providers of services for which assistance is provided under the CCDF comply with all applicable State or local (or tribal) health and safety requirements;

(9) Caregivers, teachers, and directors of child care providers comply with the State's, Territory's, or Tribe's procedures for reporting child abuse and neglect as required by section 106(b)(2)(B)(i) of the Child Abuse Prevention and Treatment Act (42 U.S.C. 5106a(b)(2)(B)(i)), if applicable, or other child abuse reporting procedures and laws in the service area, as required by § 98.41(e);

(10) There are in effect monitoring policies and practices pursuant to § 98.42;

(11) Payment rates for the provision of child care services, in accordance with § 98.45, are sufficient to ensure equal access for eligible children to comparable child care services in the State or sub-State area that are provided to children whose parents are not eligible to receive assistance under this program or under any other Federal or State child care assistance programs;

(12) Payment practices of child care providers of services for which assistance is provided under the CCDF reflect generally-accepted payment practices of child care providers that serve children who do not receive CCDF assistance, pursuant to § 98.45(l); and

(13) There are in effect policies to govern the use and disclosure of confidential and personally identifiable information about children and families receiving CCDF assistance and child care providers receiving CCDF funds.

■ 9. Revise § 98.16 to read as follows:

§ 98.16 Plan provisions.

A CCDF Plan shall contain the following:

(a) Specification of the Lead Agency whose duties and responsibilities are delineated in § 98.10;

(b) A description of processes the Lead Agency will use to monitor administrative and implementation responsibilities undertaken by agencies other than the Lead Agency including descriptions of written agreements, monitoring and auditing procedures, and indicators or measures to assess performance pursuant to § 98.11(a)(3);

(c) The assurances and certifications listed under § 98.15;

(d)(1) A description of how the CCDF program will be administered and implemented, if the Lead Agency does not directly administer and implement the program;

(2) Identification of the public or private entities designated to receive private donated funds and the purposes for which such funds will be expended, pursuant to § 98.55(f);

(e) A description of the coordination and consultation processes involved in the development of the Plan and the provision of services, including a description of public-private partnership activities that promote business involvement in meeting child care needs pursuant to § 98.14;

(f) A description of the public hearing process, pursuant to § 98.14(c);

(g) Definitions of the following terms for purposes of determining eligibility, pursuant to §§ 98.20(a) and 98.46:

(1) Special needs child;

(2) Physical or mental incapacity (if applicable);

(3) Attending (a job training or educational program);

(4) Job training and educational program;

(5) Residing with;

(6) Working;

(7) Protective services (if applicable), including whether children in foster care are considered in protective services for purposes of child care eligibility; and whether respite care is provided to custodial parents of children in protective services.

(8) Very low income; and

(9) In loco parentis;

(h) A description and demonstration of eligibility determination and redetermination processes to promote continuity of care for children and stability for families receiving CCDF services, including:

(1) An eligibility redetermination period of no less than 12 months in accordance with § 98.21(a);

(2) A graduated phase-out for families whose income exceeds the Lead Agency's threshold to initially qualify for CCDF assistance, but does not exceed 85 percent of State median income, pursuant to § 98.21(b);

(3) Processes that take into account irregular fluctuation in earnings, pursuant to § 98.21(c);

(4) Procedures and policies to ensure that parents are not required to unduly disrupt their education, training, or employment to complete eligibility redetermination, pursuant to § 98.21(d);

(5) Limiting any requirements to report changes in circumstances in accordance with § 98.21(e);

(6) Policies that take into account children's development and learning when authorizing child care services pursuant to § 98.21(f); and

(7) Other policies and practices such as timely eligibility determination and processing of applications;

(i) For child care services pursuant to § 98.50:

(1) A description of such services and activities;

(2) Any limits established for the provision of in-home care and the reasons for such limits pursuant to § 98.30(e)(1)(iii);

(3) A list of political subdivisions in which such services and activities are offered, if such services and activities are not available throughout the entire service area;

(4) A description of how the Lead Agency will meet the needs of certain families specified at § 98.50(e);

(5) Any eligibility criteria, priority rules, and definitions established pursuant to §§ 98.20 and 98.46;

(j) A description of the activities to provide comprehensive consumer and provider education, including the posting of monitoring and inspection reports, pursuant to § 98.33, to increase parental choice, and to improve the quality of child care, pursuant to § 98.53;

(k) A description of the sliding fee scale(s) (including any factors other than income and family size used in establishing the fee scale(s)) that provide(s) for cost-sharing by the families that receive child care services for which assistance is provided under the CCDF and how co-payments are affordable for families, pursuant to § 98.45(k). This shall include a description of the criteria established by the Lead Agency, if any, for waiving contributions for families;

(l) A description of the health and safety requirements, applicable to all providers of child care services for which assistance is provided under the CCDF, in effect pursuant to § 98.41, and any exemptions to those requirements for relative providers made in accordance with § 98.42(c);

(m) A description of child care standards for child care providers of services for which assistance is provided under the CCDF, in accordance with § 98.41(d), that includes group size limits, child-staff ratios, and required qualifications for caregivers, teachers, and directors;

(n) A description of monitoring and other enforcement procedures in effect to ensure that child care providers comply with applicable health and safety requirements pursuant to § 98.42;

(o) A description of criminal background check requirements, policies, and procedures in accordance with § 98.43, including a description of the requirements, policies, and procedures in place to respond to other States', Territories', and Tribes' requests for background check results in order to accommodate the 45 day timeframe;

(p) A description of training and professional development requirements for caregivers, teaching staff, and directors of providers of services for which assistance is provided in accordance with § 98.44;

(q) A description of the child care certificate payment system(s), including the form or forms of the child care certificate, pursuant to § 98.30(c);

(r) Payment rates and a summary of the facts, including a local market rate survey or alternative methodology relied upon to determine that the rates provided are sufficient to ensure equal access pursuant to § 98.45;

(s) A detailed description of the State's hotline for complaints, its process for substantiating and responding to complaints, whether or not the State uses monitoring as part of its process for responding to complaints for both CCDF and non-CCDF providers, how the State maintains a record of substantiated parental complaints, and how it makes information regarding those complaints available to the public on request, pursuant to § 98.32;

(t) A detailed description of the procedures in effect for affording parents unlimited access to their children whenever their children are in the care of the provider, pursuant to § 98.31;

(u) A detailed description of the licensing requirements applicable to child care services provided, any exemption to licensing requirements that is applicable to child care providers of services for which assistance is provided under the CCDF and a demonstration of why such exemption does not endanger the health, safety, or development of children, and a description of how such licensing requirements are effectively enforced, pursuant to § 98.40;

(v) Pursuant to § 98.33(f), the definitions or criteria used to implement the exception, provided in section 407(e)(2) of the Social Security Act (42 U.S.C. 607(e)(2)), to individual penalties in the TANF work requirement applicable to a single custodial parent caring for a child under age six;

(w)(1) When any Matching funds under § 98.55(b) are claimed, a description of the efforts to ensure that pre-Kindergarten programs meet the needs of working parents;

(2) When State pre-Kindergarten expenditures are used to meet more than 10% of the amount required at § 98.55(c)(1), or for more than 10% of the funds available at § 98.55(b), or both, a description of how the State will coordinate its pre-Kindergarten and child care services to expand the availability of child care;

(x) A description of the Lead Agency's strategies (which may include alternative payment rates to child care providers, the provision of direct grants or contracts, offering child care certificates, or other means) to increase the supply and improve the quality of child care services for children in underserved areas, infants and toddlers, children with disabilities as defined by the Lead Agency, and children who receive care during nontraditional hours, including whether the Lead Agency plans to use grants and contracts in building supply and how supply-building mechanisms will address the needs identified. The description must identify shortages in the supply of high-quality child care providers, list the data sources used to identify shortages, and describe the method of tracking progress to support equal access and parental choice. If the Lead Agency employs grants and contracts to meet the purposes of this section, the Lead Agency must provide CCDF families the option to choose a certificate for the purposes of acquiring care;

(y) A description of how the Lead Agency prioritizes increasing access to high-quality child care and development services for children of families in areas that have significant concentrations of poverty and unemployment and that do not have sufficient numbers of such programs, pursuant to § 98.46;

(z) A description of how the Lead Agency develops and implements strategies to strengthen the business practices of child care providers to expand the supply, and improve the quality of, child care services;

(aa) A demonstration of how the State, Territory or Tribe will address the needs of children, including the need for safe child care, before, during and after a state of emergency declared by the Governor or a major disaster or emergency (as defined by section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5122) through a Statewide Disaster Plan (or Disaster Plan for a Tribe's service area) that:

(1) For a State, is developed in collaboration with the State human services agency, the State emergency management agency, the State licensing agency, the State health department or public health department, local and State child care resource and referral agencies, and the State Advisory Council on Early Childhood Education and Care (designated or established pursuant to section 642B(b)(I)(A)(i) of the Head Start Act (42 U.S.C. 9837b(b)(1)(A)(i))) or similar coordinating body; and

(2) Includes the following components:

(i) Guidelines for continuation of child care subsidies and child care services, which may include the provision of emergency and temporary child care services during a disaster, and temporary operating standards for child care after a disaster;

(ii) Coordination of post-disaster recovery of child care services; and

(iii) Requirements that child care providers of services for which assistance is provided under the CCDF, as well as other child care providers as determined appropriate by the State, Territory or Tribe, have in place:

(A) Procedures for evacuation, relocation, shelter-in-place, lock-down, communication and reunification with families, continuity of operations, accommodations of infants and toddlers, children with disabilities, and children with chronic medical conditions; and

(B) Procedures for staff and volunteer emergency preparedness training and practice drills, including training requirements for child care providers of services for which assistance is provided under CCDF at § 98.41(a)(1)(vii);

(bb) A description of payment practices applicable to providers of child care services for which assistance is provided under this part, pursuant to § 98.45(l), including practices to ensure timely payment for services, to delink provider payments from children's occasional absences to the extent practicable, and to reflect generally-accepted payment practices;

(cc) A description of internal controls to ensure integrity and accountability, processes in place to investigate and recover fraudulent payments and to impose sanctions on clients or providers in response to fraud, and procedures in place to document and verity eligibility, pursuant to § 98.68;

(dd) A description of how the Lead Agency will provide outreach and services to eligible families with limited

English proficiency and persons with disabilities and facilitate participation of child care providers with limited English proficiency and disabilities in the subsidy system;

(ee) A description of policies to prevent suspension, expulsion, and denial of services due to behavior of children birth to age five in child care and other early childhood programs receiving assistance under this part, which must be disseminated as part of consumer and provider education efforts in accordance with § 98.33(b)(1)(v);

(ff) Designation of a State, territorial, or tribal entity to which child care providers must submit reports of any serious injuries or deaths of children occurring in child care, in accordance with § 98.42(b)(4);

(gg) A description of how the Lead Agency will support child care providers in the successful engagement of families in children's learning and development;

(hh) A description of how the Lead Agency will respond to complaints submitted through the national hotline and Web site, required in section 658L(b) of the CCDBG Act of 2014 (42 U.S.C. 9858j(b)), including the designee responsible for receiving and responding to such complaints regarding both licensed and license-exempt child care providers;

(ii) Such other information as specified by the Secretary.

■ 10. In § 98.17, revise paragraph (a) to read as follows:

§ 98.17 Period covered by Plan.

(a) For States, Territories, and Indian Tribes the Plan shall cover a period of three years.

* * * * *

■ 11. In § 98.18, revise paragraph (b) to read as follows:

§ 98.18 Approval and disapproval of Plans and Plan amendments.

* * * * *

(b) *Plan amendments.* (1) Approved Plans shall be amended whenever a substantial change in the program occurs. A Plan amendment shall be submitted within 60 days of the effective date of the change. Plan amendments will be approved or denied not later than the 90th day following the date on which the amendment is received, unless a written agreement to extend that period has been secured.

(2) Lead Agencies must ensure advanced written notice is provided to affected parties (*i.e.,* parents and child care providers) of substantial changes in the program that adversely affect eligibility, payment rates, and/or sliding fee scales.

* * * * *

■ 12. Add § 98.19 to subpart B to read as follows:

§ 98.19 Requests for temporary relief from requirements.

(a) *Requests for relief.* The Secretary may temporarily waive one or more of the requirements contained in the Act or this part, with the exception of State Match and Maintenance of Effort requirements for a State, consistent with the conditions described in section 658I(c)(1) of the Act (42 U.S.C. 9858g(c)(1)), provided that the waiver request:

(1) Describes circumstances that prevent the State, Territory, or Tribe from complying with any statutory or regulatory requirements of this part;

(2) By itself, contributes to or enhances the State's, Territory's, or Tribe's ability to carry out the purposes of the Act and this part;

(3) Will not contribute to inconsistency with the purposes of the Act or this part, and;

(4) Meets the requirements set forth in paragraphs (b) through (g) of this section.

(b) *Types.* Types of waivers include:

(1) *Transitional and legislative waivers.* Lead Agencies may apply for temporary waivers meeting the requirements described in paragraph (a) of this section that would provide transitional relief from conflicting or duplicative requirements preventing implementation, or an extended period of time in order for a State, territorial, or tribal legislature to enact legislation to implement the provisions of this subchapter. Such waivers are:

(i) Limited to a one-year initial period;

(ii) May be extended, in accordance with paragraph (f) of this section, for at most one additional year from the date of approval of the extension,

(iii) Are designed to provide States, Territories and Tribes at most one full legislative session to enact legislation to implement the provisions of the Act or this part, and;

(iv) Are conditional, dependent on progress towards implementation, and may be terminated by the Secretary at any time in accordance with paragraph (e) of this section.

(2) *Waivers for extraordinary circumstances.* States, Territories and Tribes may apply for waivers meeting the requirements described in paragraph (a) of this section, in cases of extraordinary circumstances, which are defined as temporary circumstances or situations, such as a natural disaster or financial crisis. Such waivers are:

(i) Limited to an initial period of no more than 2 years from the date of approval;

(ii) May be extended, in accordance with paragraph (f) of this section, for at most one additional year from the date of approval of the extension, and;

(iii) May be terminated by the Secretary at any time in accordance with paragraph (e) of this section.

(c) *Contents.* Waiver requests must be submitted to the Secretary in writing and:

(1) Indicate which type of waiver, as detailed in paragraph (b) of this section, the State, Territory or Tribe is requesting;

(2) Detail each sanction or provision of the Act or regulations that the State, Territory or Tribe seeks relief from;

(3) Describe how a waiver from that sanction or provision will, by itself, improve delivery of child care services for children; and

(4) Certify and describe how the health, safety, and well-being of children served through assistance received under this part will not be compromised as a result of the waiver.

(d) *Notification.* Within 90 days after receipt of the waiver request or, if additional follow up information has been requested, the receipt of such information, the Secretary will notify the Lead Agency of the approval or disapproval of the request.

(e) *Termination.* The Secretary shall terminate approval of a request for a waiver authorized under the Act or this section if the Secretary determines, after notice and opportunity for a hearing based on the rules of procedure in part 99 of this chapter, that the performance of a State, Territory or Tribe granted relief under this section has been inadequate, or if such relief is no longer necessary to achieve its original purposes.

(f) *Renewal.* The Secretary may approve or disapprove a request from a State, Territory or Tribe for renewal of an existing waiver under the Act or this section for a period no longer than one year. A State, Territory or Tribe seeking to renew their waiver approval must inform the Secretary of this intent no later than 30 days prior to the expiration date of the waiver. The State, Territory or Tribe shall re-certify in its extension request the provisions in paragraph (a) of this section, and shall also explain the need for additional time of relief from such sanction(s) or provisions.

(g) *Restrictions.* The Secretary may not:

(1) Permit Lead Agencies to alter the federal eligibility requirements for eligible children, including work requirements, job training, or

educational program participation, that apply to the parents of eligible children under this part;

(2) Waive anything related to the Secretary's authority under this part; or

(3) Require or impose any new or additional requirements in exchange for receipt of a waiver if such requirements are not specified in the Act.

■ 13. Amend § 98.20 as follows:

■ a. Revise paragraphs (a) introductory text, (a)(2) and (3), and (b) introductory text;

■ b. In paragraph (b)(2), remove "Subpart D; or" and add in its place "subpart D of this part;";

■ c. In paragraph (b)(3):

■ i. Remove "§ 98.44" and add "§ 98.46" in its place; and

■ ii. Remove the period at the end of the paragraph and add "; or" in its place; and

■ d. Add paragraphs (b)(4) and (c).

The revisions and additions read as follows:

§ 98.20 A child's eligibility for child care services.

(a) To be eligible for services under § 98.50, a child shall, at the time of eligibility determination or redetermination:

* * * * *

(2)(i) Reside with a family whose income does not exceed 85 percent of the State's median income (SMI), which must be based on the most recent SMI data that is published by the Bureau of the Census, for a family of the same size; and

(ii) Whose family assets do not exceed $1,000,000 (as certified by such family member); and (3)(i) Reside with a parent or parents who are working or attending a job training or educational program; or

(ii) Receive, or need to receive, protective services, which may include specific populations of vulnerable children as identified by the Lead Agency, and reside with a parent or parents other than the parent(s) described in paragraph (a)(3)(i) of this section.

(A) At grantee option, the requirements in paragraph (a)(2) of this section may be waived for families eligible for child care pursuant to this paragraph, if determined to be necessary on a case-by-case basis.

(B) At grantee option, the waiver provisions in paragraph (a)(3)(ii)(A) of this section apply to children in foster care when defined in the Plan, pursuant to § 98.16(g)(7).

(b) A grantee or other administering agency may establish eligibility conditions or priority rules in addition to those specified in this section and § 98.46, which shall be described in the Plan pursuant to § 98.16(i)(5), so long as they do not:

* * * * *

(4) Impact eligibility other than at the time of eligibility determination or redetermination.

(c) For purposes of implementing the citizenship eligibility verification requirements mandated by title IV of the Personal Responsibility and Work Opportunity Reconciliation Act, 8 U.S.C. 1601 *et seq.*, only the citizenship and immigration status of the child, who is the primary beneficiary of the CCDF benefit, is relevant. Therefore, a Lead Agency or other administering agency may not condition a child's eligibility for services under § 98.50 based upon the citizenship or immigration status of their parent or the provision of any information about the citizenship or immigration status of their parent.

■ 14. Add § 98.21 to subpart C to read as follows:

§ 98.21 Eligibility determination processes.

(a) A Lead Agency shall re-determine a child's eligibility for child care services no sooner than 12 months following the initial determination or most recent redetermination, subject to the following:

(1) During the period of time between determinations or redeterminations, if the child met all of the requirements in § 98.20(a) on the date of the most recent eligibility determination or redetermination, the child shall be considered eligible and will receive services at least at the same level, regardless of:

(i) A change in family income, if that family income does not exceed 85 percent of SMI for a family of the same size; or

(ii) A temporary change in the ongoing status of the child's parent as working or attending a job training or educational program. A temporary change shall include, at a minimum:

(A) Any time-limited absence from work for an employed parent due to reasons such as need to care for a family member or an illness;;

(B) Any interruption in work for a seasonal worker who is not working between regular industry work seasons;

(C) Any student holiday or break for a parent participating in training or education;

(D) Any reduction in work, training or education hours, as long as the parent is still working or attending training or education;

(E) Any other cessation of work or attendance at a training or education program that does not exceed three months or a longer period of time established by the Lead Agency;

(F) Any change in age, including turning 13 years old during the eligibility period; and

(G) Any change in residency within the State, Territory, or Tribal service area.

(2)(i) Lead Agencies have the option, but are not required, to discontinue assistance due to a parent's loss of work or cessation of attendance at a job training or educational program that does not constitute a temporary change in accordance with paragraph (a)(1)(ii) of this section. However, if the Lead Agency exercises this option, it must continue assistance at least at the same level for a period of not less than three months after each such loss or cessation in order for the parent to engage in job search and resume work, or resume attendance at a job training or educational activity.

(ii) At the end of the minimum three-month period of continued assistance, if the parent is engaged in a qualifying work, education, or training activity with income below 85% of SMI, assistance cannot be terminated and the child must continue receiving assistance until the next scheduled re-determination, or at Lead Agency option, for an additional minimum 12—month eligibility period.

(iii) If a Lead Agency chooses to initially qualify a family for CCDF assistance based a parent's status of seeking employment or engaging in job search, the Lead Agency has the option to end assistance after a minimum of three months if the parent has still not found employment, although assistance must continue if the parent becomes employed during the job search period.

(3) Lead Agencies cannot increase family co-payment amounts, established in accordance with § 98.45(k), within the minimum 12-month eligibility period except as described in paragraph (b)(3) of this section.

(4) Because a child meeting eligibility requirements at the most recent eligibility determination or redetermination is considered eligible between redeterminations as described in paragraph (a)(1) of this section, any payment for such a child shall not be considered an error or improper payment under subpart K of this part due to a change in the family's circumstances.

(5) Notwithstanding paragraph (a)(1), the Lead Agency may discontinue assistance prior to the next re-determination in limited circumstances where there have been:

(i) Excessive unexplained absences despite multiple attempts by the Lead Agency or designated entity to contact the family and provider, including prior notification of possible discontinuation of assistance;

(A) If the Lead Agency chooses this option, it shall define the number of unexplained absences that shall be considered excessive;

(ii) A change in residency outside of the State, Territory, or Tribal service area; or

(iii) Substantiated fraud or intentional program violations that invalidate prior determinations of eligibility.

(b)(1) Lead Agencies that establish family income eligibility at a level less than 85 percent of SMI for a family of the same size (in order for a child to initially qualify for assistance) must provide a graduated phase-out by implementing two-tiered eligibility thresholds, with the second tier of eligibility (used at the time of eligibility re-determination) set at:

(i) 85 percent of SMI for a family of the same size; or

(ii) An amount lower than 85 percent of SMI for a family of the same size, but above the Lead Agency's initial eligibility threshold, that:

(A) Takes into account the typical household budget of a low income family; and

(B) Provides justification that the second eligibility threshold is:

(*1*) Sufficient to accommodate increases in family income over time that are typical for low-income workers and that promote and support family economic stability; and

(*2*) Reasonably allows a family to continue accessing child care services without unnecessary disruption.

(2) At re-determination, a child shall be considered eligible (pursuant to paragraph (a) of this section) if their parents, at the time of redetermination, are working or attending a job training or educational program even if their income exceeds the Lead Agency's income limit to initially quality for assistance, as long as their income does not exceed the second tier of the eligibility described in (b)(1);

(3) A family meeting the conditions described in (b)(2) shall be eligible for services pursuant to the conditions described in § 98.20 and all other paragraphs of § 98.21, with the exception of the co-payment restrictions at § 98.21(a)(3). To help families transition off of child care assistance, Lead Agencies may gradually adjust co-pay amounts for families whose children are determined eligible under the graduate phase-out conditions described in paragraph (b)(2) and may require additional reporting on changes in family income as described in paragraph (e)(3) of this section, provided such requirements do not constitute an undue burden, pursuant to conditions described in (e)(2)(ii) and (iii) of this section.

(c) The Lead Agency shall establish processes for initial determination and redetermination of eligibility that take into account irregular fluctuation in earnings, including policies that ensure temporary increases in income, including temporary increases that result in monthly income exceeding 85 percent of SMI (calculated on a monthly basis), do not affect eligibility or family co-payments.

(d) The Lead Agency shall establish procedures and policies to ensure parents, especially parents receiving assistance through the Temporary Assistance for Needy Families (TANF) program, are not required to unduly disrupt their education, training, or employment in order to complete the eligibility redetermination process.

(e) The Lead Agency shall specify in the Plan any requirements for parents to notify the Lead Agency of changes in circumstances during the minimum 12-month eligibility period, and describe efforts to ensure such requirements do not place an undue burden on eligible families that could impact continued eligibility between redeterminations.

(1) The Lead Agency must require families to report a change at any point during the minimum 12-month period, limited to:

(i) If the family's income exceeds 85% of SMI, taking into account irregular income fluctuations; or

(ii) At the option of the Lead Agency, the family has experienced a non-temporary cessation of work, training, or education.

(2) Any additional requirements the Lead Agency chooses, at its option, to impose on parents to provide notification of changes in circumstances to the Lead Agency or entities designated to perform eligibility functions shall not constitute an undue burden on families. Any such requirements shall:

(i) Limit notification requirements to items that impact a family's eligibility (*e.g.,* only if income exceeds 85 percent of SMI, or there is a non-temporary change in the status of the child's parent as working or attending a job training or educational program) or those that enable the Lead Agency to contact the family or pay providers;

(ii) Not require an office visit in order to fulfill notification requirements; and

(iii) Offer a range of notification options (*e.g.,* phone, email, online forms, extended submission hours) to accommodate the needs of parents;

(3) During a period of graduated phase-out, the Lead Agency may require additional reporting on changes in family income in order to gradually adjust family co-payments, if desired, as described in paragraph (b)(3) of this section.

(4) Lead Agencies must allow families the option to voluntarily report changes on an ongoing basis.

(i) Lead Agencies are required to act on this information provided by the family if it would reduce the family's co-payment or increase the family's subsidy.

(ii) Lead Agencies are prohibited from acting on information that would reduce the family's subsidy unless the information provided indicates the family's income exceeds 85 percent of SMI for a family of the same size, taking into account irregular income fluctuations, or, at the option of the Lead Agency, the family has experienced a non-temporary change in the work, training, or educational status.

(f) Lead Agencies must take into consideration children's development and learning and promote continuity of care when authorizing child care services.

(g) Lead Agencies are not required to limit authorized child care services strictly based on the work, training, or educational schedule of the parent(s) or the number of hours the parent(s) spend in work, training, or educational activities.

■ 15. In § 98.30, revise paragraphs (e)(1), (f) introductory text, and (f)(2) and add paragraphs (g) and (h) to read as follows:

§ 98.30 Parental choice.

* * * * *

(e)(1) For child care services, certificates under paragraph (a)(2) of this section shall permit parents to choose from a variety of child care categories, including:

(i) Center-based child care;

(ii) Family child care; and

(iii) In-home child care, with limitations, if any, imposed by the Lead Agency and described in its Plan at § 98.16(i)(2). Under each of the above categories, care by a sectarian provider may not be limited or excluded.

* * * * *

(f) With respect to State and local regulatory requirements under § 98.40, health and safety requirements under § 98.41, and payment rates under § 98.45, CCDF funds will not be available to a Lead Agency if State or local rules, procedures or other requirements promulgated for purposes of the CCDF significantly restrict parental choice by:

* * * * *

(2) Having the effect of limiting parental access to or choice from among such categories of care or types of providers, as defined in § 98.2, with the exception of in-home care; or

* * * * *

(g) As long as provisions at paragraph (f) of this section are met, parental choice provisions shall not be construed as prohibiting a Lead Agency from establishing policies that require providers of child care services for which assistance is provided under this part to meet higher standards of quality, such as those identified in a quality rating and improvement system or other transparent system of quality indicators.

(h) Parental choice provisions shall not be construed as prohibiting a Lead Agency from providing parents with information and incentives that encourage the selection of high-quality child care.

■ 16. Revise § 98.31 to read as follows:

§ 98.31 Parental access.

The Lead Agency shall have in effect procedures to ensure that providers of child care services for which assistance is provided afford parents unlimited access to their children, and to the providers caring for their children, during normal hours of provider operation and whenever the children are in the care of the provider. The Lead Agency shall provide a detailed description in the Plan of such procedures.

■ 17. Revise § 98.32 to read as follows:

§ 98.32 Parental complaints.

The State shall:

(a) Establish or designate a hotline or similar reporting process for parents to submit complaints about child care providers;

(b) Maintain a record of substantiated parent complains;

(c) Make information regarding such parental complaints available to the public on request; and

(d) The Lead Agency shall provide a detailed description in the Plan of how:

(1) Complaints are substantiated and responded to, including whether or not the State uses monitoring as part of its process for responding to complaints for both CCDF and non-CCDF providers; and,

(2) A record of substantiated complaints is maintained and is made available.

■ 18. Revise § 98.33 to read as follows:

§ 98.33 Consumer and provider education.

The Lead Agency shall:

(a) Certify that it will collect and disseminate consumer education information to parents of eligible children, the general public, and providers through a consumer-friendly and easily accessible Web site that ensures the widest possible access to services for families who speak languages other than English and persons with disabilities, including:

(1) Lead Agency processes, including:

(i) The process for licensing child care providers pursuant to § 98.40;

(ii) The process for conducting monitoring and inspections of child care providers pursuant to § 98.42;

(iii) Policies and procedures related to criminal background checks for child care providers pursuant to § 98.43; and

(iv) The offenses that prevent individuals from serving as child care providers.

(2) A localized list of all licensed child care providers, and, at the discretion of the Lead Agency, all eligible child care providers (other than an individual who is related to all children for whom child care services are provided), differentiating between licensed and license-exempt providers, searchable by zip code;

(3) The quality of a provider as determined by the Lead Agency through a quality rating and improvement system or other transparent system of quality indicators, if such information is available for the provider;

(4) Results of monitoring and inspection reports for all eligible and licensed child care providers (other than an individual who is related to all children for whom child care services are provided), including those required at § 98.42 and those due to major substantiated complaints about failure to comply with provisions at § 98.41 and Lead Agency child care policies. Lead Agencies shall post in a timely manner full monitoring and inspection reports, either in plain language or with a plain language summary, for parents and child care providers to understand, and shall establish a process for correcting inaccuracies in the reports. Such results shall include:

(i) Information on the date of such inspection;

(ii) Information on corrective action taken by the State and child care provider, where applicable;

(iii) Any health and safety violations, including any fatalities and serious injuries occurring at the provider, prominently displayed on the report or summary; and

(iv) A minimum of 3 years of results where available.

(5) Aggregate number of deaths and serious injuries (for each provider category and licensing status) and instances of substantiated child abuse that occurred in child care settings each year, for eligible providers.

(6) Referrals to local child care resource and referral organizations.

(7) Directions on how parents can contact the Lead Agency or its designee and other programs to help them understand information included on the Web site.

(b) Certify that it will collect and disseminate, through resource and referral organizations or other means as determined by the State, including, but not limited to, through the Web site described in paragraph (a) of this section, to parents of eligible children and the general public, and where applicable providers, information about:

(1) The availability of the full diversity of child care services to promote informed parental choice, including information about:

(i) The availability of child care services under this part and other programs for which families may be eligible, as well as the availability of financial assistance to obtain child care services;

(ii) Other programs for which families that receive assistance under this part may be eligible, including:

(A) Temporary Assistance for Needy Families (TANF) (42 U.S.C. 601 *et seq.*);

(B) Head Start and Early Head Start (42 U.S.C. 9831 *et seq.*);

(C) Low-Income Home Energy Assistance Program (LIHEAP) (42 U.S.C. 8621 *et seq.*);

(D) Supplemental Nutrition Assistance Program (SNAP) (7 U.S.C. 2011 *et seq.*);

(E) Special supplemental nutrition program for women, infants, and children (42 U.S.C. 1786);

(F) Child and Adult Care Food Program (CACFP) (42 U.S.C. 1766);

(G) Medicaid and the State children's health insurance programs (42 U.S.C. 1396 *et seq.*, 1397aa *et seq.*);

(iii) Programs carried out under section 619 and part C of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. 1419, 1431 *et seq.*);

(iv) Research and best practices concerning children's development, meaningful parent and family engagement, and physical health and development, particularly healthy eating and physical activity; and

(v) State policies regarding social emotional behavioral health of children which may include positive behavioral health intervention and support models for birth to school-age or age-appropriate, and policies to prevent suspension and expulsion of children birth to age five in child care and other early childhood programs, as described in the Plan pursuant to § 98.16(ee), receiving assistance under this part.

(c) Provide information on developmental screenings to parents as part of the intake process for families receiving assistance under this part, and to providers through training and education, including:

(1) Information on existing resources and services the State can make available in conducting developmental screenings and providing referrals to services when appropriate for children who receive assistance under this part, including the coordinated use of the Early and Periodic Screening, Diagnosis, and Treatment program (42 U.S.C. 1396 *et seq.*) and developmental screening services available under section 619 and part C of the Individuals with Disabilities Education Act (20 U.S.C. 1419, 1431 *et seq.*); and

(2) A description of how a family or eligible child care provider may utilize the resources and services described in paragraph (c)(1) of this section to obtain developmental screenings for children who receive assistance under this part who may be at risk for cognitive or other developmental delays, which may include social, emotional, physical, or linguistic delays.

(d) For families that receive assistance under this part, provide specific information about the child care provider selected by the parent, including health and safety requirements met by the provider pursuant to § 98.41, any licensing or regulatory requirements met by the provider, date the provider was last inspected, any history of violations of these requirements, and any voluntary quality standards met by the provider. Information must also describe how CCDF subsidies are designed to promote equal access in accordance with § 98.45, how to submit a complaint through the hotline at § 98.32(a), and how to contact local resource and referral agencies or other community-based supports that assist parents in finding and enrolling in quality child care.

(e) Provide linkages to databases related to paragraph (a) to HHS for implementing a national Web site and other uses as determined by the Secretary.

(f) Inform parents who receive TANF benefits about the requirement at section 407(e)(2) of the Social Security Act (42 U.S.C. 607(e)(2)) that the TANF agency make an exception to the individual penalties associated with the work requirement for any single custodial parent who has a demonstrated inability to obtain needed child care for a child under six years of age. The information may be provided directly by the Lead Agency, or, pursuant to § 98.11, other entities, and shall include:

(1) The procedures the TANF agency uses to determine if the parent has a demonstrated inability to obtain needed child care;

(2) The criteria or definitions applied by the TANF agency to determine whether the parent has a demonstrated inability to obtain needed child care, including:

(i) "Appropriate child care";

(ii) "Reasonable distance";

(iii) "Unsuitability of informal child care";

(iv) "Affordable child care arrangements";

(3) The clarification that assistance received during the time an eligible parent receives the exception referred to in paragraph (f) of this section will count toward the time limit on Federal benefits required at section 408(a)(7) of the Social Security Act (42 U.S.C. 608(a)(7)).

(g) Include in the triennial Plan the definitions or criteria the TANF agency uses in implementing the exception to the work requirement specified in paragraph (f) of this section.

■ 19. In § 98.40, redesignate paragraph (a)(2) as (a)(3), revise newly redesignated paragraph (a)(3), and add new paragraph (a)(2).

The addition and revision read as follows:

§ 98.40 Compliance with applicable State and local regulatory requirements.

(a) * * *

(2) Describe in the Plan exemption(s) to licensing requirements, if any, for child care services for which assistance is provided, and a demonstration for how such exemption(s) do not endanger the health, safety, or development of children who receive services from such providers. Lead Agencies must provide the required description and demonstration for any exemptions based on:

(i) Provider category, type, or setting;

(ii) Length of day;

(iii) Providers not subject to licensing because the number of children served falls below a State-defined threshold; and

(iv) Any other exemption to licensing requirements; and

(3) Provide a detailed description in the Plan of the requirements under paragraph (a)(1) of this section and of how they are effectively enforced.

* * * * *

■ 20. Revise § 98.41 to read as follows:

§ 98.41 Health and safety requirements.

(a) Each Lead Agency shall certify that there are in effect, within the State (or other area served by the Lead Agency), under State, local or tribal law, requirements (appropriate to provider setting and age of children served) that are designed, implemented, and enforced to protect the health and safety of children. Such requirements must be applicable to child care providers of services for which assistance is provided under this part. Such requirements, which are subject to monitoring pursuant to § 98.42, shall:

(1) Include health and safety topics consisting of, at a minimum:

(i) The prevention and control of infectious diseases (including immunizations); with respect to immunizations, the following provisions apply:

(A) As part of their health and safety provisions in this area, Lead Agencies shall assure that children receiving services under the CCDF are age-appropriately immunized. Those health and safety provisions shall incorporate (by reference or otherwise) the latest recommendation for childhood immunizations of the respective State, territorial, or tribal public health agency.

(B) Notwithstanding this paragraph (a)(1)(i), Lead Agencies may exempt:

(*1*) Children who are cared for by relatives (defined as grandparents, great grandparents, siblings (if living in a separate residence), aunts, and uncles), provided there are no other unrelated children who are cared for in the same setting.

(*2*) Children who receive care in their own homes, provided there are no other unrelated children who are cared for in the home.

(*3*) Children whose parents object to immunization on religious grounds.

(*4*) Children whose medical condition contraindicates immunization.

(C) Lead Agencies shall establish a grace period that allows children experiencing homelessness and children in foster care to receive services under this part while providing their families (including foster families) a reasonable time to take any necessary action to comply with immunization and other health and safety requirements.

(*1*) The length of such grace period shall be established in consultation with the State, Territorial or Tribal health agency.

(*2*) Any payment for such child during the grace period shall not be considered an error or improper payment under subpart K of this part.

(*3*) The Lead Agency may also, at its option, establish grace periods for other children who are not experiencing homelessness or in foster care.

(*4*) Lead Agencies must coordinate with licensing agencies and other relevant State, Territorial, Tribal, and local agencies to provide referrals and support to help families of children receiving services during a grace period comply with immunization and other health and safety requirements;

(ii) Prevention of sudden infant death syndrome and use of safe sleeping practices;

(iii) Administration of medication, consistent with standards for parental consent;

(iv) Prevention and response to emergencies due to food and allergic reactions;

(v) Building and physical premises safety, including identification of and protection from hazards, bodies of water, and vehicular traffic;

(vi) Prevention of shaken baby syndrome, abusive head trauma, and child maltreatment;

(vii) Emergency preparedness and response planning for emergencies resulting from a natural disaster, or a man-caused event (such as violence at a child care facility), within the meaning of those terms under section 602(a)(1) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195a(a)(1)) that shall include procedures for evacuation, relocation, shelter-in-place and lock down, staff and volunteer emergency preparedness training and practice drills, communication and reunification with families, continuity of operations, and accommodation of infants and toddlers, children with disabilities, and children with chronic medical conditions;

(viii) Handling and storage of hazardous materials and the appropriate disposal of biocontaminants;

(ix) Appropriate precautions in transporting children, if applicable;

(x) Pediatric first aid and cardiopulmonary resuscitation;

(xi) Recognition and reporting of child abuse and neglect, in accordance with the requirement in paragraph (e) of this section; and

(xii) May include requirements relating to:

(A) Nutrition (including age-appropriate feeding);

(B) Access to physical activity;

(C) Caring for children with special needs; or

(D) Any other subject area determined by the Lead Agency to be necessary to promote child development or to protect children's health and safety.

(2) Include minimum health and safety training on the topics above, as described in § 98.44.

(b) Lead Agencies may not set health and safety standards and requirements other than those required in paragraph (a) of this section that are inconsistent with the parental choice safeguards in § 98.30(f).

(c) The requirements in paragraph (a) of this section shall apply to all providers of child care services for which assistance is provided under this part, within the area served by the Lead Agency, except the relatives specified at § 98.42(c).

(d) Lead Agencies shall describe in the Plan standards for child care services for which assistance is provided under this part, appropriate to strengthening the adult and child relationship in the type of child care setting involved, to provide for the safety and developmental needs of the children served, that address:

(1) Group size limits for specific age populations;

(2) The appropriate ratio between the number of children and the number of caregivers, in terms of age of children in child care; and

(3) Required qualifications for caregivers in child care settings as described at § 98.44(a)(4).

(e) Lead Agencies shall certify that caregivers, teachers, and directors of child care providers within the State or service area will comply with the State's, Territory's, or Tribe's child abuse reporting requirements as required by section 106(b)(2)(B)(i) of the Child Abuse and Prevention and Treatment Act (42 U.S.C. 5106a(b)(2)(B)(i)) or other child abuse reporting procedures and laws in the service area.

■ 21. Revise § 98.42 to read as follows:

§ 98.42 Enforcement of licensing and health and safety requirements.

(a) Each Lead Agency shall certify in the Plan that procedures are in effect to ensure that child care providers of services for which assistance is made available in accordance with this part, within the area served by the Lead Agency, comply with all applicable State, local, or tribal health and safety requirements, including those described in § 98.41.

(b) Each Lead Agency shall certify in the Plan it has monitoring policies and practices applicable to all child care providers and facilities eligible to deliver services for which assistance is provided under this part. The Lead Agency shall:

(1) Ensure individuals who are hired as licensing inspectors are qualified to inspect those child care providers and facilities and have received training in related health and safety requirements appropriate to provider setting and age of children served. Training shall include, but is not limited to, those requirements described in § 98.41, and all aspects of the State, Territory, or Tribe's licensure requirements;

(2) Require inspections of child care providers and facilities, performed by licensing inspectors (or qualified inspectors designated by the Lead Agency), as specified below:

(i) For licensed child care providers and facilities,

(A) Not less than one pre-licensure inspection for compliance with health, safety, and fire standards, and

(B) Not less than annually, an unannounced inspection for compliance with all child care licensing standards, which shall include an inspection for compliance with health and safety, (including, but not limited to, those requirements described in § 98.41) and fire standards (inspectors may inspect for compliance with all three standards at the same time); and

(ii) For license-exempt child care providers and facilities that are eligible to provide services for which assistance is made available in accordance with this part, an annual inspection for compliance with health and safety (including, but not limited to, those requirements described in § 98.41), and fire standards;

(iii) Coordinate, to the extent practicable, monitoring efforts with other Federal, State, and local agencies that conduct similar inspections.

(iv) The Lead Agency may, at its option:

(A) Use differential monitoring or a risk-based approach to design annual inspections, provided that the contents covered during each monitoring visit is representative of the full complement of health and safety requirements;

(B) Develop alternate monitoring requirements for care provided in the child's home that are appropriate to the setting; and

(3) Ensure the ratio of licensing inspectors to such child care providers and facilities is maintained at a level sufficient to enable the State, Territory, or Tribe to conduct effective inspections on a timely basis in accordance with the applicable Federal, State, Territory, Tribal, and local law;

(4) Require child care providers to report to a designated State, Territorial, or Tribal entity any serious injuries or deaths of children occurring in child care.

(c) For the purposes of this section and § 98.41, Lead Agencies may exclude grandparents, great grandparents, siblings (if such providers live in a separate residence), aunts, or uncles, from the term "child care providers." If the Lead Agency chooses to exclude these providers, the Lead Agency shall provide a description and justification in the CCDF Plan, pursuant to § 98.16(l), of requirements, if any, that apply to these providers.

§§ 98.43 through 98.47 [Redesignated as §§ 98.45 through 98.49]

■ 22. Redesignate §§ 98.43 through 98.47 of subpart E as §§ 98.45 through 98.49.

■ 23. Add new § 98.43 to subpart E to read as follows:

§ 98.43 Criminal background checks.

(a)(1) States, Territories, and Tribes, through coordination of the Lead agency with other State, territorial, and tribal agencies, shall have in effect:

(i) Requirements, policies, and procedures to require and conduct criminal background checks for child care staff members (including prospective child care staff members) of all licensed, regulated, or registered child care providers and all child care providers eligible to deliver services for which assistance is provided under this part as described in paragraph (a)(2) of this section;

(ii) Licensing, regulation, and registration requirements, as applicable, that prohibit the employment of child care staff members as described in paragraph (c) of this section; and

(iii) Requirements, policies, and procedures in place to respond as expeditiously as possible to other States', Territories', and Tribes' requests for background check results in order to accommodate the 45 day timeframe required in paragraph (e)(1) of this section.

(2) In this section:

(i) Child care provider means a center based child care provider, a family child care provider, or another provider of child care services for compensation and on a regular basis that:

(A) Is not an individual who is related to all children for whom child care services are provided; and

(B) Is licensed, regulated, or registered under State law or eligible to receive assistance provided under this subchapter; and

(ii) Child care staff member means an individual (other than an individual who is related to all children for whom child care services are provided):

(A) Who is employed by a child care provider for compensation, including contract employees or self-employed individuals;

(B) Whose activities involve the care or supervision of children for a child care provider or unsupervised access to children who are cared for or supervised by a child care provider; or

(C) Any individual residing in a family child care home who is age 18 and older.

(b) A criminal background check for a child care staff member under paragraph (a) of this section shall include:

(1) A Federal Bureau of Investigation fingerprint check using Next Generation Identification;

(2) A search of the National Crime Information Center's National Sex Offender Registry; and

(3) A search of the following registries, repositories, or databases in the State where the child care staff member resides and each State where such staff member resided during the preceding five years:

(i) State criminal registry or repository, with the use of fingerprints being:

(A) Required in the State where the staff member resides;

(B) Optional in other States;

(ii) State sex offender registry or repository; and

(iii) State-based child abuse and neglect registry and database.

(c)(1) A child care staff member shall be ineligible for employment by child care providers of services for which assistance is made available in accordance with this part, if such individual:

(i) Refuses to consent to the criminal background check described in paragraph (b) of this section;

(ii) Knowingly makes a materially false statement in connection with such criminal background check;

(iii) Is registered, or is required to be registered, on a State sex offender registry or repository or the National Sex Offender Registry; or

(iv) Has been convicted of a felony consisting of:

(A) Murder, as described in section 1111 of title 18, United States Code;

(B) Child abuse or neglect;

(C) A crime against children, including child pornography;

(D) Spousal abuse;

(E) A crime involving rape or sexual assault;

(F) Kidnapping;

(G) Arson;

(H) Physical assault or battery; or

(I) Subject to paragraph (e)(4) of this section, a drug-related offense committed during the preceding 5 years; or

(v) Has been convicted of a violent misdemeanor committed as an adult against a child, including the following crimes: Child abuse, child endangerment, sexual assault, or of a misdemeanor involving child pornography.

(2) A child care provider described in paragraph (a)(2)(i) of this section shall be ineligible for assistance provided in accordance with this subchapter if the provider employs a staff member who is ineligible for employment under paragraph (c)(1) of this section.

(d)(1) A child care provider covered by paragraph (a)(2)(i) of this section shall submit a request, to the appropriate State, Territorial, or Tribal agency, defined clearly on the State or Territory Web site described in paragraph (g) of this section, for a criminal background check described in paragraph (b) of this section, for each child care staff member (including prospective child care staff members) of the provider.

(2) Subject to paragraph (d)(3) of this section, the provider shall submit such a request:

(i) Prior to the date an individual becomes a child care staff member of the provider; and

(ii) Not less than once during each 5-year period for any existing staff member.

(3) A child care provider shall not be required to submit a request under paragraph (d)(2) of this section for a child care staff member if:

(i) The staff member received a background check described in paragraph (b) of this section:

(A) Within 5 years before the latest date on which such a submission may be made; and

(B) While employed by or seeking employment by another child care provider within the State;

(ii) The State provided to the first provider a qualifying background check result, consistent with this subchapter, for the staff member; and

(iii) The staff member is employed by a child care provider within the State, or has been separated from employment from a child care provider within the State for a period of not more than 180 consecutive days.

(4) A prospective staff member may begin work for a child care provider described in paragraph (a)(2)(i) of this section after completing either the check described at paragraph (b)(1) or (b)(3)(i) of this section in the State where the prospective staff member resides. Pending completion of all background check components in paragraph (b) of this section, the staff member must be supervised at all times by an individual who received a qualifying result on a background check described in paragraph (b) of this section within the past five years.

(e) *Background check results.* (1) The State, Territory, or Tribe shall carry out the request of a child care provider for a criminal background check as expeditiously as possible, but not to exceed 45 days after the date on which the provider submitted the request, and shall provide the results of the criminal background check to such provider and to the current or prospective staff member.

(2) States, Territories, and Tribes shall ensure the privacy of background check results by:

(i) Providing the results of the criminal background check to the provider in a statement that indicates whether a child care staff member (including a prospective child care staff member) is eligible or ineligible for employment described in paragraph (c)(1) of this section, without revealing any disqualifying crime or other related information regarding the individual.

(ii) If the child care staff member is ineligible for such employment due to the background check, the State, Territory, or Tribe will, when providing the results of the background check, include information related to each disqualifying crime, in a report to the staff member or prospective staff member, along with information on the opportunity to appeal, described in paragraph (e)(3) of this section.

(iii) No State, Territory, or Tribe shall publicly release or share the results of individual background checks, except States and Tribes may release aggregated data by crime as listed under paragraph (c)(1)(iv) of this section from background check results, as long as such data is not personally identifiable information.

(3) States, Territories, and Tribes shall provide for a process by which a child care staff member (including a prospective child care staff member) may appeal the results of a criminal background check conducted under this section to challenge the accuracy or completeness of the information contained in such member's criminal background report. The State, Territory, and Tribe shall ensure that:

(i) Each child care staff member is given notice of the opportunity to appeal;

(ii) A child care staff member will receive clear instructions about how to complete the appeals process if the child care staff member wishes to challenge the accuracy or completeness of the information contained in such member's criminal background report;

(iii) If the staff member files an appeal, the State, Territory, or Tribe will attempt to verify the accuracy of the information challenged by the child care staff member, including making an effort to locate any missing disposition information related to the disqualifying crime;

(iv) The appeals process is completed in a timely manner for each child care staff member; and

(v) Each child care staff member shall receive written notice of the decision. In the case of a negative determination, the decision should indicate the State's efforts to verify the accuracy of information challenged by the child care staff member, as well as any additional appeals rights available to the child care staff member.

(4) States, Territories, and Tribes may allow for a review process through which the State, Territory, or Tribe may determine that a child care staff member (including a prospective child care staff member) disqualified for a crime specified in paragraph (c)(1)(iv)(I) of this section is eligible for employment described in paragraph (c)(1) of this section, notwithstanding paragraph (c)(2) of this section. The review process shall be consistent with title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*);

(5) Nothing in this section shall be construed to create a private right of action if a provider has acted in accordance with this section.

(f) *Fees for background checks.* Fees that a State, Territory, or Tribe may charge for the costs of processing applications and administering a criminal background check as required by this section shall not exceed the actual costs for the processing and administration.

(g) *Transparency.* The State or Territory must ensure that its policies and procedures under this section, including the process by which a child care provider or other State or Territory may submit a background check request, are published in the Web site of the State or Territory as described in § 98.33(a) and the Web site of local lead agencies.

(h) *Disqualification for other crimes.* (1) Nothing in this section shall be construed to prevent a State, Territory, or Tribe from disqualifying individuals as child care staff members based on their conviction for crimes not specifically listed in paragraph (c)(1) of this section that bear upon the fitness of an individual to provide care for and have responsibility for the safety and well-being of children.

(2) Nothing in this section shall be construed to alter or otherwise affect the rights and remedies provided for child care staff members or prospective staff members residing in a State that disqualifies individuals as child care staff members for crimes not specifically provided for under this section.

■ 24. Add new § 98.44 to subpart E to read as follows:

§ 98.44 Training and professional development.

(a) The Lead Agency must describe in the Plan the State or Territory framework for training, professional development, and postsecondary education for caregivers, teachers, and directors, including those working in school-age care, that:

(1) Is developed in consultation with the State Advisory Council on Early Childhood Education and Care (designated or established pursuant to section 642B(b)(1)(A)(i) of the Head Start Act (42 U.S.C. 9837b(b)(1)(A)(i)) or similar coordinating body;

(2) May engage training and professional development providers, including higher education in aligning training and education opportunities with the State's framework;

(3) Addresses professional standards and competencies, career pathways, advisory structure, articulation, and workforce information and financing;

(4) Establishes qualifications in accordance with § 98.41(d)(3) designed to enable child care and school-age care providers that provide services for which assistance is provided in accordance with this part to promote the social, emotional, physical, and cognitive development of children and improve the knowledge and skills of caregivers, teachers and directors in working with children and their families;

(5) Includes professional development conducted on an ongoing basis, providing a progression of professional development (which may include encouraging the pursuit of postsecondary education);

(6) Reflects current research and best practices relating to the skills necessary for caregivers, teachers, and directors to meet the developmental needs of participating children and engage families, including culturally and linguistically appropriate practices; and

(7) Improves the quality, diversity, stability, and retention (including financial incentives and compensation improvements) of caregivers, teachers, and directors.

(b) The Lead Agency must describe in the Plan its established requirements for pre-service or orientation (to be completed within three months) and ongoing professional development for caregivers, teachers, and directors of child care providers of services for which assistance is provided under the

CCDF that, to the extent practicable, align with the State framework:

(1) Accessible pre-service or orientation training in health and safety standards appropriate to the setting and age of children served that addresses:

(i) Each of the requirements relating to matters described in § 98.41(a)(1)(i) through (xi) and specifying critical health and safety training that must be completed before caregivers, teachers, and directors are allowed to care for children unsupervised;

(ii) At the Lead Agency option, matters described in § 98.41(a)(1)(xii); and

(iii) Child development, including the major domains (cognitive, social, emotional, physical development and approaches to learning);

(2) Ongoing, accessible professional development, aligned to a progression of professional development, including the minimum annual requirement for hours of training and professional development for eligible caregivers, teachers and directors, appropriate to the setting and age of children served, that:

(i) Maintains and updates health and safety training standards described in § 98.41(a)(1)(i) through (xi), and at the Lead Agency option, in § 98.41(a)(1)(xii);

(ii) Incorporates knowledge and application of the State's early learning and developmental guidelines for children birth to kindergarten (where applicable);

(iii) Incorporates social-emotional behavior intervention models for children birth through school-age, which may include positive behavior intervention and support models including preventing and reducing expulsions and suspensions of preschool-aged and school-aged children;

(iv) To the extent practicable, are appropriate for a population of children that includes:

(A) Different age groups;

(B) English learners;

(C) Children with developmental delays and disabilities; and

(D) Native Americans, including Indians, as the term is defined in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b) (including Alaska Natives within the meaning of that term), and Native Hawaiians (as defined in section 6207 of the Elementary and Secondary Education Act of 1965);

(v) To the extent practicable, awards continuing education units or is credit-bearing; and

(vi) Shall be accessible to caregivers, teachers, and directors supported through Indian tribes or tribal organizations that receive assistance under this subchapter.

■ 25. Revise newly redesignated § 98.45 to read as follows:

§ 98.45 Equal access.

(a) The Lead Agency shall certify that the payment rates for the provision of child care services under this part are sufficient to ensure equal access, for eligible families in the area served by the Lead Agency, to child care services comparable to those provided to families not eligible to receive CCDF assistance or child care assistance under any other Federal, State, or tribal programs.

(b) The Lead Agency shall provide in the Plan a summary of the data and facts relied on to determine that its payment rates ensure equal access. At a minimum, the summary shall include facts showing:

(1) How a choice of the full range of providers is made available, and the extent to which child care providers participate in the CCDF subsidy system and any barriers to participation including barriers related to payment rates and practices, based on information obtained in accordance with paragraph (d)(2) of this section;

(2) How payment rates are adequate and have been established based on the most recent market rate survey or alternative methodology conducted in accordance with paragraph (c) of this section;

(3) How base payment rates enable providers to meet health, safety, quality, and staffing requirements in accordance with paragraphs (f)(1)(ii)(A) and (f)(2)(ii) of this section;

(4) How the Lead Agency took the cost of higher quality into account in accordance with paragraph (f)(2)(iii) of this section, including how payment rates for higher-quality care, as defined by the Lead Agency using a quality rating and improvement system or other system of quality indicators, relate to the estimated cost of care at each level of quality;

(5) How co-payments based on a sliding fee scale are affordable, as stipulated at paragraph (k) of this section; if applicable, a rationale for the Lead Agency's policy on whether child care providers may charge additional amounts to families above the required family co-payment, including a demonstration that the policy promotes affordability and access; analysis of the interaction between any such additional amounts with the required family co-payments, and of the ability of subsidy payment rates to provide access to care without additional fees; and data on the extent to which CCDF providers charge such additional amounts to families (based on information obtained in accordance with paragraph (d)(2) of this section);

(6) How the Lead Agency's payment practices support equal access to a range of providers by providing stability of funding and encouraging more child care providers to serve children receiving CCDF subsidies, in accordance with paragraph (l) of this section;

(7) How and on what factors the Lead Agency differentiates payment rates; and

(8) Any additional facts the Lead Agency considered in determining that its payment rates ensure equal access.

(c) The Lead Agency shall demonstrate in the Plan that it has developed and conducted, not earlier than two years before the date of the submission of the Plan, either:

(1) A statistically valid and reliable survey of the market rates for child care services; or

(2) An alternative methodology, such as a cost estimation model, that has been:

(i) Proposed by the Lead Agency; and

(ii) Approved in advance by ACF.

(d) The Lead Agency must:

(1) Ensure that the market rate survey or alternative methodology reflects variations by geographic location, category of provider, and age of child;

(2) Track through the market rate survey or alternative methodology, or through a separate source, information on the extent to which:

(i) Child care providers are participating in the CCDF subsidy program and any barriers to participation, including barriers related to payment rates and practices; and

(ii) CCDF child care providers charge amounts to families more than the required family co-payment (under paragraph (k) of this section) in instances where the provider's price exceeds the subsidy payment, including data on the size and frequency of any such amounts.

(e) Prior to conducting the market rate survey or alternative methodology, the Lead Agency must consult with:

(1) The State Advisory Council on Early Childhood Education and Care (designated or established pursuant to section 642B(b)(1)(A)(i) of the Head Start Act (42 U.S.C. 9837b(b)(1)(A)(i)) or similar coordinating body, local child care program administrators, local child care resource and referral agencies, and other appropriate entities; and

(2) Organizations representing child care caregivers, teachers, and directors.

(f) After conducting the market rate survey or alternative methodology, the Lead Agency must:

(1) Prepare a detailed report containing the results, and make the report widely available, including by posting it on the Internet, not later than 30 days after the completion of the report.

The report must include:

(i) The results of the market rate survey or alternative methodology;

(ii) The estimated cost of care necessary (including any relevant variation by geographic location, category of provider, or age of child) to support:

(A) Child care providers' implementation of the health, safety, quality, and staffing requirements at §§ 98.41 through 98.44; and

(B) Higher-quality care, as defined by the Lead Agency using a quality rating and improvement system or other system of quality indicators, at each level of quality; and

(iii) The Lead Agency's response to stakeholder views and comments.

(2) Set payment rates for CCDF assistance:

(i) In accordance with the results of the most recent market rate survey or alternative methodology conducted pursuant to paragraph (c) of this section;

(ii) With base payment rates established at least at a level sufficient for child care providers to meet health, safety quality, and staffing requirements in accordance with paragraph (f)(1)(ii)(A) of this section;

(iii) Taking into consideration the cost of providing higher-quality child care services, including consideration of the information at each level of higher quality required by paragraph (f)(1)(ii)(B) of this section;

(iv) Taking into consideration the views and comments of the public obtained in accordance with paragraph (e) and through other processes determined by the Lead Agency; and

(v) Without, to the extent practicable, reducing the number of families receiving CCDF assistance.

(g) A Lead Agency may not establish different payment rates based on a family's eligibility status, such as TANF status.

(h) Payment rates under paragraph (a) of this section shall be consistent with the parental requirements in § 98.30

(i) Nothing in this section shall be construed to create a private right of action if the Lead Agency acts in accordance with the Act and this part.

(j) Nothing in this part shall be construed to prevent a Lead Agency from differentiating payment rates on the basis of such factors as:

(1) Geographic location of child care providers (such as location in an urban or rural area);

(2) Age or particular needs of children (such as the needs of children with disabilities, children served by child protective services, and children experiencing homelessness);

(3) Whether child care providers provide services during the weekend or other non-traditional hours; or

(4) The Lead Agency's determination that such differential payment rates may enable a parent to choose high-quality child care that best fits the parents' needs.

(k) Lead Agencies shall establish, and periodically revise, by rule, a sliding fee scale(s) for families that receive CCDF child care services that:

(1) Helps families afford child care and enables choice of a range of child care options;

(2) Is based on income and the size of the family and may be based on other factors as appropriate, but may not be based on the cost of care or amount of subsidy payment;

(3) Provides for affordable family co-payments that are not a barrier to families receiving assistance under this part; and

(4) At Lead Agency discretion, allows for co-payments to be waived for families whose incomes are at or below the poverty level for a family of the same size, that have children who receive or need to receive protective services, or that meet other criteria established by the Lead Agency.

(l) The Lead Agency shall demonstrate in the Plan that it has established payment practices applicable to all CCDF child care providers that:

(1) Ensure timeliness of payment by either:

(i) Paying prospectively prior to the delivery of services; or

(ii) Paying within no more than 21 calendar days of the receipt of a complete invoice for services.

(2) To the extent practicable, support the fixed costs of providing child care services by delinking provider payments from a child's occasional absences by:

(i) Paying based on a child's enrollment rather than attendance;

(ii) Providing full payment if a child attends at least 85 percent of the authorized time;

(iii) Providing full payment if a child is absent for five or fewer days in a month; or

(iv) An alternative approach for which the Lead Agency provides a justification in its Plan.

(3) Reflect generally-accepted payment practices of child care providers that serve children who do not receive CCDF subsidies, which must include (unless the Lead Agency provides evidence in the Plan that such practices are not generally-accepted in the State or service area):

(i) Paying on a part-time or full-time basis (rather than paying for hours of service or smaller increments of time); and

(ii) Paying for reasonable mandatory registration fees that the provider charges to private-paying parents:

(4) Ensure child care providers receive payment for any services in accordance with a written payment agreement or authorization for services that includes, at a minimum, information regarding provider payment policies, including rates, schedules, any fees charged to providers, and the dispute resolution process required by paragraph (l)(6);

(5) Ensure child care providers receive prompt notice of changes to a family's eligibility status that may impact payment, and that such notice is sent to providers no later than the day the Lead Agency becomes aware that such a change will occur;

(6) Include timely appeal and resolution processes for any payment inaccuracies and disputes.

■ 26. Revise newly redesignated § 98.46 to read as follows:

§ 98.46 Priority for child care services.

(a) Lead Agencies shall give priority for services provided under § 98.50(a) to:

(1) Children of families with very low family income (considering family size);

(2) Children with special needs, which may include any vulnerable populations as defined by the Lead Agency; and

(3) Children experiencing homelessness.

(b) Lead Agencies shall prioritize increasing access to high-quality child care and development services for children of families in areas that have significant concentrations of poverty and unemployment and that do not have a sufficient number of such programs.

■ 27. Revise § 98.50 to read as follows:

§ 98.50 Child care services.

(a) Direct child care services shall be provided:

(1) To eligible children, as described in § 98.20;

(2) Using a sliding fee scale, as described in § 98.45(k);

(3) Using funding methods provided for in § 98.30; and

(4) Based on the priorities in § 98.46.

(b) Of the aggregate amount of funds expended by a State or Territory (*i.e.*, Discretionary, Mandatory, and Federal and State share of Matching funds):

(1) No less than seven percent in fiscal years 2016 and 2017, eight percent in fiscal years 2018 and 2019, and nine percent in fiscal year 2020 and each succeeding fiscal year shall be used for activities designed to improve the quality of child care services and increase parental options for, and access to, high-quality child care as described at § 98.53; and

(2) No less than three percent in fiscal year 2017 and each succeeding fiscal year shall be used to carry out activities at § 98.53(a)(4) as such activities relate to the quality of care for infants and toddlers.

(3) Nothing in this section shall preclude the State or Territory from reserving a larger percentage of funds to carry out activities described in paragraphs (b)(1) and (2) of this section.

(c) Funds expended from each fiscal year's allotment on quality activities pursuant to paragraph (b) of this section:

(1) Must be in alignment with an assessment of the Lead Agency's need to carry out such services and care as required at § 98.53(a);

(2) Must include measurable indicators of progress in accordance with § 98.53(f); and

(3) May be provided directly by the Lead Agency or through grants or contracts with local child care resource and referral organizations or other appropriate entities.

(d) Of the aggregate amount of funds expended (*i.e.*, Discretionary, Mandatory, and Federal and State share of Matching Funds), no more than five percent may be used for administrative activities as described at § 98.54.

(e) Not less than 70 percent of the Mandatory and Federal and State share of Matching Funds shall be used to meet the child care needs of families who:

(1) Are receiving assistance under a State program under Part A of title IV of the Social Security Act;

(2) Are attempting through work activities to transition off such assistance program; and

(3) Are at risk of becoming dependent on such assistance program.

(f) From Discretionary amounts provided for a fiscal year, the Lead Agency shall:

(1) Reserve the minimum amount required under paragraph (b) of this section for quality activities, and the funds for administrative costs described at paragraph (d) of this section; and

(2) From the remainder, use not less than 70 percent to fund direct services (provided by the Lead Agency).

(g) Of the funds remaining after applying the provisions of paragraphs (a) through (f) of this section, the Lead Agency shall spend a substantial portion of funds to provide direct child care services to low-income families who are working or attending training or education.

(h) Pursuant to § 98.16(i)(4), the Plan shall specify how the State will meet the child care needs of families described in paragraph (e) of this section.

§§ 98.51 through 98.55 [Redesignated as §§ 98.53 through 98.57]

■ 28. Redesignate §§ 98.51 through 98.55 of subpart F as §§ 98.53 through 98.57.

■ 29. Add new § 98.51 to subpart F to read as follows:

§ 98.51 Services for children experiencing homelessness.

Lead Agencies shall expend funds on activities that improve access to quality child care services for children experiencing homelessness, including:

(a) The use of procedures to permit enrollment (after an initial eligibility determination) of children experiencing homelessness while required documentation is obtained;

(1) If, after full documentation is provided, a family experiencing homelessness is found ineligible,

(i) The Lead Agency shall pay any amount owed to a child care provider for services provided as a result of the initial eligibility determination; and

(ii) Any CCDF payment made prior to the final eligibility determination shall not be considered an error or improper payment under subpart K of this part;

(2) [Reserved]

(b) Training and technical assistance for providers and appropriate Lead Agency (or designated entity) staff on identifying and serving children experiencing homelessness and their families; and

(c) Specific outreach to families experiencing homelessness.

■ 30. Add new § 98.52 to subpart F to read as follows:

§ 98.52 Child care resource and referral system.

(a) A Lead Agency may expend funds to establish or support a system of local or regional child care resource and referral organizations that is coordinated, to the extent determined appropriate by the Lead Agency, by a statewide public or private nonprofit, community-based or regionally based, lead child care resource and referral organization.

(b) If a Lead Agency uses funds as described in paragraph (a) of this section, the local or regional child care resource and referral organizations supported shall, at the direction of the Lead Agency:

(1) Provide parents in the State with consumer education information referred to in § 98.33 (except as otherwise provided in that paragraph), concerning the full range of child care options (including faith-based and community-based child care providers), analyzed by provider, including child care provided during nontraditional hours and through emergency child care centers, in their political subdivisions or regions;

(2) To the extent practicable, work directly with families who receive assistance under this subchapter to offer the families support and assistance, using information described in paragraph (b)(1) of this section, to make an informed decision about which child care providers they will use, in an effort to ensure that the families are enrolling their children in the most appropriate child care setting to suit their needs and one that is of high quality (as determined by the Lead Agency);

(3) Collect data and provide information on the coordination of services and supports, including services under section 619 and part C of the Individuals with Disabilities Education Act (20 U.S.C. 1431, *et seq.*), for children with disabilities (as defined in section 602 of such Act (20 U.S.C. 1401));

(4) Collect data and provide information on the supply of and demand for child care services in political subdivisions or regions within the State and submit such information to the State;

(5) Work to establish partnerships with public agencies and private entities, including faith-based and community-based child care providers, to increase the supply and quality of child care services in the State; and

(6) As appropriate, coordinate their activities with the activities of the State Lead Agency and local agencies that administer funds made available in accordance with this part.

■ 31. Revise newly redesignated § 98.53 to read as follows:

§ 98.53 Activities to improve the quality of child care.

(a) The Lead Agency must expend funds from each fiscal year's allotment on quality activities pursuant to §§ 98.50(b) and 98.83(g) in accordance with an assessment of need by the Lead Agency. Such funds must be used to carry out at least one of the following quality activities to improve the quality of child care services for all children, regardless of CCDF receipt, in accordance with paragraph (d) of this section:

(1) Supporting the training, professional development, and postsecondary education of the child care workforce as part of a progression of professional development through activities such as those included at § 98.44, in addition to:

(i) Offering training, professional development, and postsecondary education opportunities for child care caregivers, teachers and directors that:

(A) Relate to the use of scientifically based, developmentally-appropriate, culturally-appropriate, and age-appropriate strategies to promote the social, emotional, physical, and cognitive development of children, including those related to nutrition and physical activity; and

(B) Offer specialized training, professional development, and postsecondary education for caregivers, teachers and directors caring for those populations prioritized at § 98.44(b)(2)(iv), and children with disabilities;

(ii) Incorporating the effective use of data to guide program improvement and improve opportunities for caregivers, teachers and directors to advance on their progression of training, professional development, and postsecondary education;

(iii) Including effective, age-appropriate behavior management strategies and training, including positive behavior interventions and support models for birth to school-age, that promote positive social and emotional development and reduce challenging behaviors, including reducing suspensions and expulsions of children under age five for such behaviors;

(iv) Providing training and outreach on engaging parents and families in culturally and linguistically appropriate ways to expand their knowledge, skills, and capacity to become meaningful partners in supporting their children's positive development;

(v) Providing training corresponding to the nutritional and physical activity needs of children to promote healthy development;

(vi) Providing training or professional development for caregivers, teachers and directors regarding the early neurological development of children; and

(vii) Connecting child care caregivers, teachers, and directors with available Federal and State financial aid that would assist these individuals in pursuing relevant postsecondary education, or delivering financial resources directly through programs that provide scholarships and compensation improvements for education attainment and retention.

(2) Improving upon the development or implementation of the early learning and development guidelines at § 98.15(a)(9) by providing technical assistance to eligible child care providers in order to enhance the cognitive, physical, social, and emotional development and overall well-being of participating children.

(3) Developing, implementing, or enhancing a tiered quality rating and improvement system for child care providers and services to meet consumer education requirements at § 98.33, which may:

(i) Support and assess the quality of child care providers in the State, Territory, or Tribe;

(ii) Build on licensing standards and other regulatory standards for such providers;

(iii) Be designed to improve the quality of different types of child care providers and services;

(iv) Describe the safety of child care facilities;

(v) Build the capacity of early childhood programs and communities to promote parents' and families' understanding of the early childhood system and the rating of the program in which the child is enrolled;

(vi) Provide, to the maximum extent practicable, financial incentives and other supports designed to expand the full diversity of child care options and help child care providers improve the quality of services; and

(vii) Accommodate a variety of distinctive approaches to early childhood education and care, including but not limited to, those practiced in faith-based settings, community-based settings, child centered settings, or similar settings that offer a distinctive approach to early childhood development.

(4) Improving the supply and quality of child care programs and services for infants and toddlers through activities, which may include:

(i) Establishing or expanding high-quality community or neighborhood based family and child development centers, which may serve as resources to child care providers in order to improve the quality of early childhood services provided to infants and toddlers from low-income families and to help eligible child care providers improve their capacity to offer high-quality, age-appropriate care to infants and toddlers from low-income families;

(ii) Establishing or expanding the operation of community or neighborhood-based family child care networks;

(iii) Promoting and expanding child care providers' ability to provide developmentally appropriate services for infants and toddlers through, but not limited to:

(A) Training and professional development for caregivers, teachers and directors, including coaching and technical assistance on this age group's unique needs from statewide networks of qualified infant-toddler specialists; and

(B) Improved coordination with early intervention specialists who provide services for infants and toddlers with disabilities under part C of the Individuals with Disabilities Education Act (20 U.S.C. 1431. *et seq.*);

(iv) If applicable, developing infant and toddler components within the Lead Agency's quality rating and improvement system described in paragraph (a)(3) of this section for child care providers for infants and toddlers, or the development of infant and toddler components in the child care licensing regulations or early learning and development guidelines;

(v) Improving the ability of parents to access transparent and easy to understand consumer information about high-quality infant and toddler care as described at § 98.33; and

(vi) Carrying out other activities determined by the Lead Agency to improve the quality of infant and toddler care provided, and for which there is evidence that the activities will lead to improved infant and toddler health and safety, infant and toddler cognitive and physical development, or infant and toddler well-being, including providing health and safety training (including training in safe sleep practices, first aid, and cardiopulmonary resuscitation for providers and caregivers.

(5) Establishing or expanding a statewide system of child care resource and referral services.

(6) Facilitating compliance with Lead Agency requirements for inspection, monitoring, training, and health and safety, and with licensing standards.

(7) Evaluating and assessing the quality and effectiveness of child care programs and services offered, including evaluating how such programs positively impact children.

(8) Supporting child care providers in the voluntary pursuit of accreditation by a national accrediting body with demonstrated, valid, and reliable program standards of high-quality.

(9) Supporting Lead Agency or local efforts to develop or adopt high-quality program standards relating to health, mental health, nutrition, physical activity, and physical development.

(10) Carrying out other activities, including implementing consumer education provisions at § 98.33, determined by the Lead Agency to improve the quality of child care services provided, and for which measurement of outcomes relating to improvement of provider preparedness, child safety, child well-being, or entry to kindergarten is possible.

(b) Pursuant to § 98.16(j), the Lead Agency shall describe in its Plan the activities it will fund under this section.

(c) Non-Federal expenditures required by § 98.55(c) (*i.e.,* the maintenance-of effort amount) are not subject to the requirement at paragraph (a) of this section.

(d) Activities to improve the quality of child care services are not restricted to activities affecting children meeting eligibility requirements under § 98.20 or to child care providers of services for which assistance is provided under this part.

(e) Unless expressly authorized by law, targeted funds for quality improvement and other set asides that may be included in appropriations law may not be used towards meeting the quality expenditure minimum requirement at § 98.50(b).

(f) States shall annually prepare and submit reports, including a quality progress report and expenditure report, to the Secretary, which must be made publicly available and shall include:

(1) An assurance that the State was in compliance with requirements at § 98.50(b) in the preceding fiscal year and information about the amount of funds reserved for that purpose;

(2) A description of the activities carried out under this section to comply with § 98.50(b);

(3) The measures the State will use to evaluate its progress in improving the quality of child care programs and services in the State, and data on the extent to which the State had met these measures;

(4) A report describing any changes to State regulations, enforcement mechanisms, or other State policies addressing health and safety based on an annual review and assessment of serious child injuries and any deaths occurring in child care programs serving children receiving assistance under this part, and in other regulated and unregulated child care centers and family child care homes, to the extent possible; and

(5) A description of how the Lead Agency responded to complaints submitted through the national hotline and Web site, required in section 658L(b) of the CCDBG Act (42 U.S.C. 9858j(b)).

■ 32. Amend newly redesignated § 98.54 as follows:
■ a. Revise paragraphs (a) introductory text and (a)(6);
■ b. Redesignate paragraphs (b) and (c) as (c) and (d), respectively;
■ c. Add new paragraph (b);
■ d. Revise newly redesignated paragraph (d); and
■ e. Add paragraph (e).

The revisions and additions read as follows:

§ 98.54 Administrative costs.

(a) Not more than five percent of the aggregate funds expended by the Lead Agency from each fiscal year's allotment, including the amounts expended in the State pursuant to § 98.55(b), shall be expended for administrative activities. These activities may include but are not limited to:

* * * * *

(6) Indirect costs as determined by an indirect cost agreement or cost allocation plan pursuant to § 98.57.

(b) The following activities do not count towards the five percent limitation on administrative expenditures in paragraph (a) of this section:

(1) Establishment and maintenance of computerized child care information systems;

(2) Establishing and operating a certificate program;

(3) Eligibility determination and redetermination;

(4) Preparation/participation in judicial hearings;

(5) Child care placement;

(6) Recruitment, licensing, inspection of child care providers;

(7) Training for Lead Agency or sub recipient staff on billing and claims processes associated with the subsidy program;

(8) Reviews and supervision of child care placements;

(9) Activities associated with payment rate setting;

(10) Resource and referral services; and

(11) Training for child care staff.

* * * * *

(d) Non-Federal expenditures required by § 98.55(c) (*i.e.,* the maintenance-of-effort amount) are not subject to the five percent limitation at paragraph (a) of this section.

(e) If a Lead Agency enters into agreements with sub-recipients for operation of the CCDF program, the amount of the contract or grant attributable to administrative activities as described in this section shall be counted towards the five percent limit.

■ 33. In newly redesignated § 98.55, revise paragraphs (e)(2)(iv), (f), (g)(2), and (h)(2) to read as follows:

§ 98.55 Matching Fund requirements.

* * * * *

(e) * * *

(2) * * *

(iv) Shall be certified both by the Lead Agency and by the donor (if funds are donated directly to the Lead Agency) or the Lead Agency and the entity designated by the State to receive donated funds pursuant to paragraph (f) of this section (if funds are donated directly to the designated entity) as available and representing funds eligible for Federal match; and

* * * * *

(f) Donated funds need not be transferred to or under the administrative control of the Lead Agency in order to qualify as an expenditure eligible to receive Federal match under this section. They may be given to the public or private entities designated by the State to implement the child care program in accordance with § 98.11 provided that such entities are identified and designated in the State Plan to receive donated funds in accordance with § 98.16(d)(2).

(g) * * *

(2) Family contributions to the cost of care as required by § 98.45(k).

(h) * * *

(2) May be eligible for Federal match if the State includes in its Plan, as provided in § 98.16(w), a description of the efforts it will undertake to ensure that pre-K programs meet the needs of working parents.

* * * * *

■ 34. In newly redesignated § 98.56, add a sentence to the end of paragraph (b)(1) and revise paragraphs (d) and (e) to read as follows:

§ 98.56 Restrictions on the use of funds.

* * * * *

(b) * * *

(1) * * * Improvements or upgrades to a facility which are not specified under the definitions of construction or major renovation at § 98.2 may be considered minor remodeling and are, therefore, not prohibited.

* * * * *

(d) *Sectarian purposes and activities.* Funds provided under grants or contracts to providers may not be expended for any sectarian purpose or activity, including sectarian worship or instruction. Assistance provided to parents through certificates is not a grant or contract. Funds provided through child care certificates may be expended for sectarian purposes or activities, including sectarian worship or instruction when provided as part of the child care services.

(e) *Non-Federal share for other Federal programs.* The CCDF may not be used as the non-Federal share for other Federal grant programs, unless explicitly authorized by statute.

■ 35. Amend § 98.60 as follows:

■ a. Revise paragraphs (b) introductory text, (b)(1), (d)(2)(i), (d)(4)(ii), and (d)(6) introductory text;

■ b. Redesignate paragraph (d)(7) as (d)(8);

■ c. Add new paragraph (d)(7); and

■ d. Revise paragraph (h).

The revisions and addition read as follows:

§ 98.60 Availability of funds.

* * * * *

(b) Subject to the availability of appropriations, in accordance with relevant statutory provisions and the apportionment of funds from the Office of Management and Budget, the Secretary:

(1) May withhold a portion of the CCDF funds made available for a fiscal year for the provision of technical assistance, for research, evaluation, and demonstration, and for a national toll free hotline and Web site;

* * * * *

(d) * * *

(2)(i) Mandatory Funds for States requesting Matching Funds per § 98.55 shall be obligated in the fiscal year in which the funds are granted and are available until expended.

* * * * *

(4) * * *

(ii) If there is no applicable State or local law, the regulation at 45 CFR 75.2, Expenditures and Obligations.

* * * * *

(6) In instances where the Lead Agency issues child care certificates, funds for child care services provided through a child care certificate will be considered obligated when a child care certificate is issued to a family in writing that indicates:

* * * * *

(7) In instances where third party agencies issue child care certificates, the obligation of funds occurs upon entering into agreement through a subgrant or contract with such agency, rather than when the third party issues certificates to a family.

* * * * *

(h) Repayment of loans made to child care providers as part of a quality improvement activity pursuant to § 98.53, may be made in cash or in services provided in-kind. Payment provided in-kind shall be based on fair market value. All loans shall be fully repaid.

* * * * *

■ 36. In § 98.61, revise paragraph (a) and paragraph (c) introductory text and add paragraph (f) to read as follows:

§ 98.61 Allotments from the Discretionary Fund.

(a) To the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico an amount equal to the funds appropriated for the Child Care and Development Block Grant, less amounts reserved for technical assistance, research, and the national hotline and Web site, pursuant to § 98.60(b), and amounts reserved for the Territories and Tribes, pursuant to § 98.60(b) and paragraphs (b) and (c) of this section, shall be allotted based upon the formula specified in section 658O(b) of the Act (42 U.S.C. 9858m(b)).

* * * * *

(c) For Indian Tribes and tribal organizations, including any Alaskan Native Village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*) not less than two percent of the amount appropriated for the Child Care and Development Block Grant shall be reserved.

* * * * *

(f) Lead Agencies shall expend any funds that may be set-aside for targeted activities pursuant to annual appropriations law as directed by the Secretary.

■ 37. In § 98.63, revise paragraphs (b) and (c) to read as follows:

§ 98.63 Allotments from the Matching Fund.

* * * * *

(b) For purposes of this section, the amounts available under section 418(a)(3) of the Social Security Act (42 U.S.C. 618(a)(3)) excludes the amounts reserved and allocated under § 98.60(b)(1) for technical assistance, research and evaluation, and the national toll-free hotline and Web site and under § 98.62(a) and (b) for the Mandatory Fund.

(c) Amounts under this section are available pursuant to the requirements at § 98.55(c).

■ 38. In § 98.64, revise paragraph (c)(1) to read as follows:

§ 98.64 Reallotment and redistribution of funds.

* * * * *

(c)(1) Any portion of the Matching Fund granted to a State that is not obligated in the period for which the grant is made shall be redistributed. Funds, if any, will be redistributed on the request of, and only to, those other States that have met the requirements of § 98.55(c) in the period for which the grant was first made. For purposes of this paragraph (c)(1), the term "State" means the 50 States and the District of Columbia. Territorial and tribal grantees may not receive redistributed Matching Funds.

* * * * *

■ 39. In § 98.65, revise paragraphs (a) and (g) and to add paragraphs (h) and (i) to read as follows:

§ 98.65 Audits and financial reporting.

(a) Each Lead Agency shall have an audit conducted after the close of each program period in accordance with 45 CFR part 75, subpart F, and the Single Audit Act Amendments of 1996.

* * * * *

(g) Lead Agencies shall submit financial reports, in a manner specified by ACF, quarterly for each fiscal year until funds are expended.

(h) At a minimum, a State or territorial Lead Agency's quarterly report shall include the following information on expenditures under CCDF grant funds, including Discretionary (which includes realloted funding and any funds transferred from the TANF block grant), Mandatory, and Matching Funds (which includes redistributed funding); and State Matching and Maintenance-of-Effort (MOE) Funds:

(1) Child care administration;

(2) Quality activities, including any sub-categories of quality activities as required by ACF;

(3) Direct services;

(4) Non-direct services, including:

(i) Establishment and maintenance of computerized child care information systems;

(ii) Certificate program cost/eligibility determination;

(iii) All other non-direct services; and

(5) Such other information as specified by the Secretary.

(i) Tribal Lead Agencies shall submit financial reports annually in a manner specified by ACF.

■ 40. Add § 98.68 to subpart G to read as follows:

§ 98.68 Program integrity.

(a) Lead Agencies are required to describe in their Plan effective internal controls that are in place to ensure integrity and accountability, while maintaining continuity of services, in the CCDF program. These shall include:

(1) Processes to ensure sound fiscal management;

(2) Processes to identify areas of risk;

(3) Processes to train child care providers and staff of the Lead Agency and other agencies engaged in the administration of CCDF about program requirements and integrity; and

(4) Regular evaluation of internal control activities.

(b) Lead Agencies are required to describe in their Plan the processes that are in place to:

(1) Identify fraud or other program violations, which may include, but are not limited to the following:

(i) Record matching and database linkages;

(ii) Review of attendance and billing records;

(iii) Quality control or quality assurance reviews; and

(iv) Staff training on monitoring and audit processes.

(2) Investigate and recover fraudulent payments and to impose sanctions on clients or providers in response to fraud.

(c) Lead Agencies must describe in their Plan the procedures that are in place for documenting and verifying that children receiving assistance under this part meet eligibility criteria at the time of eligibility determination and redetermination. Because a child meeting eligibility requirements at the most recent eligibility determination or redetermination is considered eligible during the period between redeterminations as described in § 98.21(a)(1):

(1) The Lead Agency shall pay any amount owed to a child care provider for services provided for such a child during this period under a payment agreement or authorization for services; and

(2) Any CCDF payment made for such a child during this period shall not be considered an error or improper payment under subpart K of this part due to a change in the family's circumstances, as set forth at § 98.21(a).

■ 41. In § 98.70, add paragraph (d) to read as follows:

§ 98.70 Reporting requirements.

* * * * *

(d) State and territorial Lead Agencies shall make the following reports publicly available on a Web site in a timely manner:

(1) Annual administrative data reports under paragraph (b) of this section;

(2) Quarterly financial reports under § 98.65(g); and

(3) Annual quality progress reports under § 98.53(f).

■ 42. Revise § 98.71 to read as follows:

§ 98.71 Content of report.

(a) At a minimum, a State or territorial Lead Agency's quarterly case-level report to the Secretary, as required in § 98.70, shall include the following information on services provided under CCDF grant funds, including Federal Discretionary (which includes any funds transferred from the TANF Block Grant), Mandatory, and Matching Funds; and State Matching and Maintenance-of-Effort (MOE) Funds:

(1) The total monthly family income and family size used for determining eligibility;

(2) Zip code of residence of the family and zip code of the location of the child care provider;

(3) Gender and month/year of birth of children;

(4) Ethnicity and race of children;

(5) Whether the head of the family is a single parent

(6) The sources of family income and assistance from employment (including self-employment), cash or other assistance under the Temporary Assistance for Needy Families program under Part A of title IV of the Social Security Act (42 U.S.C. 609(a)(7)), cash or other assistance under a State program for which State spending is counted toward the maintenance of effort requirement under section 409(a)(7) of the Social Security Act, housing assistance, assistance under the Food Stamp Act of 1977, and other assistance programs;

(7) The month/year child care assistance to the family started;

(8) The type(s) of child care in which the child was enrolled (such as family child care, in-home care, or center-based child care;

(9) Whether the child care provider was a relative;

(10) The total monthly child care copayment by the family;

(11) If applicable, any amount charged by the provider to the family more than the required copayment in instances where the provider's price exceeds the subsidy payment;

(12) The total expected dollar amount per month to be received by the provider for each child;

(13) The total hours per month of such care;

(14) Unique identifier of the head of the family unit receiving child care assistance, and of the child care provider;

(15) Reasons for receiving care;

(16) Whether the family is experiencing homelessness;

(17) Whether the parent(s) are in the military service;

(18) Whether the child has a disability;

(19) Primary language spoken at home;

(20) Date of the child care provider's most recent health, safety and fire inspection meeting the requirements of § 98.42(b)(2);

(21) Indicator of the quality of the child care provider; and

(22) Any additional information that the Secretary shall require.

(b) At a minimum, a State or territorial Lead Agency's annual aggregate report to the Secretary, as required in § 98.70(b), shall include the following information on services provided through all CCDF grant funds, including Federal Discretionary (which includes any funds transferred from the TANF Block Grant), Mandatory, and Matching Funds; and State Matching and MOE Funds:

(1) The number of child care providers that received funding under CCDF as separately identified based on the types of providers listed in section 658P(5) of the amended Child Care and Development Block Grant Act;

(2) The number of children served by payments through certificates or vouchers, contracts or grants, and cash under public benefit programs, listed by the primary type of child care services provided during the last month of the report period (or the last month of service for those children leaving the program before the end of the report period);

(3) The manner in which consumer education information was provided to parents and the number of parents to whom such information was provided;

(4) The total number (without duplication) of children and families served under CCDF;

(5) The number of child fatalities by type of care; and

(6) Any additional information that the Secretary shall require.

(c) A Tribal Lead Agency's annual report as required in § 98.70(c), shall include such information as the Secretary shall require.

■ 43. In § 98.80, revise paragraphs (a) and (c)(1) and (2) and remove paragraph (f).

The revisions read as follows:

§ 98.80 General procedures and requirements.

* * * * *

(a) An Indian Tribe applying for or receiving CCDF funds shall be subject to the requirements under this part as specified in this section based on the size of the awarded funds. The Secretary shall establish thresholds for Tribes' total CCDF allotments pursuant to §§ 98.61(c) and 98.62(b) to be divided into three categories:

(1) Large allocations;

(2) Medium allocations; and

(3) Small allocations.

* * * * *

(c) * * *

(1) The consortium adequately demonstrates that each participating Tribe authorizes the consortium to receive CCDF funds on behalf of each Tribe or tribal organization in the consortium;

(2) The consortium consists of Tribes that each meet the eligibility requirements for the CCDF program as defined in this part, or that would otherwise meet the eligibility requirements if the Tribe or tribal organization had at least 50 children under 13 years of age;

* * * * *

■ 44. In § 98.81, revise paragraphs (b) introductory text, (b)(1), (5), and (6), add paragraph (b)(9), and revise paragraph (c) to read as follows:

§ 98.81 Application and Plan procedures.

* * * * *

(b) Tribal Lead Agencies with large and medium allocations shall submit a CCDF Plan, as described at § 98.16, with the following additions and exceptions:

(1) The Plan shall include the basis for determining family eligibility.

(i) If the Tribe's median income is below a certain level established by the Secretary, then, at the Tribe's option, any Indian child in the Tribe's service area shall be considered eligible to receive CCDF funds, regardless of the family's income, work, or training status, provided that provision for services still goes to those with the highest need.

(ii) If the Tribe's median income is above the level established by the Secretary, then a tribal program must determine eligibility for services pursuant to § 98.20(a)(2). A tribal program, as specified in its Plan, may use either:

(A) 85 percent of the State median income for a family of the same size; or

(B) 85 percent of the median income for a family of the same size residing in the area served by the Tribal Lead Agency.

* * * * *

(5) The Plan shall include a description of the Tribe's payment rates, how they are established, and how they support quality including, where applicable, cultural and linguistic appropriateness.

(6) The Plan is not subject to the following requirements:

(i) The early learning and developmental guidelines requirement at § 98.15(a)(9);

(ii) The certification to develop the CCDF Plan in consultation with the State Advisory Council at § 98.15(b)(1);

(iii) The licensing requirements applicable to child care services at § 98.15(b)(6) and § 98.16(u);

(iv) The identification of the public or private entities designated to receive private funds at § 98.16(d)(2);

(v) A definition of very low income at § 98.16(g)(8);

(vi) A description at § 98.16(i)(4) of how the Lead Agency will meet the needs of certain families specified at § 98.50(e);

(vii) The description of the market rate survey or alternative methodology at § 98.16(r);

(viii) The description relating to Matching Funds at § 98.16(w); and

(ix) The description of how the Lead Agency prioritizes increasing access to high-quality child care in areas with high concentration of poverty at § 98.16(y).

* * * * *

(9) Plans for Tribal Lead Agencies with medium allocations are not subject to the following requirements unless the Tribe chooses to include such services, and, therefore, the associated requirements, in its program:

(i) The assurance at § 98.15(a)(2) regarding options for services;

(ii) A description of any limits established for the provision of in-home care at § 98.16(i)(2), or

(iii) A description of the child care certificate payment system(s) at § 98.16(q).

(c) Tribal Lead Agencies with small allocations shall submit an abbreviated CCDF Plan, as described by the Secretary.

■ 45. Revise § 98.82 to read as follows:

§ 98.82 Coordination.

Tribal applicants shall coordinate the development of the Plan and the provision of services, to the extent practicable, as required by §§ 98.12 and 98.14 and:

(a) To the maximum extent feasible, with the Lead Agency in the State or States in which the applicant will carry out the CCDF program; and

(b) With other Federal, State, local, and tribal child care and childhood development programs.

■ 46. Revise § 98.83 to read as follows:

§ 98.83 Requirements for tribal programs.

(a) The grantee shall designate an agency, department, or unit to act as the Tribal Lead Agency to administer the CCDF program.

(b) With the exception of Alaska, California, and Oklahoma, programs and activities for the benefit of Indian children shall be carried out on or near an Indian reservation.

(c) In the case of a tribal grantee that is a consortium:

(1) A brief description of the direct child care services funded by CCDF for each of their participating Tribes shall be provided by the consortium in their three-year CCDF Plan; and

(2) Variations in CCDF programs or requirements and in child care licensing, regulatory and health and safety requirements shall be specified in written agreements between the consortium and the Tribe.

(3) If a Tribe elects to participate in a consortium arrangement to receive one part of the CCDF (*e.g.*, Discretionary Funds), it may not join another consortium or apply as a direct grantee to receive the other part of the CCDF (*e.g.*, Tribal Mandatory Funds).

(4) If a Tribe relinquishes its membership in a consortium at any time during the fiscal year, CCDF funds awarded on behalf of the member Tribe will remain with the tribal consortium to provide direct child care services to other consortium members for that fiscal year.

(d)(1) Tribal Lead Agencies shall not be subject to:

(i) The requirement to produce a consumer education Web site at § 98.33(a). Tribal Lead Agencies still must collect and disseminate the provider-specific consumer education information described at § 98.33(a) through (d), but may do so using methods other than a Web site;

(ii) The requirement to have licensing applicable to child care services at § 98.40;

(iii) The requirement for a training and professional development framework at § 98.44(a);

(iv) The market rate survey or alternative methodology described at § 98.45(b)(2) and the related requirements at § 98.45(c), (d), (e), and (f);

(v) The requirement that Lead Agencies shall give priority for services to children of families with very low family income at § 98.46(a)(1);

(vi) The requirement that Lead Agencies shall prioritize increasing access to high-quality child care in areas with significant concentrations of poverty and unemployment at § 98.46(b);

(vii) The requirements about Mandatory and Matching Funds at § 98.50(e);

(vii) The requirement to complete the quality progress report at § 98.53(f);

(xi) The requirement that Lead Agencies shall expend no more than five percent from each year's allotment on administrative costs at § 98.54(a); and

(x) The Matching Fund requirements at §§ 98.55 and 98.63.

(2) Tribal Lead Agencies with large, medium, and small allocations shall be subject to the provision at § 98.42(b)(2) to require inspections of child care providers and facilities, unless a Tribal Lead Agency describes an alternative monitoring approach in its Plan and provides adequate justification for the approach.

(3) Tribal Lead Agencies with large, medium, and small allocations shall be subject to the requirement at § 98.43 to conduct comprehensive criminal background checks, unless the Tribal Lead Agency describes an alternative background check approach in its Plan and provides adequate justification for the approach.

(e) Tribal Lead Agencies with medium and small allocations shall not be subject to the requirement for certificates at § 98.30(a) and (d).

(f) Tribal Lead Agencies with small allocations must spend their CCDF funds in alignment with the goals and purposes described in § 98.1. These Tribes shall have flexibility in how they spend their CCDF funds and shall be subject to the following requirements:

(1) The health and safety requirements described in § 98.41;

(2) The monitoring requirements at §§ 98.42 and 98.83(d)(2); and

(3) The background checks requirements described in §§ 98.43 and 98.83(d)(3);

(4) The requirements to spend funds on activities to improve the quality of child care described in §§ 98.83(g) and 98.53;

(5) The use of funds requirements at § 98.56 and cost allocation requirement at § 98.57;

(6) The financial management requirements at subpart G of this part that are applicable to Tribes;

(7) The reporting requirements at subpart H of this part that are applicable to Tribes;

(8) The eligibility definitions at § 98.81(b)(2);

(9) The 15 percent limitation on administrative activities at § 98.83(i);

(10) The monitoring, non-compliance, and complaint provisions at subpart J of this part; and

(11) Any other requirement established by the Secretary.

(g) Of the aggregated amount of funds expanded (*i.e.,* Discretionary and Mandatory Funds),

(1) For Tribal Lead Agencies with large, medium and small allocations, no less than four percent in fiscal years 2017, seven percent in fiscal years 2018 and 2019, eight percent in fiscal years 2020 and 2021, and nine percent in fiscal years 2022 and each succeeding fiscal year shall be used for activities designed to improve the quality of child care services and increase parental options for, and access to high-quality child care as described at § 98.53; and

(2) For Tribal Lead Agencies with large and medium allocations no less than three percent in fiscal year 2019 and each succeeding fiscal year shall be used to carry out activities at § 98.53(a)(4) as such activities relate to the quality of care for infants and toddler.

(3) Nothing in this section shall preclude the Tribal Lead Agencies from reserving a larger percentage of funds to carry out activities described in paragraph (g)(1) and (2) of this section.

(h) The base amount of any tribal grant is not subject to the administrative cost limitation at paragraph (i) of this section, the direct services requirement at § 98.50(f)(2), or the quality expenditure requirement at § 98.53(a). The base amount may be expended for any costs consistent with the purposes and requirements of the CCDF.

(i) Not more than 15 percent of the aggregate CCDF funds expended by the Tribal Lead Agency from each fiscal year's (including amounts used for construction and renovation in accordance with § 98.84, but not including the base amount provided under paragraph (h) of this section) shall be expended for administrative activities. Amounts used for construction and major renovation in accordance with § 98.84 are not considered administrative costs.

(j)(1) CCDF funds are available for costs incurred by the Tribal Lead Agency only after the funds are made available by Congress for Federal obligation unless costs are incurred for planning activities related to the submission of an initial CCDF Plan.

(2) Federal obligation of funds for planning costs, pursuant to paragraph(i)(1) of this section is subject to the actual availability of the appropriation.

■ 47. In § 98.84, add a sentence at the end of paragraph (b)(3), add paragraphs (b)(3)(i) and (ii), and revise paragraphs (d)(1) through (6) to read as follows:

§ 98.84 Construction and renovation of child care facilities.

* * * * *

(b) * * *

(3) * * * The Secretary shall waive this requirement if:

(i) The Secretary determines that the decrease in the level of child care services provided by the Indian tribe or tribal organization is temporary; and

(ii) The Indian tribe or tribal organization submits to the Secretary a plan that demonstrates that after the date on which the construction or renovation is completed:

(A) The level of direct child care services will increase; or

(B) The quality of child care services will improve.

* * * * *

(d) * * *

(1) Federal share requirements and use of property requirements at 45 CFR 75.318;

(2) Transfer and disposition of property requirements at 45 CFR 75.318(c);

(3) Title requirements at 45 CFR 75.318(a);

(4) Cost principles and allowable cost requirements at subpart E of this part;

(5) Program income requirements at 45 CFR 75.307;

(6) Procurement procedures at 45 CFR 92.36; 75.326 through 75.335; and

* * * * *

■ 48. In § 98.92, revise paragraph (a)(1) and add paragraphs (b)(3) and (4) to read as follows:

§ 98.92 Penalties and sanctions.

* * * * *

(a) * * *

(1) The Secretary will disallow any improperly expended funds;

(b) * * *

(3)(i) A penalty of five percent of the funds allotted under § 98.61 (*i.e.,* the Discretionary Funds) for a Fiscal Year shall be withheld for any For Fiscal Year the Secretary determines that the Lead Agency has failed to give priority for service in accordance with § 98.46(a);

(ii) This penalty will be withheld no earlier than the first full Fiscal Year following the determination to apply the penalty;

(iii) This penalty will not be applied if the Lead Agency corrects its failure to comply and amends its CCDF Plan within six months of being notified of the failure; and

(iv) The Secretary may waive a penalty for one year in the event of extraordinary circumstances, such as a natural disaster.

(4)(i) A penalty of five percent of the funds allotted under § 98.61 (*i.e.,* the Discretionary Funds) for a Fiscal Year shall be withheld for any Fiscal Year that the Secretary determines that the State, Territory, or Tribe has failed to comply substantially with the criminal background check requirements at § 98.43;

(ii) This penalty will be withheld no earlier than the first full Fiscal Year following the determination to apply the penalty; and

(iii) This penalty will not be applied if the State, Territory, or Tribe corrects the failure before the penalty is to be applied or if it submits a plan for corrective action that is acceptable to the Secretary.

* * * * *

§ 98.93 [Amended]

■ 49. In § 98.93(b), remove ", 370 L'Enfant Promenade SW., Washington, DC 20447".

■ 50. In § 98.100, add a sentence at the end of paragraph (d)(2) and revise paragraph (e) to read as follows:

§ 98.100 Error Rate Report.

* * * * *

(d) * * *

(2) * * * Because a child meeting eligibility requirements at the most recent eligibility determination or redetermination is considered eligible between redeterminations as described in § 98.21(a)(1), any payment for such a child shall not be considered an error or improper payment due to a change in the family's circumstances, as set forth at § 98.21(a) and (b).

(e) *Costs of Preparing the Error Rate Report*—Provided the error rate calculations and reports focus on client eligibility, expenses incurred by the States, the District of Columbia and Puerto Rico in complying with this rule, including preparation of required reports, shall be considered a cost of direct service related to eligibility determination and therefore is not subject to the five percent limitation on CCDF administrative costs pursuant to § 98.54(a).

■ 51. In § 98.102, revise paragraph (a)(5) and to add paragraph (c) to read as follows:

§ 98.102 Content of Error Rate Reports.

(a) * * *

(5) Estimated annual amount of improper payments (which is a projection of the results from the sample to the universe of cases statewide during the 12-month review period) calculated by multiplying the percentage of improper payments by the total dollar amount of child care payments that the State, the District of Columbia or Puerto Rico paid during the 12-month review period;

* * * * *

(c) Any Lead Agency with an improper payment rate that exceeds a threshold established by the Secretary must submit to the Assistant Secretary for approval a comprehensive corrective action plan, as well as subsequent reports describing progress in implementing the plan.

(1) The corrective action plan must be submitted within 60 days of the deadline for submitting the Lead Agency's standard error rate report required by paragraph (b) of this section.

(2) The corrective action plan must include the following:

(i) Identification of a senior accountable official;

(ii) Milestones that clearly identify actions to be taken to reduce improper payments and the individual responsible for completing each action;

(iii) A timeline for completing each action within 1 year of the Assistant Secretary's approval of the plan, and for reducing the improper payment rate below the threshold established by the Secretary; and

(iv) Targets for future improper payment rates.

(3) Subsequent progress reports must be submitted as requested by the Assistant Secretary.

(4) Failure to carry out actions described in the approved corrective action plan will be grounds for a penalty or sanction under § 98.92.

[FR Doc. 2016–22986 Filed 9–23–16; 8:45 am]

BILLING CODE P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
1985

FEDERAL REGISTER

Vol. 81 Friday,
No. 190 September 30, 2016

Book 2 of 2 Books

Pages 67597–67900

Part III

Department of Labor

29 CFR Part 13
Establishing Paid Sick Leave for Federal Contractors; Final Rule

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 13

RIN 1235–AA13

Establishing Paid Sick Leave for Federal Contractors

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule.

SUMMARY: This Final Rule issues regulations to implement Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors, signed by President Barack Obama on September 7, 2015. Executive Order 13706 requires certain parties that contract with the Federal Government to provide their employees with up to 7 days (56 hours) of paid sick leave annually, including paid leave allowing for family care; it explains that providing access to paid sick leave will improve the health and performance of employees of Federal contractors and bring their benefits packages in line with model employers, ensuring that Federal contractors remain competitive employers and generating savings and quality improvements that will lead to improved economy and efficiency in Government procurement. The Order directs the Secretary of Labor to issue regulations to implement its requirements by September 30, 2016. This Final Rule defines terms used in the regulatory text, describes the categories of contracts and employees the Order covers and excludes from coverage, sets forth requirements and restrictions governing the accrual and use of paid sick leave, and prohibits interference with or discrimination for the exercise of rights under the Executive Order. It also describes the obligations of contracting agencies, the Department of Labor, and contractors under the Executive Order, and it establishes the standards and procedures for complaints, investigations, remedies, and administrative enforcement proceedings related to alleged violations of the Order. As required by the Order and to the extent practicable, the Final Rule incorporates existing definitions, procedures, remedies, and enforcement processes under the Fair Labor Standards Act, the Service Contract Act, the Davis-Bacon Act, the Family and Medical Leave Act, the Violence Against Women Act, and Executive Order 13658, Establishing a Minimum Wage for Contractors.

DATES: *Effective date:* This Final Rule is effective on November 29, 2016.

Applicability date: For procurement contracts subject to the Federal Acquisition Regulation and Executive Order 13706, this Final Rule is applicable only after the effective date of regulations to be issued by the Federal Acquisition Regulatory Council. The Department of Labor will publish a document in the **Federal Register** to announce the applicability date for such contracts.

FOR FURTHER INFORMATION CONTACT: Robert Waterman, Compliance Specialist, Wage and Hour Division, U.S. Department of Labor, Room S–3510, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Copies of this Final Rule may be obtained in alternative formats (large print, Braille, audio tape or disc), upon request, by calling (202) 693–0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest Wage and Hour Division (WHD) district office. Locate the nearest office by calling the WHD's toll free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto the WHD's Web site for a nationwide listing of WHD district and area offices at *http://www.dol.gov/whd/america2.htm.*

SUPPLEMENTARY INFORMATION:

I. Executive Order 13706 Requirements and Background

On September 7, 2015, President Barack Obama signed Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors (the Executive Order or the Order). 80 FR 54697.

Section 1 of Executive Order 13706 explains that the Order seeks to increase efficiency and cost savings in the work performed by parties that contract with the Federal Government by ensuring that employees on those contracts can earn up to 7 days or more of paid sick leave annually, including paid leave allowing for family care. 80 FR 54697. The Order states that providing access to paid sick leave will improve the health and performance of employees of Federal contractors and bring benefits packages at Federal contractors in line with model employers, ensuring that they remain competitive employers in the search for dedicated and talented employees. *Id.* The Order further states that these savings and quality improvements will lead to improved economy and efficiency in Government procurement. *Id.* Section 2 of the Executive Order establishes paid sick leave for Federal contractors and subcontractors. 80 FR 54697. Section 2(a) provides that executive departments and agencies (agencies) shall, to the extent permitted by law, ensure that new contracts, contract-like instruments, and solicitations (collectively referred to as "contracts"), as described in section 6 of the Order, include a clause, which the contractor and any subcontractors shall incorporate into lower-tier subcontracts, specifying, as a condition of payment, that all employees, in the performance of the contract or any subcontract thereunder, shall earn not less than 1 hour of paid sick leave for every 30 hours worked. *Id.* Section 2(b) prohibits a contractor from limiting the total accrual of paid sick leave per calendar year, or at any point, at less than 56 hours. *Id.*

Section 2(c) explains that paid sick leave earned under the Order may be used by an employee for an absence resulting from: (i) Physical or mental illness, injury, or medical condition; (ii) obtaining diagnosis, care, or preventive care from a health care provider; (iii) caring for a child, a parent, a spouse, a domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship who has any of the conditions or needs for diagnosis, care, or preventive care described in (i) or (ii) or is otherwise in need of care; or (iv) domestic violence, sexual assault, or stalking, if the time absent from work is for the purposes described in (i) or (ii), to obtain additional counseling, to seek relocation, to seek assistance from a victim services organization, or take related legal action, including preparation for or participation in any related civil or criminal legal proceeding, or to assist an individual related to the employee as described in (iii) in engaging in any of these activities. 80 FR 54697.

Section 2(d) provides that paid sick leave shall carry over from one year to the next and shall be reinstated for employees rehired by a covered contractor within 12 months after a job separation. *Id.* Under section 2(e), the use of paid sick leave cannot be made contingent on the requesting employee finding a replacement to cover any work time to be missed. 80 FR 54698. Section 2(f) provides that the paid sick leave required by the Order is in addition to a contractor's obligations under the Service Contract Act and Davis-Bacon Act, and contractors may not receive credit toward their prevailing wage or fringe benefit obligations under those Acts for any paid sick leave provided in satisfaction of the Order's requirements. *Id.*

Section 2(g) provides that an employer's existing paid sick leave policy provided in addition to the fulfillment of Service Contract Act or Davis-Bacon Act obligations, if applicable, and made available to all covered employees will satisfy the requirements of the Executive Order if the amount of paid leave is sufficient to meet the requirements of section 2 and if it may be used for the same purposes and under the same conditions described in the Executive Order. *Id.*

Section 2(h) of the Order establishes that paid sick leave shall be provided upon the oral or written request of an employee that includes the expected duration of the leave, and is made at least 7 calendar days in advance where the need for the leave is foreseeable, and in other cases as soon as is practicable. *Id.*

Section 2(i) addresses when a contractor may require employees to provide certification or documentation regarding the use of leave. 80 FR 54698. It provides that a contractor may only require certification issued by a health care provider for paid sick leave used for the purposes listed in sections 2(c)(i), (c)(ii), or (c)(iii) for employee absences of 3 or more consecutive workdays, to be provided no later than 30 days from the first day of the leave. *Id.* It further provides that if 3 or more consecutive days of paid sick leave is used for the purposes listed in section 2(c)(iv), documentation may be required to be provided from an appropriate individual or organization with the minimum necessary information establishing a need for the employee to be absent from work. *Id.* The Executive Order notes that the contractor shall not disclose any verification information and shall maintain confidentiality about domestic abuse, sexual assault, or stalking, unless the employee consents or when disclosure is required by law. *Id.*

Section 2(j) states that nothing in the Order shall require a covered contractor to make a financial payment to an employee upon a separation from employment for unused accrued sick leave. 80 FR 54698. Section 2(j) further notes, however, that unused leave is subject to reinstatement as prescribed in section 2(d). *Id.*

Section 2(k) prohibits a covered contractor from interfering with or in any other manner discriminating against an employee for taking, or attempting to take, paid sick leave as provided for under the Order, or in any manner asserting, or assisting any other employee in asserting, any right or claim related to the Order. *Id.*

Section 2(l) states that nothing in the Order shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights than those established under the Order. *Id.*

Section 3(a) of the Executive Order provides that the Secretary of Labor (Secretary) shall issue such regulations by September 30, 2016, as are deemed necessary and appropriate to carry out the Order, to the extent permitted by law and consistent with the requirements of 40 U.S.C. 121, including providing exclusions from the requirements set forth in the Order where appropriate; defining terms used in the Order; and requiring contractors to make, keep, and preserve such employee records as the Secretary deems necessary and appropriate for the enforcement of the provisions of the Order or the regulations thereunder. 80 FR 54698. It also requires that, to the extent permitted by law, within 60 days of the Secretary issuing such regulations, the Federal Acquisition Regulatory Council (FARC) shall issue regulations in the Federal Acquisition Regulation (FAR) to provide for inclusion in Federal procurement solicitations and contracts subject to the Executive Order the contract clause described in section 2(a) of the Order. *Id.*

Additionally, section 3(b) states that within 60 days of the Secretary issuing regulations pursuant to the Order, agencies shall take steps, to the extent permitted by law, to exercise any applicable authority to ensure that contracts or contract-like instruments for concessions and contracts entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public, entered into after January 1, 2017, consistent with the effective date of such agency action, comply with the requirements set forth in section 2 of the Order. 80 FR 54699.

Section 3(c) specifies that any regulations issued pursuant to section 3 of the Order should, to the extent practicable and consistent with section 7 of the Order, incorporate existing definitions, procedures, remedies, and enforcement processes under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* (FLSA); the McNamara-O'Hara Service Contract Act, 41 U.S.C. 6701 *et seq.* (SCA); the Davis-Bacon Act, 40 U.S.C. 3141 *et seq.* (DBA); the Family and Medical Leave Act, 29 U.S.C. 2601 *et seq.* (FMLA); the Violence Against Women Act of 1994, 42 U.S.C. 13925 *et seq.* (VAWA); and Executive Order 13658, Establishing a Minimum Wage for Contractors, 79 FR 9851 (Feb. 20, 2014) (Executive Order 13658 or Minimum Wage Executive Order). *Id.*

Section 4(a) of the Executive Order grants authority to the Secretary to investigate potential violations of and obtain compliance with the Order, including the prohibitions on interference and discrimination in section 2(k) of the Order. 80 FR 54699. Section 4(b) further explains that the Executive Order creates no rights under the Contract Disputes Act, and disputes regarding whether a contractor has provided employees with paid sick leave prescribed by the Order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued pursuant to the Order. *Id.*

Section 5 of the Executive Order establishes that if any provision of the Order, or applying such provision to any person or circumstance, is held to be invalid, the remainder of the Order and the application of the provisions of such to any person or circumstances shall not be affected thereby. *Id.*

Section 6(a) of the Executive Order provides that nothing in the Order shall be construed to impair or otherwise affect (i) the authority granted by law to an executive department, agency, or the head thereof; or (ii) the functions of the Director of the Office of Management and Budget (OMB) relating to budgetary, administrative, or legislative proposals. 80 FR 54699. Section 6(b) states that the Order is to be implemented consistent with applicable law and subject to the availability of appropriations. *Id.* Section 6(c) explains that the Order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. *Id.*

Section 6(d) of the Executive Order establishes that the Order shall apply only to a new contract or contract-like instrument, as defined by the Secretary in the regulations issued pursuant to section 3(a) of the Order, if: (i) (A) It is a procurement contract for services or construction; (B) it is a contract or contract-like instrument for services covered by the Service Contract Act; (C) it is a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor (the Department) regulations at 29 CFR 4.133(b); or (D) it is a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and (ii) the wages of employees under such contract or contract-like instrument are governed by the DBA, SCA, or FLSA, including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions. 80 FR 54699.

Section 6(e) states that, for contracts or contract-like instruments covered by the SCA or DBA, the Order shall apply only to contracts or contract-like instruments at the thresholds specified in those statutes. 80 FR 54699–700. Additionally, Section 6(e) provides that for procurement contracts in which employees' wages are governed by the FLSA, the Order shall apply only to contracts or contract-like instruments that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a), unless expressly made subject to the Order pursuant to regulations or actions taken under section 3 of the Order. 80 FR 54700.

Section 6(f) specifies that the Order shall not apply to grants; contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act (Pub. L. 93–638), as amended; or any contracts or contract-like instruments expressly excluded by the regulations issued pursuant to section 3(a) of the Order. *Id.* Section 6(g) strongly encourages independent agencies to comply with the Order's requirements. *Id.*

Section 7(a) of the Executive Order provides that the Order is effective immediately and shall apply to covered contracts where the solicitation for such contract has been issued, or the contract has been awarded outside the solicitation process, on or after: (i) January 1, 2017, consistent with the effective date for the action taken by the FARC pursuant to section 3(a) of the Order; or (ii) January 1, 2017, for contracts where an agency action is taken pursuant to section 3(b) of the Order, consistent with the effective date for such action. 80 FR 54700. Section 7(b) specifies that the Order shall not apply to contracts or contract-like instruments that are awarded, or entered into pursuant to solicitations issued, on or before the effective date for the relevant action taken pursuant to section 3 of the Order. *Id.*

II. Discussion of Final Rule

A. Legal Authority

The President issued Executive Order 13706 pursuant to his authority under "the Constitution and the laws of the United States of America," expressly including 40 U.S.C. 121, a provision of the Federal Property and Administrative Services Act (Procurement Act). 80 FR 54697. The Procurement Act authorizes the President to "prescribe policies and directives that [the President] considers necessary to carry out" the statutory purposes of ensuring "economical and efficient" government procurement and administration of government property. 40 U.S.C. 101, 121(a). Executive Order 13706 delegates to the Secretary the authority to issue regulations "deemed necessary and appropriate to carry out this order." 80 FR 54698. The Secretary has delegated his authority to promulgate these regulations to the Administrator of the WHD. Secretary's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (published Dec. 24, 2014).

B. Comments Received

On February 25, 2016, the Department published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register**, inviting public comments on a proposal to implement the provisions of Executive Order 13706, which were to be submitted by March 28, 2016. *See* 81 FR 9592. On March 14, 2016, the Department extended the period for submitting written comments until April 12, 2016. *See* 81 FR 13306.

More than 35,000 individuals and entities commented on the Department's NPRM. Comments were received from a variety of interested stakeholders, such as labor organizations; contractors and contractor associations; worker advocates; advocacy groups focused on issues affecting women, children, seniors, and the LGBT community; Members of Congress; local government agencies; small businesses; and workers. The vast majority of comments received came from individuals who submitted materially identical comments through interested organizations. For example, 9,025 individuals submitted essentially identical comments in support of, or joined, a comment submitted by the National Partnership for Women & Families (National Partnership) in favor of the rule, and Organizing for Action submitted a comment in support of the rule signed by 20,853 individuals.

The Department received many comments, such as those submitted by the Center for American Progress (CAP), Jobs With Justice, the Service Employees International Union (SEIU), the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), the National Women's Law Center (NWLC), A Better Balance, North America's Building Trades Unions (Building Trades), the National Employment Law Project (NELP), Pride at Work, The Leadership Conference on Civil and Human Rights, Lambda Legal, Demos, the Center for Law and Social Policy (CLASP), and 73 U.S. Senators and Representatives expressing support for establishing paid sick leave for employees of Federal contractors. For instance, the AFL–CIO agreed with the Order's policy rationale that providing access to paid sick leave improves the health and performance of Federal contractor employees, and the Leadership Conference on Civil and Human Rights wrote that providing paid sick leave means fewer employees will be forced to make difficult choices between their jobs and their health or the health of their families.

The Department also received submissions from a number of commenters, including the U.S. Chamber of Commerce and the International Franchise Association (Chamber/IFA), Associated General Contractors of America (AGC), the Professional Services Council (PSC), the Equal Employment Advisory Council (EEAC), and Associated Builders and Contractors, Inc. (ABC), expressing opposition to the Order, many describing its requirements as burdensome for contractors. Some of these commenters also questioned the President's authority to issue the Order, which is a subject outside the purview of this rulemaking.

Many commenters expressed reactions to, offered suggestions regarding, or posed questions about specific provisions in the proposed regulations. The Department will address such comments in the section-by-section analysis of the Final Rule below.

C. Effective Date

The Department received comments requesting that the effective date of this Final Rule be delayed. AGC requested that the Final Rule apply only to contracts resulting from solicitations issued no earlier than one year after the date of the rule's publication in the **Federal Register**; the American Benefits Council asked for a "grace period" of 1 year before contractors were responsible for compliance with the Order; and TrueBlue, Inc. asked that the rule's effective date be 1 year after its publication. The General Contractors Association of Hawaii, Master Sheet Metal, Inc., and Alan Shintani, Inc. also requested a delay in the effective date beyond January 1, 2017. Because the Order itself specifically designates a date as of which its requirements apply to covered contracts, the Department does not believe it is appropriate to generally delay its effective date. (A specific, temporary exception from the Order's requirements for employees performing work subject to the terms of a collective bargaining agreement is discussed in the section of this preamble addressing § 13.4.) As such, this Final Rule is effective as indicated in the Dates section above, and shall apply to covered contracts where the solicitation for such contract has been issued, or the contract has been awarded outside the solicitation process, on or after January 1, 2017.

D. Discussion of the Final Rule

After considering all timely and relevant comments received in response to the February 25, 2016 NPRM, the Department is issuing this Final Rule to implement the provisions of Executive Order 13706. The Final Rule, which amends Title 29 of the Code of Federal Regulations (CFR) by adding part 13, establishes standards and procedures for implementing and enforcing Executive Order 13706. Subpart A of part 13 addresses general matters, including the purpose and scope of the rule, sets forth definitions of terms used in part 13, and describes the types of contracts and employees covered by the Order and part 13 and excluded from such coverage. It describes the paid sick leave requirements for contractors established by the Executive Order, including rules and restrictions regarding the accrual and use of such leave. It also prohibits interference with the accrual or use of paid sick leave provided pursuant to the Executive Order or part 13 and discrimination for the exercise of rights under the Executive Order or part 13, and it addresses failure to comply with the recordkeeping requirements of part 13. Finally, subpart A includes a prohibition against waiver of rights and a new provision regarding multiemployer plans and other plans, funds, or programs to provide paid sick leave.

Subpart B establishes the obligations of the Federal Government (specifically, contracting agencies and the Department) under the Order, and subpart C establishes the obligations of contractors under the Order, including recordkeeping requirements. Subparts D and E specify standards and procedures related to alleged violations of the Order and part 13, including complaint intake, investigations, remedies, and administrative enforcement proceedings. Appendix A contains a contract clause to implement Executive Order 13706.

The following section-by-section discussion of this Final Rule presents the contents of each section in more detail, summarizes and responds to comments received about specific provisions, and describes the Final Rule as adopted, including by noting and explaining modifications from the proposed rule.

Subpart A—General

Subpart A of part 13 summarizes the purpose of the rule, defines terms used in the rule, describes the types of contracts and employees covered by and excluded from the rule, and sets forth rules and restrictions regarding the accrual and use of paid sick leave. Subpart A also prohibits interference with the accrual or use of the paid sick leave required by, and discrimination for the exercise of rights under, the Executive Order or part 13, as well as violations of the recordkeeping requirements of part 13. Additionally, subpart A includes a prohibition against waiver of rights and a new provision regarding multiemployer plans and other plans, funds, or programs to provide paid sick leave.

Section 13.1 Purpose and Scope

Proposed § 13.1(a) explained that the purpose of the rule is to implement Executive Order 13706 and reiterated statements from the Order that the Federal Government's procurement interests in economy and efficiency are promoted when the Federal Government contracts with sources that provide paid sick leave to their employees. It explained that the Order states that providing access to paid sick leave will improve the productivity of employees by improving their health and performance and will bring benefits packages offered by Federal contractors in line with model employers, ensuring they remain competitive in the search for dedicated and talented employees. Proposed § 13.1(a) stated that it is for these reasons that the Executive Order concludes that the provision of paid sick leave under the Order will generate savings and quality improvements in the work performed by parties who contract with the Federal Government, thereby leading to improved economy and efficiency in Government procurement. The Department believes that, by increasing the quality and efficiency of services provided to the Federal Government, the Executive Order will improve the value that taxpayers receive from the Federal Government's investment. The Department did not receive comments regarding § 13.1(a) in particular, and, as noted above, comments questioning the President's authority to issue Executive Order 13706 are outside of the scope of this rulemaking. This provision is therefore adopted as proposed.

Proposed § 13.1(b) set forth the general position of the Federal Government that providing access to paid sick leave on Federal contracts will increase efficiency and cost savings for the Federal Government, and it explained the general requirement established in Executive Order 13706 that new contracts with the Federal Government include a clause, which the contractor and any subcontractors shall incorporate into lower-tier subcontracts, requiring, as a condition of payment, that the contractor and any subcontractors provide paid sick leave to employees in the amount of not less than 1 hour of paid sick leave for every 30 hours worked on or in connection with covered contracts. The final sentence of proposed § 13.1(b) also specified that nothing in Executive Order 13706 or part 13 would excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement (CBA) requiring greater paid sick leave or leave rights than those established under the Order or part 13. The Department did not receive comments regarding § 13.1(b) and adopts the provision largely as proposed, except for one change that has no substantive effect: Deletion of the final sentence, because identical language appears in § 13.5(f)(1).

Proposed § 13.1(c) outlined the scope of the proposed rule and provided that neither Executive Order 13706 nor part 13 created any rights under the Contract Disputes Act or created any private right of action. As noted in the NPRM, the Department does not interpret the Executive Order as limiting existing rights under the Contract Disputes Act. Proposed § 13.1(c) also implemented the directive in section 4(b) of the Order that disputes regarding whether a contractor has provided paid sick leave as prescribed by the Order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued under the Order. The proposed provision specified, however, that nothing in the Order or part 13 was intended to limit or preclude a civil action under the False Claims Act, 31 U.S.C. 3730, or criminal prosecution under 18 U.S.C. 1001. Finally, this proposed paragraph specified that neither the Order nor part 13 would preclude judicial review of final decisions by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* No commenters addressed this provision, and the Department adopts it as proposed.

Section 13.2 Definitions

Proposed § 13.2 defined terms for purposes of part 13. Section 3(c) of the Executive Order instructs that any regulations issued pursuant to the Order should "incorporate existing definitions" under the FLSA, SCA, DBA, FMLA, VAWA, and Executive Order 13658 "to the extent practicable and consistent with section 7 of this order." 80 FR 54699. Because of the similarities in language, structure, and intent of the Minimum Wage Executive Order and Executive Order 13706, many of the definitions provided in the proposed rule were identical to or based on definitions promulgated in the Minimum Wage Executive Order Final Rule, which in turn were largely based on the definitions of relevant terms set forth in the statutory text or implementing regulations of the FLSA, SCA, or DBA. In addition, some definitions were based on definitions published by the FARC in section 2.101 of the FAR, 48 CFR 2.101, and others were based on definitions set forth in the Department's regulations implementing Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts (Executive Order 13495 or Nondisplacement Executive Order), at 29 CFR 9.2. 79 FR 60637. Definitions in the proposed rule that were relevant because of provisions of Executive Order 13706 that do not appear in Executive Order 13658 were largely based on definitions set forth in the statutory text or implementing regulations of the FMLA or the VAWA, as well as regulations issued by the U.S. Office of Personnel Management (OPM) at 5 CFR part 630, subparts B and D, which govern the accrual and use of sick leave by employees of the Federal Government.

As explained in the NPRM, the definitions discussed below will govern the implementation and enforcement of Executive Order 13706. Nothing in this Final Rule is intended to alter the meaning of or to be interpreted inconsistently with the definitions set forth in section 2.101 of the FAR for purposes of that regulation.

The Department proposed to define *accrual year* to mean the 12-month period during which a contractor may limit an employee's accrual of paid sick leave to no less than 56 hours. No commenters suggested revising this definition, and it is adopted as proposed.

The Department proposed to define the term *Administrative Review Board* as the Administrative Review Board within the U.S. Department of Labor. The Department received no comments addressing this definition, and it is adopted as proposed.

The Department proposed to define the term *Administrator* to mean the Administrator of the Wage and Hour Division and to include any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under part 13. The Department received no comments regarding this definition and adopts it as proposed.

The Department proposed to define *as soon as is practicable* to mean as soon as both possible and practical, taking into account all of the facts and circumstances of the individual case. This definition was derived from the definition of "as soon as practicable" in the FMLA regulations. 29 CFR 825.302(b). Although the Department received comments regarding the application of this term, as described in the discussion of § 13.5(d) below, the Department did not receive comments requesting changes to this definition and therefore implements it without modification.

The Department proposed to define *certification issued by a health care provider* as any type of written document created or signed by a health care provider (or by a representative of the health care provider) that contains information verifying the existence of the physical or mental illness, injury, medical condition, or need for diagnosis, care, or preventive care or other need for care referred to in proposed § 13.5(c)(1)(i), (ii), or (iii). The proposed definition allowed employees to provide as certification a greater range of documents than would suffice to demonstrate the existence of a serious health condition for purposes of the FMLA. *See* 29 CFR 825.305, 825.306. For example, under the proposal, a note from a hospital nurse stating that an employee needed surgery and would require at least 3 days to recover before returning to work would meet the definition, as would a note from an employee's parent's doctor stating that the parent needs daily assistance with tasks such as dressing and eating. EEAC commented that employees should be required to provide as much information to certify the use of paid sick leave as is necessary to certify the use of FMLA leave; on the other hand, the Center for WorkLife Law at the University of California, Hastings College of Law (Center for WorkLife Law) commented that the Department should require no specificity in the certification beyond the fact that a medical or health condition exists, because such a statement is sufficient to prevent employee abuse of leave and would avoid inviting the contractor to inappropriately evaluate whether a particular condition justifies the use of paid sick leave. The Department declines to adopt either suggestion. With respect to EEAC's comment, the Department notes that the reasons for which an employee may use FMLA leave are significantly more limited than the permissible uses of paid sick leave under the Order and part 13, and it is therefore logical that the information required to justify the use of FMLA leave correspondingly reflects a higher threshold than is called for in using paid sick leave. But neither does the Department agree that a simple statement that an employee (or an employee's family member) has a medical or health issue would constitute the type of certification contemplated in the Executive Order. As the examples above indicate, the Department believes that great specificity regarding the medical or health issue is not required; a health care provider's note referring to surgery need not explain what condition the surgery treated or the specifics of the procedure, and a note from a doctor regarding a physical or mental condition (such as a broken leg or dementia) that causes a need for caretaking need not provide specific details about the parent's condition or the specific tasks with which assistance is required.

In the discussion of this definition in the NPRM, the Department noted that a contractor could not require that an employee or the individual for whom the employee is caring have seen the health care provider in person in order to accept the certification. The Department did not receive comments regarding this interpretation. For purposes of clarity, it has included language in the final regulatory text making the point that the health care provider (or representative) need not have seen the employee or individual in person in order to create a valid certification.

In the NPRM, the Department proposed to define *child* to mean (1) a biological, adopted, step, or foster son or daughter of the employee; (2) a person who is a legal ward or was a legal ward of the employee when that individual was a minor or required a legal guardian; (3) a person for whom the employee stands *in loco parentis* or stood *in loco parentis* when that individual was a minor or required someone to stand *in loco parentis;* or (4) a child, as described in paragraphs (1) through (3) of the definition, of an employee's spouse or domestic partner. The NPRM explained that this definition was adopted from the definition of "son or daughter" in the OPM regulations governing leave for Federal employees. 5 CFR 630.201(b). The Department noted that the proposed definition was deliberately broader than the definition of "son or daughter" in the FMLA, which includes only minor children or adult children "incapable of self-care because of a mental or physical disability." 29 CFR 825.102. As the Department explained in the NPRM, the terms of the Executive Order make clear that employees are to be permitted to use paid sick leave for a broader range of purposes than those for which they can use FMLA leave, and one such more expansive use is to care for an employee's child of any age.

EEAC commented that the Department should use as its definition of "child" the definition of "son or daughter" from the FMLA, asserting that an employee should not be able to use paid sick leave to care for adult children who are not incapable of self-care or the child of a spouse or domestic partner who is not also the employee's child. A comment from scholars affiliated with the Williams Institute at the UCLA School of Law, however, specifically supported the definition's inclusion of a child who is the employee's spouse or domestic partner's son or daughter but not legally recognized as the employee's child. Because the Department interprets the list of family members for whom an employee may use paid sick leave to care in section 2(c)(iii) of the Order as being deliberately broad and inclusive, *see* 80 FR 54697 (permitting the use of paid sick leave to care for "a child, a parent, a spouse, a domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship")—and in particular because the list so plainly deviates from the more limited list in the FMLA, *see* 29 U.S.C. 2612(a)(1)(C) (permitting the use of FMLA leave "to care for the spouse, or a son, daughter, or parent, of the employee")—the Department adopts the inclusive definition of *child* as proposed.

The Department proposed a definition of *concessions contract* or *contract for concessions* identical to the definition of those terms in the Minimum Wage Executive Order Final Rule. *See* 79 FR 60722 (codified at 29 CFR 10.2). Specifically, the Department proposed to define the term as a contract under which the Federal Government grants a right to use Federal property, including land or facilities, for furnishing services, and included as examples of such contracts those the principal purpose of which is to furnish food, lodging, automobile fuel, souvenirs, newspaper stands, and/or recreational equipment. The Department noted that the proposed definition was not limited based on the beneficiary of the services but rather that it encompassed contracts regardless of whether they are of direct benefit to the Federal Government, its property, its civilian or military personnel, or the general public. *See* 29 CFR 4.133; *see also* 79 FR 60638. The NPRM noted that the proposed definition included, but was not limited to, all concessions contracts excluded by Departmental regulations under the SCA at 29 CFR 4.133(b). *See* 79 FR 60638. No commenters addressed the definition of *concessions contract* or *contract for concessions,* and the Department adopts the definition as proposed.

The Department proposed to define *contract* and *contract-like instrument* collectively for purposes of the Executive Order in the same manner as it did in the Minimum Wage Executive Order implementing regulations. *See* 79 FR 60722 (codified at 29 CFR 10.2). Specifically, the NPRM defined a *contract* or *contract-like instrument* as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. The proposed definition included, but was not limited to, a mutually binding legal relationship obligating one party to furnish services (including construction) and another party to pay for them. The proposed definition of the term *contract* broadly included all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing. The proposed definition of the term *contract* was interpreted broadly to include, but not be limited to, any contract that may be consistent with the definition provided in the FAR or applicable Federal statutes. The proposed definition further included, but was not limited to, any contract that may be covered under any Federal procurement statute. The Department specifically noted in the proposed definition that contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. The proposed definition also explained that, in addition to bilateral instruments, contracts included, but were not limited to, awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. The proposed definition also specified that the term *contract* included contracts covered by the SCA, contracts covered by the DBA, concessions contracts not subject to the SCA, and contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public. As explained in the Minimum Wage Executive Order rulemaking, the proposed definition of *contract* was derived from the definition of the term *contract* set forth in Black's Law Dictionary (9th ed. 2009) and section 2.101 of the FAR (48 CFR 2.101), as well as the descriptions of the term *contract* that appear in the SCA's regulations at 29 CFR 4.110–4.111 and 4.130. *See* 79 FR 60638–41.

The Department's proposal deliberately adopted a broad definition of this term, but noted that the mere fact that a legal instrument constitutes a *contract* would not mean that such contract is subject to the Executive Order. In order for a contract to be covered by the Executive Order and part 13, the contract must (1) qualify as a *contract* or *contract-like instrument;* (2) fall within one of the specifically enumerated types of contracts set forth in section 6(d)(i) of the Order and § 13.3; and (3) be a *new contract.* Therefore, the NPRM explained that, for example, although a cooperative agreement was a contract under the Department's proposed definition, a cooperative agreement would not be covered by the Executive Order and part 13 unless it was a new contract and was subject to the SCA or DBA, was a concessions contract, or was entered into in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

The Department did not receive any comments requesting a change to this proposed definition, and it therefore adopts it as proposed. One commenter, Bodman PLC, asked for clarification of whether, based on the broad definition of *contract,* a financial institution that holds deposits insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration would be covered by the Order and part 13. A contract with the Federal

Government is not covered by the Order and this rulemaking unless it is one of the types of covered contracts named in the Order and further described in § 13.3 and the accompanying explanation in this preamble. Unless the types of agreements to which the commenter referred are procurement contracts for construction covered by the DBA, contracts for services covered by the SCA, contracts for concessions, or contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public, the Order does not cover them. Furthermore, as explained below, with respect to the fourth category of covered contracts, the Department does not interpret "Federal property" to encompass money, and therefore purely financial transactions with the Federal Government are not covered by the Order or part 13.

The Department proposed to define *contracting officer* based on the definition used in 29 CFR 10.2, issued pursuant to the Minimum Wage Executive Order, which in turn was adopted from the definition in section 2.101 of the FAR. *See* 79 FR 60641 (citing 48 CFR 2.101). As proposed, the term meant a representative of an executive department or agency with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term also included certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer. The Department received no comments regarding this definition and adopts it as proposed.

The Department proposed to define *contractor* to mean any individual or other legal entity that is awarded a Federal Government contract or a subcontract under a Federal Government contract. The proposed definition referred to both a prime contractor and all of its first- or lower-tier subcontractors on a contract with the Federal Government. It also included lessors and lessees. The Department noted that the term *employer* was used interchangeably with the terms *contractor* and *subcontractor* in part 13. The proposed definition also explained that the U.S. Government, its agencies, and its instrumentalities are not considered contractors, subcontractors, employers, or joint employers for purposes of compliance with the provisions of Executive Order 13706. The proposed definition, which was derived from the definition adopted in the Minimum Wage Executive Order rulemaking, *see* 79 FR 60722 (codified at 29 CFR 10.2), incorporated relevant aspects of the definitions of the term *contractor* in section 9.403 of the FAR, *see* 48 CFR 9.403; the SCA regulations at 29 CFR 4.1a(f); and the Department's regulations implementing the Nondisplacement Executive Order at 29 CFR 9.2. The proposed definition differed from the Minimum Wage Executive Order only in that it did not refer to employers of employees performing work on covered Federal contracts whose wages are computed pursuant to special certificates issued under 29 U.S.C. 214(c). The Department noted in the NPRM that although such employers would be contractors for purposes of Executive Order 13706, such a reference was not called for in the proposed definition because, unlike the Minimum Wage Executive Order, this Order does not contain any explicit reference to employees whose wages are computed pursuant to section 14(c) certificates. No commenters addressed this definition, and it is adopted as proposed.

The Department proposed to define the term *Davis-Bacon Act* to mean the Davis-Bacon Act of 1931, as amended, 40 U.S.C. 3141 *et seq.*, and its implementing regulations. This definition is adopted as proposed.

The Department proposed to define the term *domestic partner* to mean an adult in a committed relationship with another adult. The proposed definition included both same-sex and opposite-sex relationships. The Department proposed to further explain that a committed relationship was one in which the employee and the domestic partner of the employee are each other's sole domestic partner (and are not married to or domestic partners with anyone else) and share responsibility for a significant measure of each other's common welfare and financial obligations. The proposed definition included, but was not limited to, any relationship between two individuals of the same or opposite sex that is granted legal recognition by a State or by the District of Columbia as a marriage or analogous relationship (including, but not limited to, a civil union). The proposed definition was adopted from the definitions of "domestic partner" and "committed relationship" in the OPM regulations regarding the use of sick leave by Federal employees. 5 CFR 630.201(b).

The Department received a number of comments, including from Pride at Work, the Los Angeles LGBT Center, CAP, and Lambda Legal, largely supporting this proposed definition but also asking that it be clarified. Specifically, these organizations wrote that they have "a concern regarding the requirement that domestic partners share responsibility for a significant measure of each other's financial obligations" because for many couples, only one individual earns an income that supports both partners, and "the regulations should be clear that such couples are not excluded from the definition of domestic partners or committed relationship solely because only one partner earns income that they both depend upon." The Department did not intend its proposed definition to imply that only if both members of a couple earn an income would that couple be considered domestic partners. Rather, the language regarding sharing responsibility for financial obligations could refer to a variety of circumstances, such as but not limited to one member of the couple paying for the housing and other necessities of the other, the couple having joint bank accounts, the couple sharing significant expenses, and/or the couple being jointly responsible for financial obligations such as mortgage or other loan payments. In other words, rather than calling for any particular financial arrangement, the financial interdependence clause of the definition is meant to indicate that the couple's financial situation reflects that the relationship is a committed one, rather than, for example, a casual roommate situation. *See* Final Rule, Absence and Leave; Definitions of Family Member, Immediate Relative, and Related Terms, 75 FR 33491, 33493–94 (June 14, 2010) (OPM's discussion of the term "committed relationship," noting that its definition "would preclude casual roommates from qualifying as each other's domestic partner"). Because the Department's language is consistent with OPM's and does not have the meaning about which the commenters were concerned, the Department adopts the definition of *domestic partner* as proposed.

The Department proposed to define *domestic violence* as (1) felony or misdemeanor crimes of violence (including threats or attempts) committed: (i) by a current or former spouse, domestic partner, or intimate partner of the victim; (ii) by a person with whom the victim shares a child in common; (iii) by a person who is cohabitating with or has cohabitated with the victim as a spouse, domestic partner, or intimate partner; (iv) by a person similarly situated to a spouse of the victim under domestic or family violence laws of the jurisdiction in which the victim resides or the events occurred; or (v) by any other adult person against a victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the victim resides or the events occurred. Under the proposed definition, domestic violence also included (2) any crime of violence considered to be an act of domestic violence according to State law. This definition was derived from the VAWA, 42 U.S.C. 13925(a)(8), and its implementing regulations, 28 CFR 90.2(a). In its comment, the Women's Law Project expressed concern that this definition only refers to acts that are considered to be domestic violence for purposes of criminal laws rather than also including acts that constitute domestic violence for purposes of civil laws, in particular those allowing for civil protection orders. Because the Department did not intend for this definition to be narrow or exclude any subset of victims of acts that a State considers to constitute domestic violence, it is adopting the definition with the revisions suggested by the Women's Law Project. Specifically, in the fourth and fifth lines of the first part of the definition, the Department is inserting "civil or criminal" before "domestic and family violence laws," and in the second part of the definition, the Department is replacing "according to State law" with "under the civil or criminal domestic or family violence laws of the jurisdiction in which the victim resides or the events occurred," the same phrase used in the first part of the definition.

The Department proposed to define *employee* similarly to the way the term *worker* was used in the Minimum Wage Executive Order rulemaking, *see* 79 FR 60723, but with some differences reflecting the differences in the text of that Executive Order and Executive Order 13706. As proposed, the term meant any person engaged in performing work on or in connection with a contract covered by the Executive Order, and whose wages under such contract are governed by the SCA, DBA, or FLSA, including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions, regardless of the contractual relationship alleged to exist between the individual and the employer. Furthermore, the term *employee* included any person performing work on or in connection with a covered contract and individually registered in a bona fide apprenticeship or training program registered with the U.S. Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.

Much of this proposed definition came directly from section 6(d)(ii) of the Executive Order, and much of it was identical to the definition of *worker* in the Minimum Wage Executive Order regulations. The most significant difference between the proposed definition of *employee* and the Minimum Wage Executive Order rulemaking's definition of *worker* was the inclusion of employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions, such as employees employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541. Comments regarding the application of the Order and part 13 to such employees are addressed below, in the discussion of coverage of employees under § 13.3; for the reasons explained there, the Department adopts the relevant portion of this definition as proposed.

The proposed definition also emphasized, as had been explained in the Minimum Wage Executive Order rulemaking, the well-established principle under the DBA, SCA, and FLSA that employee coverage does not depend upon the existence or form of any contractual relationship that may be alleged to exist between the contractor or subcontractor and such persons. *See* 79 FR 60644 (citing 29 U.S.C. 203(d), (e)(1), (g) (FLSA); 41 U.S.C. 6701(3)(B), 29 CFR 4.155 (SCA); 29 CFR 5.5(a)(1)(i) (DBA)). As reflected in the proposed definition, the Executive Order is intended to apply to a wide range of employment relationships. Neither an individual's subjective belief about his or her employment status nor the existence of a contractual relationship is determinative of whether an employee is covered by the Executive Order.

EEAC and AGC remarked on the breadth of the proposed rule's statements about coverage of independent contractors, and AGC, Master Sheet Metal, Inc., General Contractors Association of Hawaii, and TrueBlue, Inc. specifically requested clarification that the rule does not apply to independent contractor owner-operators or sole proprietors to the extent they are not subject to SCA or DBA prevailing wage requirements. Although the Department reiterates its statement that allegations of a contractual relationship or the existence of a contract are not determinative of whether a worker is an employee or an independent contractor, it clarifies its statements about the effect of a worker being properly categorized as an independent contractor here. Whether a worker is an "employee" or an "independent contractor" as those terms are often used in other contexts is not material to whether that worker is a service employee for purposes of the SCA or a laborer or mechanic for purposes of the DBA. *See, e.g.,* 29 CFR 4.155 (SCA); 29 CFR 5.5(a)(1)(i) (DBA); *In re Igwe,* ARB Case No. 07–120, 2009 WL 4324725, at *3–4 (Nov. 25, 2009) (rejecting an argument that "the individuals working on the four contracts were not entitled to SCA prevailing wages and fringe benefits because they were independent contractors, not employees" because "the relevant inquiry is whether the persons working on the contract come within the SCA definition of 'service employee'" and explaining "the irrelevance of 'contractual relationship' to that definition"). Because even workers who are independent contractors may be covered by the SCA and DBA, those workers, if so covered, are employees for purposes of the Order and part 13. A worker who is not a service employee for purposes of the SCA or a laborer or mechanic for purposes of the DBA *and* who is not an employee under the FLSA, however, is not covered by the Order or part 13. (The Department notes that an employee who qualifies for an exemption from the FLSA's minimum wage and overtime requirements is still an employee rather than an independent contractor; as explained elsewhere, employees who qualify for such exemptions are covered by the Order and part 13.) More specifically, owner-operators (such as owner-operator truck drivers) and sole proprietors are not covered by the Executive Order and part 13 to the extent they are not entitled to prevailing wages under the DBA or SCA *and* are properly classified as independent contractors whose wages are not governed by the FLSA. The Department's guidance regarding the classification of workers as independent contractors under the FLSA is available on the WHD Web site, *http://www.dol.gov/whd.*

The proposed definition's inclusion of any person performing work on or in connection with a covered contract and individually registered in a bona fide apprenticeship or training program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship, was similarly in keeping with the Minimum Wage Executive Order's adoption of those provisions from the SCA and DBA regulations. *See* 79 FR 60644 (citing 29 CFR 4.6(p) (SCA); 29 CFR 5.2(n) (DBA)). The Department received no comments regarding this portion of the proposed definition and has adopted it as proposed.

The Department noted in the NPRM that, because unlike the Minimum Wage Executive Order, Executive Order 13706 makes no reference to individuals performing work on or in connection with a covered contract whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c), that category of employees was not explicitly mentioned in the proposed definition. It further explained that such individuals would nevertheless plainly fall within the definition of *employee* for purposes of this rulemaking because their wages are governed by the FLSA. The AFL–CIO and SEIU supported the Department's inclusion of such workers, and the Department makes no change to this implication of the definition.

Finally, the Department has added language to this definition explaining the meaning of working "on or in connection with" a covered contract. Specifically, the definition now provides that an employee performs "on" a contract if the employee directly performs the specific services called for by the contract and that an employee performs "in connection with" a contract if the employee's work activities are necessary to the performance of a contract but are not the specific services called for by the contract. As noted in the more detailed discussion below of employee coverage as provided for in § 13.3, these concepts were explained in the NPRM but were not included in the regulatory text itself.

The Department proposed to define *executive departments and agencies* for purposes of this rulemaking by adopting the definition of that term used in the Minimum Wage Executive Order rulemaking, which was derived from the definition of *executive agency* provided in section 2.101 of the FAR, 48 CFR 2.101. 79 FR 60642, 60722 (codified at 29 CFR 10.2). The Department therefore proposed to interpret the Executive Order to apply to executive departments within the meaning of 5 U.S.C. 101, military departments within the meaning of 5 U.S.C. 102, independent establishments within the meaning of 5 U.S.C. 104(1), and wholly owned Government corporations within the meaning of 31 U.S.C. 9101. The Department did not interpret this definition as including the District of Columbia or any Territory or possession of the United States.

Bredhoff & Kaiser, PLLC submitted a comment on behalf of the National Postal Mail Handlers Union urging the Department to ensure that the Executive Order and part 13 apply to covered contracts with the U.S. Postal Service. Although the proposed rule did not identify any particular entities that would or would not have qualified as *executive departments and agencies,* its definition of that term referred to, among other types of entities, independent establishments within the meaning of 5 U.S.C. 104(1). That statutory provision expressly excludes the U.S. Postal Service.

The Department agrees with the commenter that the Executive Order, which contains no indication that the U.S. Postal Service is not among the governmental entities the contracts of which may be covered, is best interpreted to apply to covered contracts with the U.S. Postal Service. The Minimum Wage Executive Order rulemaking did not address the implications of its adoption of the FAR's definition of *executive departments and agencies,* including its reference to independent establishments within the meaning of 5 U.S.C. 104(1) generally or coverage of the U.S. Postal Service specifically; there is no indication in the rulemaking that any commenter asked that the Department expand coverage to the U.S. Postal Service or that doing so would have had practical effect. The terms of Executive Order 13706 (as well as Executive Order 13658) indicate that contracts with the Federal Government covered by the SCA are covered by the Order, and it is clear that under the SCA, service contracts with the Federal Government covered by that Act include contracts with the U.S. Postal Service unless they are expressly excluded. *See, e.g.,* 41 U.S.C. 6702(b)(7) ("This chapter does not apply to . . . a contract with the United States Postal Service, the principal purpose of which is the operation of postal contract stations."). It is therefore appropriate to infer that the Executive Order was intended to apply to covered contracts with the U.S. Postal Service. Furthermore, the purpose of the Executive Order—ensuring that employees working on or in connection with covered contracts have access to paid sick leave—is best served by modifying the proposed definition to make clear that coverage extends to covered contracts with the U.S. Postal Service. Accordingly, the Department has expanded the definition of *executive departments and agencies* to refer to independent establishments not only within the meaning of 5 U.S.C. 104(1), but also within the meaning of 39 U.S.C. 201, which establishes the U.S. Postal Service "as an independent establishment of the executive branch of the Government of the United States."

The Department proposed to define *Executive Order 13495* or *Nondisplacement Executive Order* to mean Executive Order 13495 of January 30, 2009, Nondisplacement of Qualified Workers Under Service Contracts, 74 FR 6103 (Feb. 4, 2009), and its implementing regulations at 29 CFR part 9. This definition is adopted as proposed.

The Department proposed to define *Executive Order 13658* or *Minimum Wage Executive Order* to mean Executive Order 13658 of February 12, 2014, Establishing a Minimum Wage for Contractors, 79 FR 9851 (Feb. 20, 2014), and its implementing regulations at 29 CFR part 10. This definition is adopted as proposed.

The Department proposed to define *Fair Labor Standards Act* as the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et seq.,* and its implementing regulations. This definition is adopted as proposed.

The Department proposed to define *Family and Medical Leave Act* as the Family and Medical Leave Act of 1993, as amended, 29 U.S.C. 2601 *et seq.,* and its implementing regulations. This definition is adopted as proposed.

The Department proposed to define *family violence,* a term used in the definition of *domestic violence,* to mean any act or threatened act of violence, including any forceful detention of an individual that results or threatens to result in physical injury and is committed by a person against another individual (including an elderly individual) to or with whom such person is related by blood, is or was related by marriage or is or was otherwise legally related, or is or was lawfully residing. Because the VAWA does not provide a definition of the term, this definition was adopted from the definition of "family violence" in the Family Violence Prevention and Services Act, 42 U.S.C. 10401. *See* 42 U.S.C. 10402(4). The Department did not receive any comments regarding this definition and therefore adopts it as proposed.

Proposed § 13.2 defined *Federal Government* as an agency or instrumentality of the United States that enters into a contract pursuant to authority derived from the Constitution or the laws of the United States. The proposed definition was identical to that used in the regulations implementing the Minimum Wage Executive Order. 79 FR 60722 (codified at 29 CFR 10.2). That definition was based on the definition of *Federal Government* set forth in 29 CFR 9.2, but eliminated the term "procurement" from that definition because Executive Order 13658 applies—as does Executive Order 13706—to both procurement and non-procurement contracts. 79 FR 60642. Consistent with the SCA, the term *Federal Government* under the proposal included nonappropriated fund instrumentalities under the jurisdiction of the Armed Forces or of other Federal agencies. *See* 29 CFR 4.107(a). The proposed definition provided that for purposes of Executive Order 13706 and part 13, *Federal Government* did not include the District of Columbia or any Territory or possession of the United States. As used in the Order and part 13, the term also did not include any independent regulatory agency within the meaning of 44 U.S.C. 3502(5) because such agencies are not required to comply with the Order or part 13.

Bredhoff & Kaiser's comment, discussed above with respect to the definition of *executive departments and agencies,* suggested that the Department adjust the definition of *Federal Government* to ensure that this rulemaking applies to covered contracts with the U.S. Postal Service. The Department believes that the definition of *Federal Government* is sufficiently broad that the expansion of the definition of *executive departments and agencies* to include the U.S. Postal Service fulfills the purpose of making clear that the Department interprets the Order and part 13 to apply to covered contracts with the U.S. Postal Service. The Department therefore adopts the definition as proposed.

The Department proposed to define *health care provider* as any practitioner who is licensed or certified under Federal or State law to provide the health-related service in question or any practitioner recognized by an employer or the employer's group health plan. The term included, but was not limited to, doctors of medicine or osteopathy, podiatrists, dentists, psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers, physician assistants, physical therapists, and Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. This definition was intended to be broad and inclusive, and the Department reiterates that the list is not exhaustive. For example, not only a nurse practitioner, but also a registered nurse or a licensed practical nurse, would fall under this definition if an employee sought a service such a practitioner was licensed or certified to provide. The definition was derived from the definitions of health care provider in the FMLA regulations, 29 CFR 825.125, and OPM regulations, 5 CFR 630.201 and 5 CFR 630.1202.

EEAC was opposed to the breadth of this term, specifically suggesting that referring to "psychologists" instead of "clinical psychologists" and failing to limit "chiropractors" with the phrase "treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist" was inappropriate. Because the types of ailments and treatments for which an employee may use paid sick leave is intended to be broad, the list of practitioners is illustrative rather than restricting the types of professionals who fall within the definition, and the definition is already limited to practitioners licensed or certified under Federal or State law or recognized by an employer or the employer's group health plan, the Department does not believe the suggested changes are appropriate. Accordingly, it adopts the definition as proposed.

The Department proposed to define the term *independent agencies* as any independent regulatory agency within the meaning of 44 U.S.C. 3502(5). Section 6(g) of the Executive Order states that "[i]ndependent agencies are strongly encouraged to comply with the requirements of this order." The Department's proposal interpreted this provision, as it interpreted an identical provision in the Minimum Wage Executive Order, to mean that independent agencies are not required to comply with this Executive Order. *See* 79 FR 9853; 79 FR 60643. The proposed definition was therefore based on other Executive Orders that similarly exempt independent regulatory agencies within the meaning of 44 U.S.C. 3502(5) from the definition of *agency* or include language requesting that they comply. *See, e.g.,* Executive Order 13636, 78 FR 11739 (Feb. 12, 2013) (defining *agency* as any executive department, military department, Government corporation, Government-controlled operation, or other establishment in the executive branch of the Government but excluding independent regulatory agencies as defined in 44 U.S.C. 3502(5)); Executive Order 13610, 77 FR 28469 (May 10, 2012) (same); Executive Order 12861, 58 FR 48255 (September 11, 1993) ("Sec. 4 Independent Agencies. All independent regulatory commissions and agencies are requested to comply with the provisions of this order."); Executive Order 12837, 58 FR 8205 (Feb. 10, 1993) ("Sec. 4. All independent regulatory commissions and agencies are requested to comply with the provisions of this order."). The Department received no comments regarding this definition and adopts it as proposed.

The Department proposed to include in § 13.2 a definition of *individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.* The Department proposed to define the term to mean any person with whom the employee has a significant personal bond that is or is like a family relationship, regardless of biological or legal relationship. The NPRM noted that although this term is used in the OPM regulations, *see* 5 CFR 630.201 (defining "family member," for purposes of Federal employees' use of leave, to include the term), OPM has not created a regulatory definition of it; the Department's proposed definition was, however, derived from OPM's discussion of the term in OPM's 2010 Final Rule, 75 FR 33491. In particular, OPM explained that creating an exhaustive list of the relationships that meet the definition is not possible, but that OPM has "broadly interpreted the phrase to include such relationships as grandparent and grandchild, brother- and sister-in-law, fiancé and fiancée, cousin, aunt and uncle, other relatives not specified in [the list naming a spouse, child, parent, brother, or sister], and close friend, to the extent that the connection between the employee and the individual was significant enough to be regarded as having the closeness of a family relationship even though the individuals might not be related by blood or formally in law." 75 FR 33492.

The Department explained in the NPRM that it understood the term to be inclusive of non-nuclear family structures, noting that it could include, for example, an individual who was a foster child in the same home in which the employee was a foster child for several years and with whom the employee has maintained a sibling-like relationship, a friend of the family in whose home the employee lived while she was in high school and whom the employee therefore considers to be like a mother or aunt to her, or an elderly neighbor with whom the employee has regularly shared meals and to whom the employee has provided unpaid caregiving assistance for the past 5 years and whom the employee therefore considers to be like a grandfather to her.

In the NPRM, the Department sought comments regarding its proposed definition of this term, in particular regarding whether additional specificity was necessary. Numerous organizations—including but not limited to Lambda Legal, the National LGBTQ Task Force, Pride at Work, CAP, the Children's Alliance, the Family Equality Council, Equality Maine, Basic Rights Oregon, CLASP, Demos, A Better Balance, the Working Families Organization, Caring Across Generations, the Labor Project for Working Families in partnership with Family Values @ Work, and the Movement Advancement Project—strongly supported the proposed definition of this phrase. Many of these commenters noted that many Americans live in multigenerational households and LGBTQ Americans in particular often rely on "families of choice," meaning that any specific limitations inserted into the definition could defeat the purpose of using the broad term. They also wrote that a broad definition has been successfully in place with respect to Federal employees' sick leave for years, indicating that the proposed definition would not be difficult to implement or likely to be abused. The New York City (NYC) Department of Consumer Affairs wrote about its experience enforcing a local paid sick time law and the importance of capturing, for example, an employee's fiancé or aunt in the set of people for whom the employee can take leave to care. The Main Street Alliance, a coalition of employers, wrote that using a broad definition alleviated the burden on contractors of determining whether an employee's relationship fit into some more limited set of relationships. Other commenters noted that the example included in the NPRM of the elderly neighbor was useful.

Other commenters, however, did not support the proposed definition. The American Benefits Council, Seyfarth Shaw LLP, the Chamber/IFA, and Society for Human Resource Management and the College and University Professional Association for Human Resources (SHRM/CUPA–HR), for example, asked that the Department narrow the definition. Some of these commenters wrote that the definition applies more broadly than is necessary to achieve the goals of the Executive Order. Others noted that State and local paid sick time laws do not apply as broadly or that they believed it would be difficult for contractors to verify whether a relationship of the type described exists. A few commenters proposed specific replacement definitions: The Independent Electrical Contractors, Inc. (IEC) asked that the Department interpret the Order to allow an employee to use paid sick leave to care only for individuals with whom the employee has a biological or legal relationship; Koga Engineering and Construction, Royal Contracting Company LTD, Master Sheet Metal, Inc., and the General Contractors Association of Hawaii asked that this category extend only to family members for whom an employee can take FMLA leave; EEAC asked that it extend only to a "person with whom the employee has a significant personal bond that is or is like that of a child, parent or spouse"; and Vigilant asked that the Department interpret the word "affinity" to mean only a relationship by marriage.

The Department carefully considered the comments received and is adopting this definition as proposed. The term has been used with respect to sick leave for Federal employees since 1994, *see* Final Rule, Absence and Leave; Sick Leave, 59 FR 62266, 62266–67, 62270–71 (codified at 5 CFR 630.201(b)(v)), and OPM has indicated that it has had and continues to have an expansive meaning, *see* 75 FR 33491–92. The Department agrees with commenters that these facts suggest that the term in the Executive Order is best interpreted to have the same meaning as the term in the OPM regulations and that OPM does not consider its use of the term to have proved unworkable. Furthermore, the Department will not depart from the plain meaning of the text, which clearly extends beyond marital relationships or those referenced in the FMLA and reflects a general intent to be broad and inclusive by adopting the specific, significantly narrower definitions some commenters suggested. The Department notes that the issue of contractor verification of employees' relationships is addressed below in the discussions of requests to use paid sick leave and certification or documentation of the need to use paid sick leave; because contractor inquiries into employees' private lives are deliberately limited, the Department does not expect such verification to be intensive or complicated.

The Department proposed to define *intimate partner,* a term used in the definition of *domestic violence,* to mean a person who is or has been in a social relationship of a romantic or intimate nature with the victim, where the existence of such a relationship shall be determined based on a consideration of the length of the relationship; the type of relationship; and the frequency of interaction between the persons involved in the relationship. This definition was derived from the definition of "dating partner" in the VAWA. *See* 42 U.S.C. 13925(a)(9). No commenter suggested any revisions to this definition, and the Department adopts it as proposed.

In the Final Rule, the Department has added a definition of *multiemployer plan,* because that term is used in the final regulations for reasons explained in the discussion of § 13.8. The term is defined to mean a plan to which more than one employer is required to contribute and which is maintained pursuant to one or more CBAs between one or more employee organizations and more than one employer. This definition is derived from, but not identical to, the definition of the term under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq. See* 29 U.S.C. 1002(37). Because of the differences between the ERISA definition and that used here, a plan could qualify as a multiemployer plan for purposes of part 13 even though it does not so qualify for purposes of ERISA.

The Department proposed that the term *new contract* have the same meaning as in the Minimum Wage Executive Order Final Rule, but with dates altered to reflect the timing contemplated in section 7 of Executive Order 13706. *See* 79 FR 60722 (codified at 29 CFR 10.2); 80 FR 54700. Under the proposed definition, a *new contract* was a contract that results from a solicitation issued on or after January 1, 2017, or a contract that is awarded outside the solicitation process on or after January 1, 2017. This term included both new contracts and replacements for expiring contracts. It did not apply to the unilateral exercise of a pre-negotiated option to renew an existing contract by the Federal Government. The proposal explained that for purposes of the Executive Order, a contract that is entered into prior to January 1, 2017 would constitute a *new contract* if, through bilateral negotiation, on or after January 1, 2017: (1) The contract is renewed; (2) the contract is extended, unless the extension is made pursuant to a term in the contract as of December 31, 2016 providing for a short-term limited extension; or (3) the contract is amended pursuant to a modification that is outside the scope of the contract. The Minimum Wage Executive Order rulemaking explained that this definition was derived from section 8 of that Executive Order, 79 FR 9853, is consistent with the convention set forth in section 1.108(d) of the FAR, 48 CFR 1.108(d), and was developed in part in response to comments on the proposed definition of *new contract* that appeared in the Minimum Wage Executive Order NPRM. 79 FR 60643, 60646–49. No commenter suggested altering this definition, and the Department adopts it as proposed. Additional discussion of what constitutes a new contract appears in the text addressing § 13.3 below.

For purposes of the Executive Order and part 13, which use the terms in reference to domestic violence, sexual assault, or stalking, the Department proposed to define *obtain additional counseling, seek relocation, seek assistance from a victim services organization, or take related legal action* to mean to spend time arranging, preparing for, or executing acts related to addressing physical injuries or mental or emotional impacts resulting from being a victim of domestic violence, sexual assault, or stalking. Under the NPRM, such acts included finding and using services of a counselor or victim services organization (a term also defined in § 13.2) intended to assist a victim to respond to or prevent future incidents of domestic violence, sexual assault, or stalking; identifying and moving to a different residence to avoid being a victim of domestic violence, sexual assault, or stalking; or a victim's pursuing any related legal action (another term defined in § 13.2). The Department stated in the proposal that counseling could, but need not be, provided by a health care provider. The Department did not receive comments addressing this definition and adopts it as proposed.

The Department proposed to define *obtaining diagnosis, care, or preventive care from a health care provider* to mean receiving services from a health care provider, whether to identify, treat, or otherwise address an existing condition or to prevent potential conditions from arising. The Department interpreted this term broadly and provided the following non-exhaustive list of examples: Obtaining a prescription for antibiotics at a health clinic, attending an appointment with a psychologist, having an annual physical or gynecological exam, or receiving a teeth cleaning from a dentist's assistant. The proposed definition further noted that it included time spent traveling to and from the location at which such services are provided or recovering from receiving such services. The Center for the Study of Social Policy commented that the Department should state explicitly that this definition includes seeking treatment for drug or substance abuse. Under the definition as proposed and adopted, any treatment for drug, alcohol, or another addiction received from a practitioner who is a health care provider as defined in § 13.2 would be included in this definition. The Department adopts the definition as proposed.

The Department proposed to define the term *Office of Administrative Law Judges* to mean the Office of Administrative Law Judges, U.S. Department of Labor. The Department adopts this definition as proposed.

Proposed § 13.2 defined the term *option* by adopting the definition of that term used in the Minimum Wage Executive Order rulemaking, which in turn adopted the definition set forth in section 2.101 of the FAR, 48 CFR 2.101. 79 FR 60643, 60722 (codified at 29 CFR 10.2). Under the proposal, the term *option* meant a unilateral right in a contract by which, for a specified time, the Federal Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract. No commenters suggested changes to this definition, and it is adopted as proposed.

The Department proposed to define *paid sick leave* to mean compensated absence from employment that is required by Executive Order 13706 and part 13. In the NPRM and again in this Final Rule, the Department used and uses "paid sick leave" to refer to the leave required by the Order and part 13 and "paid sick time" to refer more generally to any compensated absence from work for time used for purposes similar (although not necessarily identical) to the purposes described in the Order, including as required by State and local laws or as provided pursuant to contractors' existing policies or under CBAs. The Department received no comments regarding this definition and adopts it as proposed.

Proposed § 13.2 defined the term *parent* to mean (1) a biological, adoptive, step, or foster parent of the employee, or a person who was a foster parent of the employee when the employee was a minor; (2) a person who is the legal guardian of the employee or was the legal guardian of the employee when the employee was a minor or required a legal guardian; (3) a person who stands *in loco parentis* to the employee or stood *in loco parentis* to the employee when the employee was a minor or required someone to stand *in loco parentis;* or (4) a parent, as described in paragraphs (1) through (3) of the definition, of an employee's spouse or domestic partner. This definition was adopted from the OPM regulations regarding leave for Federal employees. 5 CFR 630.102(b). EEAC urged the Department to use the definition of parent provided in the FMLA in order not to include the parent of an employee's spouse or domestic partner. Because, as noted above, the Department interprets the Order's deliberate inclusion of family members beyond those for whom an employee could take FMLA leave to indicate a general intent to allow the use of leave to care for a broad set of family members, it is adopting the definition as proposed.

The Department proposed to define *physical or mental illness, injury, or medical condition* as any disease, sickness, disorder, or impairment of, or any trauma to, the body or mind. The Department explained in the NPRM that the Executive Order intended for this term to be understood broadly, to include any illness, injury, or medical condition, regardless of whether it requires attention from a health care provider or whether it would be a "serious health condition" that qualifies for use of leave under the FMLA. *See* 29 U.S.C. 2611(11); 29 CFR 825.113. In the NPRM, the Department provided the following non-exclusive list of conditions included within the proposed definition: A common cold, ear infection, upset stomach, ulcer, flu, headache, migraine, sprained ankle, broken arm, or depressive episode. The Department did not receive comments addressing this definition and adopts it as proposed.

The Department proposed to define *predecessor contract* to mean a contract that precedes a successor contract. Because this definition was only included in the proposed rule in connection with the provision in § 13.5(b)(4) requiring reinstatement of paid sick leave by successor contractors, which for the reasons explained below does not appear in the Final Rule, the Department has removed this definition from § 13.2.

The proposed rule defined *procurement contract for construction* as that term was defined for purposes of the Minimum Wage Executive Order Final Rule, that is, to mean a contract for the construction, alteration, or repair (including painting and decorating) of public buildings or public works and which requires or involves the employment of mechanics or laborers, and any subcontract of any tier thereunder. 79 FR 60723 (codified at 29 CFR 10.2). That proposed definition, which was derived from language found at 40 U.S.C. 3142(a) and 29 CFR 5.2(h), included any contract subject to the DBA. *See* 79 FR 60643. No commenter addressed this definition, and it is adopted as proposed.

The Department proposed to define the term *procurement contract for services* to mean a contract the principal purpose of which is to furnish services in the United States through the use of service employees, and any subcontract of any tier thereunder. The proposal also stated that the term includes any contract subject to the SCA. This proposed definition was derived, as explained in the Minimum Wage Executive Order, from language set forth in 41 U.S.C. 6702(a), 29 CFR 4.1a(e), and 29 CFR 9.2. 79 FR 60643. The Department did not receive comments specifically addressing this definition. For the reasons explained in the discussion of service contract coverage below, the Department is adopting the definition as proposed.

For purposes of the Executive Order and part 13, which use the terms in reference to domestic violence, sexual assault, or stalking, the Department proposed to define *related legal action* or *related civil or criminal legal proceeding* to mean any type of legal action, in any forum, that relates to domestic violence, sexual assault, or stalking, including, but not limited to, family, tribal, territorial, immigration, employment, administrative agency, housing matters, campus administrative or protection or stay-away order proceedings, and other similar matters; and criminal justice investigations, prosecutions, and post-trial matters (including sentencing, parole, and probation) that impact the victim's safety and privacy. This definition, which the Department intended to be broad and inclusive, was derived from the definition of "legal assistance" that appears in the VAWA. *See* 42 U.S.C. 13925(a)(19). The Department explained in the NPRM that this definition encompassed actions in any civil or criminal court, including a juvenile court. The definition also included administrative proceedings run by institutions of higher education (college, community college, university, or trade school), such as those related to alleged violations of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* The Department received no comments regarding this definition and adopts it as proposed.

Under proposed § 13.2, *Secretary* meant the Secretary of Labor and included any official of the U.S. Department of Labor authorized to perform any of the functions of the Secretary of Labor under part 13. The Department adopts this definition as proposed.

The Department proposed to define the term *Service Contract Act* to mean the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. 6701 *et seq.*, and its implementing regulations. *See* 29 CFR 4.1a(a). This provision is adopted as proposed.

The proposed definition of *sexual assault* in § 13.2 was any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent. This definition was adopted from the VAWA. *See* 42 U.S.C. 13925(a)(29). No commenter suggested revising this definition, and the Department adopts it as proposed.

In the NPRM, the term *solicitation* was defined to have the meaning given to it in the Minimum Wage Executive Order Final Rule, *i.e.*, any request to submit offers, bids, or quotations to the Federal Government. 79 FR 60673 (codified at 29 CFR 10.2). As explained in the Minimum Wage Executive Order rulemaking, the definition was based on language from 29 CFR 9.2, and requests for information issued by Federal agencies and informal conversations with federal workers do not fall within the definition. *See* 79 FR 60643–44. No comments addressed this definition, and it is adopted as proposed.

The Department proposed to define the term *spouse* as the other person with whom an individual entered into marriage as defined or recognized under State law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition included an individual in a common law marriage that was entered into in a State that recognizes such marriages or, if entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State. This definition was derived from the FMLA regulations. *See* 29 CFR 825.122 (as updated by Definition of Spouse Under the Family and Medical Leave Act, 80 FR 9989 (Feb. 25, 2015)). As the Department noted in the NPRM, marriage and common law marriage include both same-sex and opposite-sex marriages or common law marriages. The Department did not receive comments regarding this definition and adopts it as proposed.

Under proposed § 13.2, *stalking* meant engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress. This definition was adopted from the VAWA. *See* 42 U.S.C. 13925(a)(30). The Department did not receive comments regarding this definition and adopts it as proposed.

The Department proposed to define *successor contract* to mean a contract for the same or similar services as were provided by a different predecessor contractor at the same location. This definition does not appear in the Final Rule because, for the reasons explained in the discussion of § 13.5(b)(4), the term is no longer relevant.

In proposed § 13.2, the Department defined the term *United States* as it did in the Minimum Wage Executive Order rulemaking, which used the definitions of that term set forth in 29 CFR 9.2 and 48 CFR 2.101, though it did not adopt any of the exceptions to the definition of the term set forth in the FAR. *See* 79 FR 60645. Based on those regulations, *United States* meant the United States and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States, including corporations of which all or substantially all of the stock is owned by the United States, by the foregoing departments, establishments, agencies, and instrumentalities, including nonappropriated fund instrumentalities. The proposed definition further noted that when used in a geographic sense, the *United States* meant the 50 States and the District of Columbia. The Department did not receive comments regarding this definition and adopts it as proposed.

The Department proposed to define *victim services organization* to mean a nonprofit, nongovernmental, or tribal organization or rape crisis center, including a State or tribal coalition, that assists or advocates for victims of domestic violence, sexual assault, or stalking, including domestic violence shelters, faith-based organizations, and other organizations, with a documented history of effective work concerning domestic violence, sexual assault, or stalking. This definition was based on the definition of "victim service provider" in the VAWA. *See* 42 U.S.C. 13925(a)(43). The Department intended this definition to include organizations that provide services to adult, teen, and/or child victims of domestic violence, sexual assault, or stalking. The Department did not receive comments regarding this definition and adopts it as proposed.

The Department proposed to define *Violence Against Women Act* as the Violence Against Women Act of 1994, 42 U.S.C. 13925 *et seq.*, and its implementing regulations. This definition is adopted as proposed.

Finally, the Department proposed to define *Wage and Hour Division* to mean the Wage and Hour Division within the U.S. Department of Labor. This definition is adopted as proposed.

Section 13.3 Coverage

Proposed § 13.3 addressed and implemented the coverage provisions of section 6 of Executive Order 13706. 80 FR 54697–700.

Proposed § 13.3(a) stated that part 13 applies to any new contract with the Federal Government, unless excluded by § 13.4, provided that: (1)(i) It is a procurement contract for construction covered by the DBA; (ii) it is a contract for services covered by the SCA; (iii) it is a contract for concessions, including any concessions contract excluded from coverage under the SCA by Department of Labor regulations at 29 CFR 4.133(b); or (iv) it is a contract in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and (2) the wages of employees performing on or in connection with such contract are governed by the DBA, SCA, or FLSA, including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions. As explained in more detail below in the discussion of covered employees, the Department is promulgating this provision as proposed.

Proposed § 13.3(b) incorporated the monetary value thresholds referred to in section 6(e) of the Executive Order. Specifically, it provided that for contracts covered by the SCA or the DBA, part 13 applies to prime contracts only at the thresholds specified in those statutes, and for procurement contracts where employees' wages are governed by the FLSA (*i.e.,* procurement contracts not covered by the SCA or DBA), part 13 applies when the prime contract exceeds the micro-purchase threshold, as defined in 41 U.S.C. 1902(a). Proposed § 13.3(b) further explained that for all other covered prime contracts and for all subcontracts awarded under covered prime contracts, part 13 applies regardless of the value of the contract. In this context, "all other prime contracts" covered by the Order and part 13 referred to non-procurement concessions contracts not covered by the SCA and non-procurement contracts with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public not covered by the SCA. The Department received one comment relevant to this provision, addressed in the discussion of "procurement contracts for construction" below, and adopts § 13.3(b) as proposed.

Proposed § 13.3(c), which was identical to the analogous provision in the Minimum Wage Executive Order Final Rule, 29 CFR 10.3(c), stated that part 13 only applies to contracts with the Federal Government requiring performance in whole or in part within the United States. It further explained that if a contract with the Federal Government is to be performed in part within and in part outside the United States and is otherwise covered by the Executive Order and part 13, the requirements of the Order and part 13 would apply with respect to that part of the contract that is performed within the United States. As explained below, the Department adopts this provision as proposed.

Proposed § 13.3(d), adopted from the Minimum Wage Executive Order regulations, 29 CFR 10.3(d), explained that part 13 does not apply to contracts subject to the Walsh-Healey Public Contracts Act, 41 U.S.C. 6501 *et seq.* The Department is adopting this provision largely as proposed, but with one modification described below in the section discussing such contracts.

The preamble to the proposed rule addressed several issues related to the coverage provisions in some detail, and the Department repeats those points here, in addition to responding to comments relevant to them, in order to ensure that this Final Rule contains a full discussion of the scope of coverage under the Order. As noted in the NPRM, the Minimum Wage Executive Order Final Rule addressed many of the same issues, and much of the discussion here reflects interpretations described in that rulemaking.

Coverage of Executive Agencies and Departments

Executive Order 13706 applies to all "[e]xecutive departments and agencies." 80 FR 54697. Like the Minimum Wage Executive Order, it strongly encourages but does not compel "[i]ndependent agencies" to comply with its requirements. 80 FR 54700; *see also* 79 FR 9853. The Department explained in the NPRM that this exemption from coverage is narrow, in light of the Executive Order's broad goal of providing paid sick leave to employees on contracts with the Federal Government. The terms *executive departments and agencies* (modified to include the U.S. Postal Service, as explained above) and *independent agencies* are defined in § 13.2. The Department received no comments regarding this interpretation.

Coverage of New Contracts With the Federal Government

Proposed § 13.3(a) provided that the requirements of the Executive Order apply to a "new contract with the Federal Government." By applying only to "new contracts," the Executive Order ensures that contracting agencies and contractors will have sufficient notice of any obligations under Executive Order 13706 and can take into account any potential impact of the Order prior to entering into "new contracts" on or after January 1, 2017. As discussed above, the proposed definition of the term *contract* was broadly inclusive, and the proposed definition of *new contract* was modeled on the definition of that term in the Minimum Wage Executive Order Final Rule, 29 CFR 10.2, and incorporated the provisions of section 7 of Executive Order 13706. Therefore, as proposed, part 13 applied to covered contracts with the Federal Government that result from solicitations issued on or after January 1, 2017, or to contracts that are awarded outside the solicitation process on or after January 1, 2017. For example, any covered contracts that are added to the GSA Schedule in response to GSA Schedule solicitations issued on or after January 1, 2017 will qualify as "new contracts" subject to the Order; any covered task orders issued pursuant to those contracts also would be deemed to be "new contracts." This included contracts to add new covered services as well as contracts to replace expiring contracts.

As explained in the discussion of § 13.2, the definition of *new contract* (adopted as proposed) also provides that the term includes both new contracts and replacements for expiring contracts. Consistent with the Minimum Wage Executive Order Final Rule, however, the definition does not include the unilateral exercise of a pre-negotiated option to renew an existing contract by the Federal Government. As discussed above, *option* means a unilateral right in a contract by which, for a specified time, the Federal Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract. *See* 48 CFR 2.101.

The proposed definition of *new contract* also provided that for purposes of the Executive Order, a contract that is entered into prior to January 1, 2017 constituted a *new contract* if, through bilateral negotiation, on or after January 1, 2017: (1) The contract is renewed; (2) the contract is extended, unless the extension is made pursuant to a term in the contract as of December 31, 2016 providing for a short-term limited extension; or (3) the contract is amended pursuant to a modification that is outside the scope of the contract. These statements have the same meaning in part 13 as they did in the Minimum Wage Executive Order rulemaking. *See* 79 FR 60646–49. The NPRM also noted the Department's understanding that contract extensions may be accomplished through options created by an agency pursuant to FAR clause 52.217–8 (which allows for an extension of time of up to 6 months for a contractor to perform services that were acquired but not provided during the contract period) or FAR clause 52.217–9 (which provides for an extension of the contract term to provide additional services for a limited term specified in the contract at previously agreed upon prices). As explained, the contracting agency's exercise of extensions under these clauses would not trigger application of the Order's paid sick leave requirements because the clauses give the contracting agency a discretionary right to unilaterally exercise the option to extend, and unilateral options are excluded from the definition of "new contract."

Specifically, and particularly in light of these clauses, a bilaterally negotiated extension of an existing contract on or after January 1, 2017 would be viewed as a "new contract" unless the extension is made pursuant to a term in the contract as of December 31, 2016 providing for a short-term limited extension, in which case the extension would not constitute a "new contract" and would not be covered. Therefore, a short-term, bilaterally negotiated extension of contract terms (*e.g.*, an extension of 6 months or less) that was provided for by the pre-negotiated terms of the contract prior to January 1, 2017, such as a bridge to prevent a gap in service, would not constitute a new contract. *See* Interim Final Rule, Federal Acquisition Regulation; Establishing a Minimum Wage for Contractors, 79 FR 74544, 74545 (Dec. 15, 2014) (providing that contracting officers "shall include" the FAR contract clause to implement the Minimum Wage Executive Order when "bilateral modifications extending the contract . . . are individually or cumulatively longer than six months"). In addition, when a contracting agency exercises its unilateral right to extend the term of an existing service contract and simply makes pricing adjustments based on increased labor costs that result from its obligation to include a current SCA wage determination pursuant to 29 CFR 4.4 but no bilateral negotiations occur (other than any necessary to determine and effectuate those pricing adjustments), the Department would not view the exercise of that option as a "new contract" covered by the Executive Order.

An extension that was bilaterally negotiated and not previously authorized by the terms of the existing contract, however, would be a "new contract" subject to the Order's paid sick leave requirements. A long-term extension of an existing contract will qualify as a "new contract" subject to the Executive Order even if such an extension was provided for by a pre-negotiated term of the contract.

With respect to the coverage of other contract modifications, the Department's approach is identical to that in the Minimum Wage Executive Order Final Rule. 79 FR 60646–49. It reflects that modifications within the scope of the contract do not in fact constitute new contracts. Long-standing contracting principles recognize that an existing contract, especially a larger one, will often require modifications, which may include very modest changes (*e.g.*, a small change to a delivery schedule). Therefore, regulations such as the FAR do not require agencies to create new contracts to support these actions. Accordingly, contract modifications that are within the scope of the contract within the meaning of the FAR, *see* 48 CFR 6.001(c) and related case law, are not "new contracts" under the proposed definition, even when undertaken after January 1, 2017. The Department's proposal nonetheless strongly encouraged agencies to bilaterally negotiate, as part of any in-scope modification, application of the Executive Order's paid sick leave requirements so that such modified contracts could take advantage of the benefits of such leave.

As also explained in the NPRM, if the parties bilaterally negotiate a modification that is outside the scope of the contract, the agency will be required to create a new contract, triggering solicitation and/or justification requirements, and thus such a modification after January 1, 2017 will constitute a "new contract" subject to the Executive Order's paid sick leave requirements. For example, if an existing SCA-covered contract for janitorial services at a Federal office building is modified by bilateral negotiation after January 1, 2017 to also provide for security services at that building, such a modification would likely be regarded as outside the scope of the contract and thus qualify as a "new contract" subject to the Executive Order. Similarly, if an existing DBA-covered contract for construction work at Site A was modified by bilateral negotiation after January 1, 2017 to also cover construction work at Site B, such a modification would generally be viewed as outside the scope of the contract and thus trigger coverage of the Executive Order. The Department cautioned, however, that whether a modification qualifies as "within the scope" or "outside the scope" of the contract is necessarily a fact-specific determination. *See, e.g., AT&T Communications, Inc.* v. *Wiltel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993).

The Department did not receive comments suggesting changes to these interpretations regarding what constitutes a "new contract." AGC asked whether new task orders under existing indefinite-delivery, indefinite-quantity (IDIQ) contracts qualify as new contracts for purposes of the Executive Order. A task order under an IDIQ contract covered by the Executive Order and part 13 would itself be covered by the Order and part 13 to the extent the task order falls within one of the four categories of contracts covered by the Order. A task order under (and within the scope of) an IDIQ contract that is not covered by the Executive Order and part 13, either because the solicitation for the IDIQ contract was issued before January 1, 2017, or the IDIQ contract was awarded outside the solicitation process before January 1, 2017, would not qualify under the Order and part 13 as a new contract even if the task order was issued after January 1, 2017. However, the Department recommended in the NPRM, and reiterates here, that the FARC should encourage, if not require, contracting officers to modify existing IDIQ contracts in accordance with FAR section 1.108(d)(3) to include the paid sick leave requirements of Executive Order 13706 and part 13, particularly if the remaining ordering period extends at least 6 months and the amount of remaining work or number of orders expected is substantial. *See* 79 FR 74545 (providing that contracting officers "are strongly encouraged to include" the FAR contract clause to implement the Minimum Wage Executive Order in "existing indefinite-delivery indefinite-quantity contracts, if the remaining ordering period extends at least six months and the amount of remaining work or number of orders expected is substantial").

Coverage of Types of Contractual Arrangements

Proposed § 13.3(a)(1) set forth the specific types of contractual arrangements with the Federal Government that are covered by the Executive Order. Consistent with the intent of Executive Order 13706 to apply to a wide range of contracts with the Federal Government for services or construction, proposed § 13.3(a)(1) implemented the Executive Order by generally extending coverage to procurement contracts for construction covered by the DBA; service contracts covered by the SCA; concessions contracts, including any concessions contract excluded by the Department's regulations at 29 CFR 4.133(b); and contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public. Each of these categories of contractual agreements is discussed in greater detail below. The Department notes that, as was also the case under the Minimum Wage Executive Order rulemaking, these categories are not mutually exclusive—a concessions contract might also be covered by the SCA, as might a contract in connection with Federal property or lands, for example—but a contract that falls within any one of the four categories is covered.

Procurement Contracts for Construction: Section 6(d)(i)(A) of the Executive Order extends coverage to any "procurement contract for . . . construction." 80 FR 54699. As explained in the NPRM and the Minimum Wage Executive Order rulemaking, 79 FR 60650, this language indicates that the Executive Order and part 13 apply to contracts subject to the DBA and that they do not apply to contracts subject only to the Davis-Bacon Related Acts, including those set forth at 29 CFR 5.1(a)(2)–(60). The Final Rule makes no change to this interpretation.

The DBA applies, in relevant part, to contracts to which the Federal Government is a party, for the construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Federal Government and which require or involve the employment of mechanics or laborers. 40 U.S.C. 3142(a). The DBA's regulatory definition of *construction* is expansive and includes all types of work done on a particular building or work by laborers and mechanics employed by a construction contractor or construction subcontractor. *See* 29 CFR 5.2(j). The DBA's implementing regulations define the term "public building or public work" as any building or work, the construction, prosecution, completion, or repair of which is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public. *See* 29 CFR 5.2(k).

Proposed § 13.3(b) implemented section 6(e) of Executive Order 13706, 80 FR 52699–700, which provides that the Order applies only to DBA-covered prime contracts that exceed the $2,000 value threshold specified in the DBA. *See* 40 U.S.C. 3142(a). Under this provision, which is adopted as proposed, there is no value threshold requirement for application of Executive Order 13706 and part 13 to subcontracts awarded under such prime contracts. The Mechanical Contractors Association of America (MCAA) asked in its comment why the proposal covered subcontracts that fall below the DBA threshold amount. The Department believes coverage of subcontracts without regard to their monetary value is appropriate because it is consistent with the DBA itself, which applies the threshold only to prime contracts, 40 U.S.C. 3142(a), is consistent with the coverage provisions of the Minimum Wage Executive Order, which also do not apply threshold amounts to subcontracts, 29 CFR 10.3(b), and ensures that employees who work for lower-tier contractors on projects in which the prime contract is DBA-covered are not denied access to paid sick leave.

Procurement Contracts for Services: Proposed § 13.3(a)(1)(ii) provided, in language identical to that of 29 CFR 10.3(a)(1)(ii) as promulgated by the Minimum Wage Executive Order Final Rule, 79 FR 60723, that coverage of the Executive Order and part 13 encompasses any "contract for services covered by the Service Contract Act."

That proposed provision implemented section 6(d)(i)(B) of the Executive Order, which states that the Order applies to "a contract or contract-like instrument for services covered by the Service Contract Act." 80 FR 54699. The SCA applies (subject to the exceptions discussed below) to any contract entered into by the United States that "has as its principal purpose the furnishing of services in the United States through the use of service employees." 41 U.S.C. 6702(a)(3); *see also* 29 CFR 4.110. The SCA is intended to cover a wide variety of service contracts with the Federal Government, so long as the principal purpose of the contract is to provide services using service employees. *See, e.g.,* 29 CFR 4.130(a). SCA coverage exists regardless of the direct beneficiary of the services or the source of the funds from which the contractor is paid for the service and irrespective of whether the contractor performs the work in its own establishment, on a Government installation, or elsewhere. 29 CFR 4.133(a).

The NPRM noted, however, that in addition to the provision in section 6(d)(i)(B) of the Executive Order extending coverage to contracts covered by the SCA, section 6(d)(i)(A) provides that the Order applies to "a procurement contract for services." 80 FR 54699. In the Minimum Wage Executive Order rulemaking, the Department interpreted these two phrases together to mean that Executive Order 13658 applied to all procurement and non-procurement contracts covered by the SCA. As the NPRM to implement Executive Order 13706 explained, the phrase "a procurement contract for services" could instead be construed to encompass a category or categories of procurement contracts for services beyond those covered by the SCA.

The SCA does not apply to all procurement contracts with the Federal Government for services. For example, the SCA itself contains a list of exemptions from its coverage: It does not apply to "a contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect"; "a contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934"; "a contract for public utility services, including electric light and power, water, steam, and gas"; "an employment contract providing for direct services to a Federal agency by an individual"; and "a contract with the United States Postal Service, the principal purpose of which is the operation of postal contract stations." 41 U.S.C. 6702(b); *see also* 29 CFR 4.115–4.122. Additionally, the SCA regulations at 29 CFR 4.123(d) and (e) identify certain categories of contracts the Department has exempted from SCA coverage pursuant to authority granted by the SCA, *see* 41 U.S.C. 6707(b), to the extent regulatory criteria for exclusion from coverage are satisfied. For example, 29 CFR 4.123(e)(1)(i)(A) exempts from SCA coverage certain contracts principally for the maintenance, calibration, or repair of automated data processing equipment and office information/word processing systems. Furthermore, the SCA does not apply to contracts for services to be performed exclusively by persons who are not service employees, *i.e.,* persons who qualify as bona fide executive, administrative, or professional employees as defined in the FLSA's regulations at 29 CFR part 541. 29 CFR 4.113(a)(2); *see also* 41 U.S.C. 6701(a)(3)(C), 6702(a)(3); WHD Field Operations Handbook (FOH) ¶ 14c07. Similarly, a contract for services "performed essentially by bona fide executive, administrative, or professional employees, with the use of service employees being only a minor factor in contract performance," is not covered by the SCA. 29 CFR 4.113(a)(3); FOH ¶ 14c07.

In the proposed rule, the Department sought comment as to whether it should include within the coverage of Executive Order 13706 a wider set of procurement contracts for services than those contracts for services covered by the SCA. The Department's proposal noted that, for example, an interpretation treating as covered procurement contracts for services performed exclusively or essentially by employees who qualify as bona fide executive, administrative, or professional employees as defined in the FLSA's regulations at 29 CFR part 541—a type of employee covered by section 6(d)(ii) of the Order because such employees qualify for an exemption from the FLSA's minimum wage and overtime provisions, 80 FR 54700—would extend the Order's paid sick leave requirements to some such employees who would otherwise not be covered by the Order. The proposal further noted that an interpretation treating as covered other types of service contracts explicitly exempted from SCA coverage under 41 U.S.C. 6702(b) and 29 CFR 4.123(d) and (e) would also extend the Order's paid sick leave requirements to at least some employees on any such contracts; although those employees' wages would by definition not be covered by the SCA, under such an interpretation, employees performing work on or in connection with such contracts whose wages were governed by the FLSA, including employees who qualify for an exemption from its minimum wage and overtime provisions, would be entitled to paid sick leave under the Order and part 13. The Department sought comments on the potential scope and implications of such coverage, including whether employees who work on or in connection with certain categories of non-SCA-covered service contracts currently typically do not have paid sick time or do not have any type of paid time off such that the protections of Executive Order 13706 would be particularly significant to them.

Numerous commenters, including CLASP, Equal Rights Advocates, the CAP Women's Initiative, Caring Across Generations, the Working Families Organization, Women Employed, the Center for Popular Democracy (CPD), and the National Association of County and City Health Officials, urged the Department to ensure that the Executive Order covers all procurement contracts for services in order to extend paid sick leave benefits to as many employees as possible. The AFL–CIO also encouraged the Department to expand contract coverage under the Order and part 13. Other commenters, such as PSC, the Chamber/IFA, and the American Benefits Council, however, urged the Department not to expand coverage to service contracts not covered by the SCA. In particular, PSC asserted that covering contracts for services performed exclusively or essentially by employees who qualify as bona fide executive, administrative, or professional employees would discourage technology and consulting companies from doing business with the Federal Government. It also asserted that contracts such as those involving utilities and airlines are exempted from the SCA by regulation for reasons that would also make application of paid sick leave requirements particularly difficult and therefore inappropriate.

After careful consideration of these comments, the Department is adopting § 13.3(a)(1)(ii) as proposed, that is, it is interpreting the Executive Order to cover contracts for services covered by the SCA and not (other than contracts covered by § 13.3(a)(1)(iii) and (iv)) contracts for services that, although entered into with an executive department or agency, are not covered by the SCA. Although the Department continues to believe in the importance of ensuring that employees performing work on or in connection with Federal contracts have access to paid sick leave, in this case, for reasons of consistency with the Minimum Wage Executive Order Final Rule and familiarity with the types of obligations and requirements imposed by the SCA and Minimum Wage Executive Order, the Department believes the best course is the one proposed in the NPRM.

The Department reiterates, however, that under § 13.3(a)(1)(iii) and (iv) (as well as § 13.3(d), described below), irrespective of whether a contract is covered by part 13 because it is an SCA-covered contract, the Order's paid sick leave requirements apply to service contracts that are concessions contracts, including all concessions contracts excluded by the SCA regulations at 29 CFR 4.133(b); apply to service contracts that are in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and do not apply to contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government that are subject to the Walsh-Healey Public Contracts Act, 41 U.S.C. 6501 *et seq.*

Proposed § 13.3(b) implemented section 6(e) of the Executive Order, which provides that for SCA-covered contracts, the Executive Order applies only to those prime contracts that exceed the threshold for prevailing wage requirements specified in the SCA. 80 FR 54700. Although the SCA covers all non-exempted contracts with the Federal Government that have the "principal purpose" of furnishing services in the United States through the use of service employees regardless of the value of the contract, the prevailing wage requirements of the SCA only apply to covered contracts in excess of $2,500. 41 U.S.C. 6702(a)(2). Consistent with the SCA, under proposed § 13.3(b), there would be no value threshold requirement for application of Executive Order 13706 and part 13 to subcontracts awarded under such prime contracts. The Department received no comments on this portion of the proposed provision.

Contracts for Concessions: Proposed § 13.3(a)(1)(iii) implemented the Executive Order's coverage of a "contract or contract-like instrument for concessions, including any concessions contract excluded by the Department of Labor's regulations at 29 CFR 4.133(b)," 80 FR 54699, just as the Minimum Wage Executive Order Final Rule implemented identical language in that Order, *see* 79 FR 60638, 60652.

The SCA generally covers contracts for concessionaire services. *See* 29 CFR 4.130(a)(11). Pursuant to the Secretary's authority under section 4(b) of the SCA, however, the SCA's regulations specifically exempt from coverage concession contracts "principally for the furnishing of food, lodging, automobile fuel, souvenirs, newspaper stands, and recreational equipment to the general public." 29 CFR 4.133(b); 48 FR 49736, 49753 (Oct. 27, 1983).[1] Proposed § 13.3(a)(1)(iii) extended coverage of the Executive Order and part 13 to all concession contracts with the Federal Government, including those exempted from SCA coverage. The Department explained that the Executive Order generally covers, for example, souvenir shops at national monuments as well as boat rental facilities and fast food restaurants at National Parks. In addition, consistent with the SCA's implementing regulations at 29 CFR 4.107(a), the Department proposed that the Executive Order generally apply to concessions contracts with nonappropriated fund instrumentalities under the jurisdiction of the Armed Forces or other Federal agencies.

---

[1] This exemption applies to certain concessions contracts that provide services to the general public, but does not apply to concessions contracts that provide services to the Federal Government or its personnel or to concessions services provided incidentally to the principal purpose of a covered SCA contract. *See, e.g.,* 29 CFR 4.130 (providing an illustrative list of SCA-covered contracts); *In the Matter of Alcatraz Cruises, LLC,* ARB Case No. 07–024, 2009 WL 250456 (ARB Jan. 23, 2009) (holding that the SCA regulatory exemption at 29 CFR 4.133(b) does not apply to National Park Service contracts for ferry transportation services to and from Alcatraz Island).

Under proposed § 13.3(b), the Executive Order applies to an SCA-covered concessions contract only if it exceeds $2,500. *Id.;* 41 U.S.C. 6702(a)(2). Section 6(e) of the Executive Order further provides that, for procurement contracts where employees' wages are governed by the FLSA, such as any procurement contracts for concessionaire services that are excluded from SCA coverage under 29 CFR 4.133(b), part 13 applies only to contracts that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a). That threshold is currently defined in the FAR as $3,500. 48 CFR 2.101. The Department proposed that there be no value threshold for application of Executive Order 13706 and part 13 to subcontracts awarded under covered prime contracts or for non-procurement concessions contracts that are not covered by the SCA.

The Chamber/IFA and the American Benefits Council commented that the Order should not apply to concessions contracts, explaining that such contractors will be disadvantaged by the requirements of the Order and part 13 because they compete against businesses that do not contract with the Federal Government and therefore do not bear the costs of providing paid sick leave. The Department declines to amend part 13's coverage provisions to exclude concessions contracts because section 6(d)(i)(C) of the Executive Order explicitly names such contracts as one of the types to which the Order applies. 80 FR 54699.

Contracts in Connection with Federal Property or Lands and Related to Offering Services: Proposed § 13.3(a)(1)(iv) implemented section 6(d)(i)(D) of the Executive Order, which extends coverage to contracts entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public. *See* 80 FR 54699; *see also* 79 FR 60655 (Minimum Wage Executive Order Final Rule preamble discussion of identical provisions in the Minimum Wage Executive Order and 29 CFR part 10). The Department's proposal interpreted this provision as generally including leases of Federal property, including space and facilities, and licenses to use such property entered into by the Federal Government for the purpose of offering services to the Federal Government, its personnel, or the general public to the extent that such agreements are not otherwise covered by § 13.3(a)(1). In other words, under the proposal, a private entity that leases space in a Federal building to provide services to Federal employees or the general public would be covered by the Executive Order and part 13 regardless of whether the lease is subject to the SCA. The Department noted in the NPRM that evidence that an agency has retained some measure of control over the terms and conditions of the lease or license to provide services, though not necessary for purposes of determining applicability of this section, would strongly indicate that the agreement involved is covered by section 6(d)(i)(D) of the Executive Order and § 13.3(a)(1)(iv). Pursuant to this interpretation, a private fast food or casual dining restaurant that rents space in a Federal building and serves food to the general public would be subject to the Executive Order's paid sick leave requirements even if the contract does not constitute a concessions contract for purposes of the Order and part 13. Additional examples of agreements that would generally be covered by the Executive Order and part 13 under the proposed approach (regardless of whether they would also be covered because they are subject to the SCA) include delegated leases of space in a Federal building from an agency to a contractor whereby the contractor operates a child care center, credit union, gift shop, barber shop, health clinic, or fitness center in the space to serve Federal employees and/or the general public.

Although this definition is broad, the Department noted some limits to it in the NPRM that it reiterates here. First, coverage under this proposed section only extends to contracts that are in connection with Federal property or lands. For example, if a Federal agency contracts with an outside catering company to provide and deliver coffee for a conference, such a contract will not be considered a covered contract under section 6(d)(i)(D), although it would be a covered contract under section 6(d)(i)(B) if it is covered by the SCA. Moreover, because the Department does not interpret section 6(d)(i)(D)'s reference to "Federal property" to encompass money, purely financial transactions with the Federal Government, *i.e.,* contracts that are not in connection with physical property or lands, are not covered by the Order and part 13. In addition, as explained in the proposed rule, section 6(d)(i)(D) coverage only extends to contracts "related to offering services for Federal employees, their dependents, or the general public." Therefore, if a Federal agency contracted with a company to solely supply materials in connection with Federal property or lands, the Department would not consider the contract to be covered by section 6(d)(i)(D) because it is not a contract related to offering services. Likewise, because a license or permit to conduct a wedding on Federal property or lands generally would not relate to offering services for Federal employees, their dependents, or the general public, but rather would only relate to offering services to the specific individual applicant(s), the Department would not consider such a contract covered by section 6(d)(i)(D).

Proposed § 13.3(b) interpreted section 6(e) of Executive Order 13706, 80 FR 54700, to mean that the Order applies only to SCA-covered prime contracts in connection with Federal property or lands and related to offering services if such contracts exceed $2,500. 41 U.S.C. 6702(a)(2); 29 CFR 4.141(a). For procurement contracts in connection with Federal property or lands and related to offering services where employees' wages are governed by the FLSA (rather than the SCA), part 13 applies only to such contracts that exceed the $3,500 micro-purchase threshold, as defined in 41 U.S.C. 1902(a) and 48 CFR 2.101. As to subcontracts awarded under prime contracts in this category and non-procurement contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public that are not SCA-covered, the Department proposed and is adopting no value threshold for coverage under Executive Order 13706 and part 13.

The Chamber/IFA and the American Benefits Council commented that the Order should not apply to contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public for the same reasons on which they based their objections to the coverage of concessions contracts. Because section 6(d)(i)(D) of the Executive Order explicitly names contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public as one of the types of contracts to which the Order applies, 80 FR 54699, the Department does not believe it would be appropriate to exclude such contracts from coverage under part 13.

Contracts Subject to the Walsh-Healey Public Contracts Act: Finally, the Department proposed to include as § 13.3(d) a statement that contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government that are subject to the Walsh-Healey Public Contracts Act (PCA), 41 U.S.C. 6501 *et seq.*, are not covered by Executive Order 13706 or part 13. As noted in the NPRM, however, where a PCA-covered contract involves a substantial and segregable amount of construction work that is subject to the DBA, employees whose wages are governed by the DBA or FLSA, including those who qualify for an exemption from the FLSA's minimum wage and overtime provisions, are covered by the Executive Order for the hours that they spend performing work on or in connection with such DBA-covered construction work.

No commenters asked that the Department not exempt contracts subject to the PCA. EEAC asked for clarification about the Order's application to a contract for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government for an amount less than $15,000, the threshold amount for PCA coverage. *See* 48 CFR 22.602. Because such contracts are not one of the four types of covered contracts, the Department did not intend for the NPRM to imply that they could be covered, nor does it intend to cover them in the Final Rule. To make this point more evident, the text of § 13.3(d) has been slightly modified to indicate that PCA-covered contracts are an example of contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government rather than to suggest that all such contracts are PCA-covered.

Coverage of Subcontracts

As explained in the Minimum Wage Executive Order rulemaking, 79 FR 60657–58, the Department proposed that the same test for determining application of the Executive Order to prime contracts apply to the determination of whether a subcontract is covered by the Order, with the distinction that the value threshold requirements set forth in section 6(e) of the Order do not apply to subcontracts. In other words, the Department proposed that the requirements of the Order apply to a subcontract if the subcontract qualifies as a *contract* or *contract-like instrument* under the definition set forth in part 13 and it falls within one of the four specifically enumerated types of contracts set forth in section 6(d)(i) of the Order and proposed § 13.3(a)(1).

Under this approach, only covered subcontracts of covered prime contracts are subject to the requirements of the Executive Order. Therefore, just as the Executive Order does not apply to prime contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment, the Order likewise does not apply to subcontracts for the manufacturing or furnishing of materials, supplies, articles, or equipment. In other words, the Executive Order does not apply to subcontracts for the manufacturing or furnishing of materials, supplies, articles, or equipment between a manufacturer or other supplier and a contractor for use on a covered contract. For example, a subcontract to supply napkins and utensils to a covered prime contractor operating a fast food restaurant on a military base is not a covered subcontract for purposes of this Order. The Executive Order likewise does not apply to contracts under which a contractor orders materials from a construction materials supplier.

The Chamber/IFA asked in their comment that the Department include in the Final Rule "significantly more guidance" regarding the definition of "subcontract." Although the Department recognizes that the NPRM did not include a definition of "subcontract," it notes that the SCA, DBA, and Minimum Wage Executive Order regulations all also refer to subcontracts without defining the term. The Department does not believe it is necessary or appropriate to develop a definition for the first time here. In this context as under those statutes, it is generally clear when a contract is a subcontract, such as when a contractor who enters into a covered contract to build a Federal office building also enters into a contract with a separate company to install the windows in that building. It is also generally clear when a contract is not a subcontract, such as when a contractor who enters into a covered contract with the Federal Government to build a Federal office building also enters into a contract with a separate company to repair the contractor's electronic time system or provide cleaning services at the contractor's corporate headquarters.

Coverage of Employees

Proposed § 13.3(a)(2) implemented section 6(d)(ii) of Executive Order 13706, which provides that the paid sick leave requirements of the Order only apply if the wages of employees under a covered contract are governed by the DBA, SCA, or FLSA, including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions. 80 FR 54699. This coverage provision is distinct from that in Executive Order 13658 in that the Minimum Wage Executive Order did not cover employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions. *See* 79 FR 9853.

The NPRM explained the Department's interpretation that an employee's wages are governed by the FLSA for purposes of section 6(d)(ii) of the Executive Order and part 13 if the employee is entitled to minimum wage and/or overtime compensation under sections 6 and/or 7 of the FLSA or the employee's wages are calculated pursuant to special certificates issued under section 14 of the FLSA. *See* 29 U.S.C. 206, 207, 214. No commenter addressed this interpretation, and the Department reiterates it here.

The Department further interpreted the Order's explicit coverage of employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions to mean that the Order and part 13 apply to an employee who would be entitled to minimum wage and/or overtime compensation under the FLSA but for the application of an exemption from the FLSA's minimum wage and overtime requirements pursuant to section 13 of the Act. *See* 29 U.S.C. 213. Such employees include those employed in a bona fide executive, administrative, or professional capacity as defined in section 13(a)(1) of the FLSA, 29 U.S.C. 213(a)(1), and 29 CFR part 541.

PSC objected to the application of the Order and regulations to employees who qualify for an exemption from the FLSA's minimum wage and overtime requirements, asserting that the Department had incorrectly interpreted the Order to include such workers. The Department disagrees with the commenter's reading of the Executive Order's text. Section 6(d)(ii) of the Order explains that the paid sick leave requirements apply to covered contracts on which employees' wages are governed by the DBA, SCA, and FLSA, "including employees who qualify for an exemption from its minimum wage and overtime provisions." 80 FR 54699. Consistent with the Department's interpretation of the analogous provision in the Minimum Wage Executive Order, this language is best understood to mean that employees exempt from FLSA requirements are among the categories of employees who, if they perform work on or in connection with any covered contract, are entitled to accrue and use paid sick leave.

EEAC expressed concern that application of the requirements of the

Executive Order and part 13 to employees who qualify for an exemption from the FLSA's minimum wage and overtime requirements would create a risk that the employee could no longer properly be treated as exempt under the FLSA. Specifically, the commenter worried that if a contractor tracks such an employee's hours worked for purposes of paid sick leave accrual or use or if a contractor deducts pay, even if for less than a full day, under a bona fide plan, policy, or practice of providing compensation for loss of salary that results from an absence for which the employee uses paid sick leave, those acts would call into question whether the employee still qualifies for the FLSA exemptions described in 29 CFR part 541. The Department has explained in its guidance regarding 29 CFR part 541, however, that "[c]ertain common payroll and recordkeeping practices do *not* bring into question whether someone is paid on a salary basis including, *e.g.,* taking deductions from an exempt employee's accrued leave accounts (regardless of whether to cover partial-day or full-day absences); requiring exempt employees to keep track of and/or record their hours worked; requiring exempt employees to work a specified schedule of hours; and implementing *bona fide,* across-the-board changes in schedules." FOH ¶ 22g02(e).

The Department also explained in the NPRM that it interpreted the Order's reference to employees whose wages are governed by the DBA to include laborers and mechanics who are covered by the DBA, including any individual who is employed on a DBA-covered contract and individually registered in a bona fide apprenticeship program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship. AGC asked that the Department exclude laborers and mechanics—*i.e.,* those workers who must receive prevailing wages pursuant to the DBA—from the paid sick leave requirements of the Order and part 13. Because section 6(d)(ii) of the Executive Order explicitly refers to employees whose wages are governed by the DBA, the Department does not believe it would be appropriate to accept the commenter's suggestion.

The Department also interpreted the language in section 6(d)(ii) of Executive Order 13706 and proposed § 13.3(a)(2) to extend coverage to employees performing work on or in connection with DBA-covered contracts for construction who are not laborers or mechanics but whose wages are governed by the FLSA as provided above, including those who qualify for an exemption from the FLSA's minimum wage and overtime provisions. Although such employees are not covered by the DBA itself because they are not "laborers and mechanics," 40 U.S.C. 3142(b), the NPRM noted that such individuals are employees performing work on or in connection with a contract subject to the Executive Order whose wages are governed by the FLSA, including those who qualify for an exemption from the FLSA's minimum wage and overtime provisions, and thus they are covered by section 6(d) of the Order. 80 FR 54699.

The NPRM further explained that this coverage extends to employees whose wages are governed by the FLSA, including those who qualify for an exemption from the FLSA's minimum wage and overtime provisions, who are working on or in connection with DBA-covered contracts regardless of whether such employees are physically present on the DBA-covered construction worksite. MCAA, ABC, and the National Electrical Contractors Association (NECA) all commented unfavorably on the application of coverage to employees who work away from the DBA "site of the work." These commenters are correct that DBA prevailing wages need only be paid to laborers and mechanics "employed or working upon the site of the work," 29 CFR 5.5(a)(1), a term that primarily refers to the "physical place or places where the building or work called for in the contract will remain," 29 CFR 5.2(k)(1)(1). The Executive Order applies, however, to DBA-covered contracts and to employees performing work on or in connection with such contracts, including employees whose wages are governed by the FLSA, such as employees who perform work away from the "site of the work." The Minimum Wage Executive Order rulemaking included the same coverage of employees away from the site of the work and similarly explained that the Order's text compelled that result. 79 FR 60658–59.

The Executive Order also refers to employees whose wages are governed by the SCA. The SCA provides that "service employees" directly engaged in providing specific services called for by the SCA-covered contract are entitled to SCA prevailing wage rates. 41 U.S.C. 6701(3), 6703; 29 CFR 4.152. The Department explained in the NPRM that these employees are covered by the plain language of section 6(d) of Executive Order 13706, and that it interpreted this category to include individuals who are employed on an SCA contract and individually registered in a bona fide apprenticeship program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship. The Department received no comments regarding this interpretation.

The NPRM also noted that under the SCA, "service employees" who do not perform the services required by an SCA-covered contract but whose duties are "necessary to performance of the contract" must be paid at least the FLSA minimum wage. 29 CFR 4.153; *see also* 41 U.S.C. 6704(a). The Department proposed to interpret the language in section 6(d)(ii) of Executive Order 13706 and proposed § 13.3(a)(2) to extend coverage to this category of employee. It offered as an example an accounting clerk who processes invoices and work orders on an SCA-covered contract for janitorial services; such an employee would likely not qualify as performing services required by the contract (and therefore would not be entitled to SCA prevailing wages), but the clerk would be entitled to at least the FLSA minimum wage. Therefore, the clerk would be covered by the Executive Order. The Department did not receive comments regarding this interpretation.

The Department further noted in the NPRM that some employees perform work on or in connection with SCA-covered contracts but are not "service employees" for purposes of the Act because that term does not include an individual employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in the FLSA regulations at 29 CFR part 541. 41 U.S.C. 6701(3)(C). The Department proposed to cover these employees under section 6(d)(ii) of the Executive Order. For example, a contractor could employ a manager who meets the test for the executive employee exemption under 29 U.S.C. 213(a)(1) and 29 CFR 541.100 to supervise janitors on an SCA-covered contract for cleaning services at a Federal building. Because that manager performs work on or in connection with a covered contract and qualifies for an exemption from the FLSA's minimum wage and overtime provisions, she would be entitled to paid sick leave as required by Executive Order 13706 and part 13. The Department did not receive comments specifically regarding this explanation, and because it is declining to adopt the suggestion of commenters who asked that part 13 not apply to employees who qualify for an exemption from the FLSA's minimum wage and overtime requirements, it also need not make any amendment to this discussion.

The NPRM included the interpretation that where State or local government employees are performing work on or in connection with covered contracts and their wages are governed by the SCA or the FLSA, including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions, such employees are entitled to the protections of the Executive Order and part 13. The Department received no comments on this issue and reiterates its position here. As noted in the NPRM, the DBA does not apply to construction performed by State or local government employees.

The Department received additional comments addressing the scope of coverage of employees. The U.S. Small Business Administration's Office of Advocacy (SBA Advocacy) asked whether employees who are part-time, seasonal, immigration visa holders, or students are covered by the Order and part 13. If those employees perform work on or in connection with covered contracts and their wages are governed by the DBA, SCA, or FLSA, including if they qualify for an exemption from the FLSA's minimum wage and overtime requirements, then they would be covered and entitled to paid sick leave as required by the Order and part 13. The ability of part-time and seasonal workers to accrue and use paid sick leave would be limited, but not eliminated, by their shorter work schedules. No special rules apply to non-citizens or students for purposes of this rulemaking. The U.S. Women's Chamber of Commerce asked that the paid sick leave requirements be extended to all private-sector employees. Although the Department appreciates that many workers do not have and would benefit from paid sick time, its authority to require employers to provide this benefit extends only to employees working on or in connection with contracts covered by the Executive Order.

On or In Connection With

As proposed, the paid sick leave requirements of Executive Order 13706 and part 13 apply to employees performing work "on or in connection with" covered contracts. As it had in the Minimum Wage Executive Order rulemaking, *see* 79 FR 60671–72, the Department proposed to interpret these terms in a manner consistent with SCA regulations, *see, e.g.,* 29 CFR 4.150–4.155. In the Final Rule, the Department reiterates these interpretations, which it is including in the definition of *employee* in § 13.2 for purposes of clarity.

Specifically, the Department explained in the NPRM that employees performing "on" a covered contract are those employees directly performing the specific services called for by the contract, and whether an employee is performing "on" a covered contract would be determined, as explained in the Minimum Wage Executive Order Final Rule, 79 FR 60660, in part by the scope of work or a similar statement set forth in the covered contract that identifies the work (*e.g.,* the services or construction) to be performed under the contract. Under this approach, all laborers and mechanics engaged in the construction of a public building or public work on the site of the work will be regarded as performing "on" a DBA-covered contract, and all service employees performing the specific services called for by an SCA-covered contract will also be regarded as performing "on" a contract covered by the Executive Order. In other words, any employee who is entitled to be paid DBA or SCA prevailing wages would necessarily be performing "on" a covered contract. For purposes of concessions contracts and contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public that are not covered by the SCA, the Department would regard any employee performing the specific services called for by the contract as performing "on" the covered contract.

The Department further noted in the NPRM that it would consider an employee performing "in connection with" a covered contract to be any employee who is performing work activities that are necessary to the performance of a covered contract but who is not directly engaged in performing the specific services called for by the contract itself. For example, any employees who are not DBA-covered laborers or mechanics but whose services are necessary to the performance of the DBA contract, such as employees who do not directly perform the construction identified in the DBA contract either due to the nature of their non-physical duties and/or because they are not present on the site of the work, would necessarily be performing "in connection with" a covered contract. This standard, also articulated in the Minimum Wage Executive Order rulemaking, was derived from SCA regulations. *See* 79 FR 60659 (citing 29 CFR 4.150–4.155).

Several commenters addressed this topic. The Small Business Legislative Council (SBLC) and Vigilant suggested that the Department not cover employees working "in connection with" a covered contract, instead limiting coverage to those employees working "on" covered contracts. The Department has considered these comments but is not accepting the commenters' suggestion for several reasons. First, the Executive Order's purpose is best fulfilled by extending its coverage to a broader set of employees whose work contributes to fulfillment of Federal contracts than only those who are directly engaged in performing the specific services called for by a covered contract. Furthermore, section 6(d) provides that an employee whose wages are governed by the FLSA, including an employee who qualifies for an exemption from the FLSA's minimum wage and overtime provisions, is covered regardless of which type of covered contract the employee's work is performed under—and the employees whose wages are governed by the FLSA under an SCA-covered contract are those who work "in connection with" such contracts. Finally, the coverage of employees working "in connection with" covered contracts is consistent with the Department's interpretation in the Minimum Wage Executive Order rulemaking. 79 FR 60659–60. SBLC, the American Benefits Council, Chamber/IFA, and the National Association of Manufacturers (NAM) all asked that the Department explain in greater detail which employees would be considered to work "in connection with" covered contracts. Specifically, some of these commenters wanted to know whether a human resources professional involved in the process of recruiting, interviewing, and/or hiring employees who perform on covered contracts would be included. Because finding employees to perform the work of a contract is necessary to the performance of the contract, such an employee would be working "in connection with" the contract for which he was performing such services and, if employed by the contractor, would be entitled to paid sick leave unless the exception described below applies. Similarly, an administrative assistant to an employee who manages the work of a contract could be working "in connection with" that contract depending on his duties. For example, if the assistant orders supplies the manager determines her subordinates need to complete the project, such tasks would be "in connection with" the contract because they are necessary to the performance of the contract; on the other hand, if the assistant schedules the manager's meetings regarding private contracts or orders supplies to be used in the completion of private contracts, that work would not be "in connection with" the contract.

MCAA requested clarification of whether a construction contractor's off-site fabrication shop employees would be regarded as performing work "in connection with" a covered contract. Such employees would be performing work "in connection with" a covered contract to the extent their services are necessary to the performance of the contract. Methods of calculating or estimating the portion of such employees' hours worked in connection with covered contracts is discussed below, particularly in the discussion of § 13.5(a)(1)(i). As MCAA notes, however, employees performing under contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government that are subject to the Walsh-Healey Public Contracts Act, 41 U.S.C. 6501 *et seq.*, would not be covered by the Executive Order or part 13 because such contracts are not one of the four types of covered contracts under the Executive Order.

The Department notes that it has included in this Final Rule, as it did in the Minimum Wage Executive Order rulemaking, an exception from coverage for employees who spend a minimal amount of time—less than 20 percent in a workweek—working in connection with covered contracts. (Comments regarding that exclusion, which appears in § 13.4(e), are addressed in the discussion of it below.) In other words, the exclusion would apply to an employee who spends only minimal amounts of time performing tasks necessary to the performance of covered contracts—such as if the human resources professional described above interviews two people to work on a covered contract during a workweek in which he interviews 20 people for jobs on a private contract, or if the assistant places a single order for supplies in a workweek in which he spends the remainder of his worktime performing duties related to private contracts. In addition, this analysis occurs on a workweek-by-workweek basis, so if the human resources professional spends most of his time for 2 weeks hiring workers for a covered contract and then the contractor for which he works takes on no new covered contract for 6 months, the contractor would only have to permit him to accrue paid sick leave for those 2 weeks. If at some point during the 6 months, one employee on the covered contract quit and the human resources professional spent 2 hours of his 40-hour workweek sorting through resumes to find a potential replacement, although he performed work in connection with a covered contract, the 20 percent exclusion would apply and he would not need to be permitted to accrue paid sick leave during that workweek.

The Department noted in the NPRM and reiterates here that the Order does not extend to employees who are not engaged in working on or in connection with a covered contract. For example, a technician who is hired to repair a DBA contractor's electronic time system or a janitor who is hired to clean the bathrooms at the DBA contractor's company headquarters are not covered by the Order because they are not performing the specific duties called for by the contract or other services or work necessary to the performance of the contract. Similarly, the Executive Order would not apply to a landscaper at the home office of an SCA contractor because that employee is not performing the specific duties called for by the SCA contract or other services or work necessary to the performance of the contract. And the Executive Order would not apply to an employee hired by a covered concessionaire to redesign the storefront sign for a snack shop in a National Park unless the redesign of the sign was called for by the concessions contract itself or otherwise necessary to the performance of the contract.

The Department noted in the NPRM and repeats here that because the Order and part 13 do not apply to employees of Federal contractors who do no work on or in connection with a covered contract, a contractor could be required to provide paid sick leave to some of its employees but not others; in other words, it is not the case that because a contractor has one or more Federal contracts, all of its employees or projects are covered.

Geographic Scope

Proposed § 13.3(c), which was identical to 29 CFR 10.3(c) as promulgated in the Minimum Wage Executive Order Final Rule, *see* 79 FR 60723, provided that Executive Order 13706 and part 13 would only apply to contracts with the Federal Government requiring performance in whole or in part within the United States. This interpretation was reflected in the Department's proposed definition of the term *United States,* which provided that when used in a geographic sense, the *United States* means the 50 States and the District of Columbia. The Department received no comments on this issue.

Accordingly, the requirements of the Order and part 13 do not apply to contracts with the Federal Government to be performed in their entirety outside the geographical limits of the United States as thus defined. If a contract with the Federal Government is to be performed in part within and in part outside these geographical limits and is otherwise covered by the Executive Order and part 13, however, the requirements of the Order and part 13 would apply with respect to that part of the contract that is performed within the United States, *i.e.,* employees would accrue paid sick leave based on their hours worked on or in connection with covered contracts within the United States, and would likewise be entitled to use accrued paid sick leave while performing work on or in connection with a covered contract within the United States.

As noted in the NPRM, as with other instances described below in which employees perform some work covered by the Executive Order and part 13 and other work that is not, or if some employees working on or in connection with a covered contract do so in the United States and others do so outside the United States, a contractor wishing to comply with the Order's paid sick leave requirements as to only some employees on a contract or only some of an employee's hours worked must keep records adequately segregating non-covered work from covered work. If a contractor does not make and maintain such records, in the absence of other proof regarding the nature or location of the work, all of the employees' hours worked and/or all of the employees working on or in connection with the covered contract will be presumed to be covered by the Order and part 13.

Section 13.4 Exclusions

Proposed § 13.4 set forth exclusions from the Executive Order's requirements, including by implementing the exclusions set forth in section 6(f) of the Order and creating other limited exclusions from coverage as authorized by section 3(a) of the Executive Order. *See* 80 FR 54698, 54700. Specifically, proposed § 13.4(a) through (d) described the limited categories of contractual arrangements with the Federal Government for services or construction excluded from the paid sick leave requirements of the Executive Order and part 13, and proposed § 13.4(e) established a narrow category of employees that are excluded from coverage of the Order and part 13. For the reasons explained below, the

Department adopts these provisions as proposed and adds a new, temporary exclusion for a particular category of employees.

Proposed § 13.4(a) implemented the statement in section 6(f) of Executive Order 13706 that the Order does not apply to "grants." 80 FR 54700. As it did in the Minimum Wage Executive Order rulemaking, *see* 79 FR 60665–66, the Department interpreted this provision to mean that the paid sick leave requirements of the Executive Order and part 13 do not apply to grants as that term is used in the Federal Grant and Cooperative Agreement Act, 31 U.S.C. 6301 *et seq.* That statute defines a "grant agreement" as "the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when—(1) the principal purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and (2) substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement." 31 U.S.C. 6304. Section 2.101 of the FAR similarly excludes "grants," as defined in the Federal Grant and Cooperative Agreement Act, from its coverage of contracts. 48 CFR 2.101.

Several appellate courts have also adopted this construction of "grants" in defining the term for purposes of other Federal statutory schemes. *See, e.g., Chem. Service, Inc.* v. *Environmental Monitoring Systems Laboratory,* 12 F.3d 1256, 1258 (3rd Cir. 1993) (applying same definition of "grants" for purposes of 15 U.S.C. 3710a); *East Arkansas Legal Services* v. *Legal Services Corp.,* 742 F.2d 1472, 1478 (D.C. Cir. 1984) (applying same definition of "grants" in interpreting 42 U.S.C. 2996a). Under the proposed provision, if a contract qualified as a grant within the meaning of the Federal Grant and Cooperative Agreement Act, it would be excluded from coverage of Executive Order 13706 and part 13. No commenter requested a change to this provision, and it is adopted as proposed.

Proposed § 13.4(b) implemented the other exclusion set forth in section 6(f) of Executive Order 13706, which states that the Order does not apply to "contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act (Pub. L. 93–638), as amended." 80 FR 54700. The proposed provision was identical to 29 CFR 10.4(b) as promulgated by the Minimum Wage Executive Order. *See* 79 FR 60723. Elk Valley Rancheria asked that the Department expand this provision to exclude from the Order and part 13's coverage all contracts, agreements, and grants with Indian tribes. Because this provision was based on language included in the Executive Order that excludes only a subset of contracts and agreements with Indian Tribes and because expanding the exemption would not advance the Order's goal of ensuring that employees working on or in connection with other types of covered contracts have access to paid sick leave, the Department adopts § 13.4(b) as proposed.

Proposed § 13.4(c) provided that any procurement contracts for construction that are not subject to the DBA are excluded from coverage of the Executive Order and part 13. The proposed provision was identical to 29 CFR 10.4(c) as promulgated by the Minimum Wage Executive Order Final Rule. *See* 79 FR 60723. The Department proposed to make coverage of construction contracts under the Executive Order and part 13 consistent with coverage under the DBA in order to assist all interested parties in understanding their rights and obligations under Executive Order 13706. The Department received no comments addressing this provision and adopts it as proposed.

Similarly, proposed § 13.4(d) incorporated the SCA's exemption of certain service contracts into the exclusionary provisions of the Executive Order. The proposed provision excluded from coverage of the Executive Order and part 13 any contracts for services, except for those expressly covered by § 13.3(a)(1)(iii) or (iv), that are exempted from coverage under the SCA, pursuant to its statutory language at 41 U.S.C. 6702(b) or its implementing regulations, including those at 29 CFR 4.115 through 4.122 and 29 CFR 4.123(d) and (e). The Department's proposal noted that this exemption would not apply if the relevant service contract is expressly included within the Executive Order's coverage by § 13.3(a)(1)(iii) or (iv). For example, certain types of concessions contracts are excluded from SCA coverage pursuant to 29 CFR 4.133(b) but are explicitly covered by section 6(d)(i)(C) of the Executive Order and part 13 under § 13.3(a)(1)(iii). Based on the Department's decision with regard to the Order's coverage of service contracts described above, the Department is adopting this provision as proposed.

Several commenters asked that the Department add additional exclusions for certain types of contracts or contractors. The America Outdoors Association and River Riders asked that the Department exclude businesses that receive two-thirds of their revenues over 6 months of the year (and one-third over the remaining 6 months) and/or businesses whose employees work less than 4 or 6 months per year. These commenters asserted that it would be difficult to document the hours of employees who work in wilderness settings and that the costs of compliance with the Executive Order would be particularly high for seasonal businesses. River & Trail Outfitters also asked that the Department create exemptions for seasonal recreational businesses. After considering these comments, the Department has decided not to grant these requests. No such exemption was included in the Minimum Wage Executive Order rulemaking, and the intent of Executive Order 13706 is best fulfilled by extending its coverage broadly. The Department also notes that the burdens of the Executive Order and part 13 on these contractors will be limited because to the extent employees of these businesses must be paid according to the FLSA or SCA, these contractors are already required to keep records of the employees' hours worked, and to the extent they are exempt from the FLSA's minimum wage and overtime requirements pursuant to 29 U.S.C. 213(a)(3), 29 U.S.C. 213(b)(29), or any other FLSA provision, these contractors may avoid the burden of tracking hours worked by using the approximation permitted by § 13.5(a)(1)(iii).

Koga Engineering and Construction, Royal Contracting Company, and the General Contractors Association of Hawaii requested that the Department exempt employers with 50 or fewer employees from the requirements of the Order and part 13, asserting that smaller contractors will not be able to afford the new systems necessary to segregate time employees work on DBA-covered contracts from other contracts. Although the Department is sensitive to the concerns of small businesses, it believes it is most appropriate not to grant this request. Under this rulemaking, prime contracts that do not meet the SCA, DBA, or 41 U.S.C. 1902(a) thresholds are excluded from coverage pursuant to a provision in the Executive Order itself, and the size of the contractor is not relevant to coverage. Furthermore, although the Department understands that small employers may not be able to afford expensive systems, the

Department believes employers can use less expensive means for tracking time, just as smaller contractors may use such means to comply with the SCA, DBA, and FLSA.

Delta Air Lines (Delta) urged the Department to include an express exception for contracts with air carriers, asserting that application of the Order would be complicated in the airline industry and noting that its employees already receive paid sick leave. As Airlines for America (A4A) noted in its comment, many contracts with air carriers are already outside of the scope of the Order's coverage because they are exempted from the SCA by regulation. And to the extent some such contracts are covered, airlines' existing paid sick time policies may satisfy the requirements of the Order or airline employees may perform a sufficiently small amount of work in connection with such contracts that the exemption created by § 13.4(e) applies. For these reasons, the Department is not exempting air carriers from the Order and part 13.

The Association of American Railroads (AAR) similarly asked the Department to exempt contracts with entities that are employers for purposes of the Railroad Unemployment Insurance Act, 45 U.S.C. 351 *et seq.*, from the Executive Order's requirements, noting that most contracts for rail services are SCA-exempt and asserting that it would be extremely difficult to segregate time railroad employees spend working on covered and non-covered contracts. For reasons analogous to those described with respect to the airline industry—many contracts are already excluded from the Order's coverage and some employees already receive paid sick time or would not be entitled to paid sick leave, and the Department is not persuaded that application of the Order is inappropriate in other circumstances—the Department has decided not to adopt this suggestion.

An individual commenter, Anthony Pannone, contended that the Department should interpret the Executive Order to apply only to contracts under which the contractor receives payment from the Federal Government, and that the Department therefore should exempt contractors that pay rent to, rather than receive appropriated funds from, the Federal Government. The Department declines to adopt this proposed exemption because it is inconsistent with section 6(d) of the Executive Order, which makes clear that the Executive Order applies to contracts that do not involve the payment of appropriated funds, including nonprocurement contracts covered by the SCA and contracts for concessions. Moreover, no such exemption was included in the Minimum Wage Executive Order rulemaking, and the intent of Executive Order 13706 is best fulfilled by extending its coverage broadly.

Vigilant sought clarification regarding whether the Department intended to cover a contract for the sale of timber by the Federal Government, the principal purpose of which is the harvesting and purchase of timber by the contractor but which also includes such incidental activities as building roads to access the timber, gathering debris for later burning or removal, and replanting the harvested areas. Application of the paid sick leave requirements to such a contract will depend, as it does for all other contracts, upon whether they are covered contracts under the Order and part 13—that is, whether they are one of the four types of contracts described in § 13.3(a)(1). To the extent such a contract is subject to the SCA or the DBA, it would be covered under Executive Order 13706. The Department also notes, however, that "[s]o-called timber sales contracts generally are not subject to the [SCA] because normally the services provided under such contracts are incidental to the principal purpose of the contracts." 29 CFR 4.131(f) (citations omitted); *see also Am. Fed'n of Labor & Cong. of Indus. Organizations* v. *Donovan,* 757 F.2d 330, 345–56 (D.C. Cir. 1985) (citing 48 FR 49736, 49751–52 (1983)).

The NPRM also addressed exemptions for categories of employees rather than contracts. Specifically, proposed § 13.4(e) provided that the accrual requirements of part 13 do not apply to employees performing work in connection with covered contracts, *i.e.,* those employees who perform work duties necessary to the performance of the contract but who are not directly engaged in performing the specific work called for by the contract, who spend less than 20 percent of their hours worked in a particular workweek performing work in connection with such contracts. It further provided that this exclusion is inapplicable to employees performing work on covered contracts, *i.e.,* those employees directly engaged in performing the specific work called for by the contract, at any point during the workweek. Finally, it explained that this exclusion is also inapplicable to employees performing work in connection with covered contracts with respect to any workweek in which the employees spend 20 percent or more of their hours worked performing work in connection with a covered contract.

This proposed provision adopted language included in the Minimum Wage Executive Order Final Rule in response to comments expressing concern about new burdens on contractors associated with employees who spend an insubstantial amount of time performing work in connection with covered contracts (in particular, DBA-covered contractors that did not previously segregate hours worked by FLSA-covered employees, including those who were not present on the site of the construction work). 79 FR 60659, 60724 (codified at 29 CFR 10.4(f)). The Department explained in that rulemaking that it expected the exclusion to significantly mitigate the recordkeeping concerns identified by commenters without substantially affecting the Executive Order's economy and efficiency interests, and noted that it has used a 20 percent threshold for other purposes in the SCA and DBA contexts. 79 FR 60660 (citing 29 CFR 4.123(e)(2); FOH ¶¶ 15e06, 15e10(b), 15e16(c), and 15e19).

SBLC asked that the Department modify the § 13.4(e) exclusion to apply to employees performing work in connection with covered contracts who spend less than 50, rather than 20, percent of their hours worked in a particular workweek performing work in connection with such contracts. The Department has decided not to adopt this suggestion. This exclusion was intended to relieve contractors from potential burden without depriving employees who would otherwise be entitled to accrue and use meaningful amounts of paid sick leave—as would be the case for employees who spend a significant portion of their work time performing covered work—of that benefit. Finally, as noted, this provision is based on an exclusion included in the Minimum Wage Executive Order Final Rule, and the Department believes it would cause confusion to have different tolerances in these otherwise identical provisions that will be applied to many of the same employees. Accordingly, the Department adopts the provision as proposed and reiterates the discussion in the NPRM regarding how the provision will operate.

As explained in the NPRM, like the exclusion created for purposes of the Minimum Wage Executive Order rulemaking, 79 FR 60659–62, this exclusion will not apply to any employee performing "on," rather than "in connection with," a covered contract at any point during the workweek. If an employee spends any time performing work on a covered contract in a workweek and that employee's wages are governed by the DBA, SCA, or FLSA, including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions, the employee will be entitled to accrue and use paid sick leave pursuant to the Executive Order as to all time performing work on or in connection with covered contracts in that workweek. For an employee solely performing "in connection with" a covered contract, however, the Executive Order's paid sick leave accrual requirements will only apply if that employee spends 20 percent or more of her hours worked in a given workweek in connection with covered contracts. Therefore, in order to apply this exclusion correctly, contractors must accurately distinguish between employees performing "on" a covered contract and those employees performing "in connection with" a covered contract. As explained above, employees directly performing the specific services called for by the contract are performing work "on" a covered contract. This category includes any employee who is entitled to be paid DBA or SCA prevailing wages, regardless of whether such covered work constitutes less than 20 percent of the employee's overall hours worked in a particular workweek.

This exclusion could apply, however, to any employees who are not directly engaged in performing the specific construction identified in a DBA contract (*i.e.,* they are not DBA-covered laborers or mechanics) but whose services are necessary to the performance of the DBA contract, such as employees who do not directly perform the construction identified in the DBA contract either due to the nature of their non-physical duties and/or because they are not present on the site of the work, but whose duties would be regarded as essential for the performance of the contract. For example, § 13.4(e) could apply to a security guard patrolling or monitoring a construction worksite where DBA-covered work is being performed or a clerk who processes the payroll for DBA contracts (either on or off the site of the work). If the security guard or clerk also performed the duties of a DBA-covered laborer or mechanic (for example, by painting or moving construction materials), however, the exclusion would not apply to any hours worked on or in connection with the contract in that workweek because that employee performed "on" the covered contract at some point in the workweek.

Similarly, any employees performing work in connection with an SCA contract who are not entitled to SCA prevailing wages but are, because they perform work "in connection with" an SCA-covered contract, entitled to at least the FLSA minimum wage could fall within the scope of the exclusion provided their work falls below the 20 percent threshold. For example, the exclusion could apply to an accounting clerk who processes a few invoices for SCA contracts out of hundreds of other invoices for non-covered contracts during the workweek or a human resources employee who assists for short periods of time in the hiring of the employees performing work on the SCA-covered contract in addition to the hiring of employees on other non-covered projects.

With respect to concessions contracts and contracts in connection with Federal property or lands and related to offering services, the § 13.4(e) exclusion could apply to any employees performing work in connection with such contracts who are not at any time directly engaged in performing the specific services identified in the contract but whose services or work duties are necessary to the performance of the covered contract. One example of an employee who could qualify for this exclusion is a clerk who handles the payroll for a child care center that leases space in a Federal building as well as the center's other locations that are not covered by the Executive Order and thus does not spend 20 percent or more of his time handling payroll for the child care center in the Federal building.

Importantly, as noted in the NPRM and the Minimum Wage Executive Order rulemaking, 79 FR 60661–62, a contractor seeking to rely on this exclusion must correctly determine the hours worked, make and maintain records (or have other affirmative proof) that the employee did not work "on" a covered contract, and appropriately segregate the hours worked by the employee in connection with the covered contract from other work not subject to the Executive Order. A contractor may apply this exception on the basis of an estimate of the employee's work time in connection with covered contracts, as discussed in more detail with respect to the final text of § 13.5(a)(1)(i), but in that case, the estimate must be reasonable and based on verifiable information. In the absence of records or other proof demonstrating that an employee did not work "on" a covered contract and adequately segregating non-covered work from the work performed in connection with a covered contract (or proof that the estimate of the employee's work time in connection with covered contracts is reasonable and based on verifiable information), the exclusion will not apply, and employees who work in connection with a covered contract will be presumed to have spent all work time performing such work throughout the workweek.

The quantum of affirmative proof necessary to support reliance on the exclusion will vary with the circumstances. For example, it may require considerably less affirmative proof to satisfy the § 13.4(e) exclusion with respect to an accounting clerk who only occasionally processes an SCA-contract-related invoice than would be necessary to establish the exclusion with respect to a security guard who works on a DBA-covered site for at least several hours each week.

Finally, as noted in the discussion of this exclusion in the NPRM, in calculating hours worked by a particular employee in connection with covered contracts for purposes of determining whether this exclusion may apply, contractors must determine the aggregate amount of hours worked on or in connection with covered contracts in a given workweek by that employee. For example, if an administrative assistant works for a single employer 40 hours per week and spends 2 hours each week handling payroll for each of four separate SCA contracts, the 8 hours that the employee spends performing work in connection with the four covered contracts must be aggregated for each workweek in order to determine whether the exclusion applies. In this case, the exclusion would not apply because the employee's hours worked in connection with the SCA contracts constitute 20 percent of her total hours worked for that workweek. As a result, the 8 hours that the employee spends performing work in connection with the four covered contracts each workweek would count toward the accrual of paid sick leave.

The Department also received several requests regarding the application of Executive Order 13706 and part 13 to employees performing work on or in connection with covered contracts whose conditions of employment are governed by a CBA. Seyfarth Shaw suggested exempting a contract from the Executive Order's requirements if a CBA applies to the work performed under the contract; the American Benefits Council and the Chamber/IFA suggested exempting a contract from the Executive Order's requirements if a CBA that provides for at least 7 days of paid sick time applies to the work performed under the contract; the AFL–CIO as well as the Chamber/IFA suggested exempting a contract from the Executive Order's requirements if a CBA applies to the work performed under the contract until after the current CBA expires, so that negotiations taking the Executive Order into account can occur; and Seyfarth Shaw offered as an alternative exempting a contract from the Executive Order's requirements if a CBA that explicitly waives the rights in the Executive Order applies to the work performed under the contract. Other commenters, such as the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) and MCAA, also suggested exempting contracts to which CBAs apply, but only with respect to narrower sets of construction contracts.

After careful consideration of these comments, the Department has included a new, temporary exclusion from the requirements of the Order and part 13 for employees whose work is governed by certain CBAs. Specifically, the new provision, § 13.4(f), provides that if a CBA ratified before September 30, 2016 applies to an employee's work performed on or in connection with a covered contract and provides the employee with at least 56 hours (or 7 days) of paid sick time (or paid time off that may be used, among other purposes, for reasons related to sickness or health care) each year, the requirements of the Executive Order and part 13 do not apply to the employee until the earlier of the date the agreement terminates or January 1, 2020. This provision balances the importance of ensuring that the Executive Order applies to all employees entitled to its benefits promptly against the complications that could arise where an existing CBA provides for paid sick time in a manner that is similar to, but not sufficient to meet the requirements of, the paid sick leave provisions of part 13. These complications are significant in circumstances involving CBAs because the agreement will limit a contractor's ability to unilaterally change the terms of the leave it requires to be provided. Similarly, the new § 13.4(f) provides that if a CBA ratified before September 30, 2016 applies to an employee's work performed on or in connection with a covered contract and provides the employee with paid sick time (or paid time off that may be used, among other purposes, for reasons related to sickness or health care) each year, but the amount provided under the CBA is less than 56 hours (or 7 days, if the CBA refers to days rather than hours), the contractor must provide covered employees with the difference between 56 hours (or 7 days) and the amount provided under the existing CBA. For example, if a CBA ratified before September 30, 2016 applies to an employee's work performed on or in connection with a covered contract and provides the employee with 20 hours of paid sick time each year, the contractor, in order to avail itself of the § 13.4(f) exemption, would be required under this Final Rule to allow the employee to accrue and use an additional 36 hours of paid sick time in that year, for a total of 56 hours. A contractor must provide such "top up" leave in a manner consistent with either the provisions of the Executive Order and part 13 or the terms and conditions of its CBA. If a CBA does not provide any paid sick time (or paid time off that could be used for an unlimited or broader range of reasons than paid sick time, but including reasons related to being sick or seeking health care), a contractor will be responsible for full compliance with the Order and part 13 pursuant to the effective date of this rule and the definition of a "new contract."

This temporary exclusion applies to employees rather than contracts because on any covered contract, some employees' work might be governed by a CBA while others' work is not. For example, laborers and mechanics working on a DBA contract might be members of a union that has negotiated a CBA with the contractor, but the administrative staff performing work in connection with the contract might not be covered by the CBA. Or a CBA could apply to janitors working on an SCA contract but not their supervisor. As to employees to whom a CBA does not apply, a contractor must provide access to paid sick leave without reliance on this exception.

In addition, the temporary exclusion applies to any paid sick time policy or other paid time off policy under a CBA that allows employees to take leave for reasons related to sickness or health care. Such policies need not permit employees to be absent for all of the reasons required under § 13.5(c)(1); for example, if a paid sick time policy under a CBA allowed an employee to use leave if she is sick but not to care for family members, or if a paid sick time policy does not permit leave for reasons related to domestic violence, sexual assault, or stalking other than seeking health care, the exclusion can still apply. Adjustments to the reasons for which an employee may use paid leave are among those changes that a contractor that is party to a CBA might be unable to make unilaterally.

Finally, the Department notes it has included a date—January 1, 2020—by which all contractors taking advantage of this limited exception must come into compliance with the paid sick leave requirements regardless of whether an applicable CBA has yet terminated. The Department believes delaying the application of the Executive Order by more than 3 years after the effective date of this rulemaking, which could occur if a CBA with an extended term is in place, is inappropriate, and parties to the CBA will have 3 full years to take any actions necessary to prepare for compliance.

SHRM/CUPA–HR also asked in their comment for a different exception for certain employees. They requested that the Department exclude graduate research assistants, *i.e.,* students who perform research under grants or contracts as part of the pursuit of an advanced degree, from the requirements of the Order and part 13, asserting that it would be problematic to cover these workers because it would be difficult to segregate their covered and non-covered hours worked. The Department does not believe a provision specific to graduate research assistants is necessary or appropriate in this context. Application of the paid sick leave requirements to such assistants will depend, as it does for all other workers, upon whether they meet the definition of employee under part 13—that is, whether their wages are governed by the SCA, DBA, or FLSA, including if they qualify for an exemption from the FLSA's minimum wage and overtime requirements—and are performing work on or in connection with a covered contract. Graduate research assistants, whether or not they qualify as employees as defined for purposes of the Order, may often perform work on or in connection with Federal grants that are excluded from the Order's coverage. To the extent such assistants' work is covered by the Order and part 13 and therefore the commenters' concern about segregating time is relevant, the Department notes that it has created additional flexibility for contractors who would have difficulty segregating the covered and non-covered hours worked of employees who perform work in connection with covered contracts, as described in the discussion of § 13.5(a)(1) below.

The Department noted in the NPRM that the Minimum Wage Executive Order rulemaking contained additional exclusions for certain categories of employees that were not replicated in the proposed rule. Specifically, under the Minimum Wage Executive Order regulations, employees whose wages are not governed by section 206(a)(1) of the

FLSA because of the applicability of exemptions under section 213(a) are not entitled to the protections of Executive Order 13658. 29 CFR 10.4(e)(3). For the reasons explained in the discussion of coverage of employees above, no such exclusion exists in this rulemaking. Additionally, the Minimum Wage Executive Order does not apply to employees whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a) or (b), 29 CFR 10.4(e)(1), (2), but the Department did not propose to incorporate an exclusion for any such employees in the proposed rule under this Order. The NPRM explained that because it interpreted Executive Order 13706 to be intended to apply to a broad range of employees, the Order explicitly applies to employees whose wages are governed by the FLSA, and the Order (unlike the Minimum Wage Executive Order) contains no reference to any category of employees whose wages are calculated pursuant to special certificates, it proposed to interpret Executive Order 13706 to apply to all employees whose wages are calculated pursuant to special certificates under section 14 of the FLSA. No commenter asked that the Department exclude employees whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a) or (b), and therefore no such provision is adopted.

Section 13.5 Paid Sick Leave for Federal Contractors and Subcontractors

Proposed § 13.5 implemented section 2 of Executive Order 13706 by setting forth rules and restrictions regarding the accrual and use of paid sick leave. It is adopted in significant part as proposed but with modifications in response to comments as described below.

Proposed § 13.5(a) addressed the accrual of paid sick leave. First, proposed § 13.5(a)(1) implemented section 2(a) of Executive Order 13706, 80 FR 54697, by providing that a contractor shall permit an employee to accrue not less than 1 hour of paid sick leave for every 30 hours worked on or in connection with a covered contract. It further provided that a contractor shall aggregate an employee's hours worked on or in connection with all covered contracts for that contractor for purposes of paid sick leave accrual. As the NPRM explained, under this approach, if, for example, a subcontractor that installs windows in building construction projects sends a single employee to three separate DBA-covered projects, all the time the employee spends on all worksites—whether during the same or different pay periods—for the subcontractor must be added together to determine how much paid sick leave the employee has accrued. If in one pay period the employee spent 20 hours at Site A and 10 hours at Site B, she would have accrued 1 hour of paid sick leave at the end of that pay period; if in the next pay period the employee spent 30 hours at Site C, she would then have a total accrual of 2 hours of paid sick leave. As for an employee who falls within the § 13.4(e) exclusion in some workweeks but not others, only the employee's hours worked on or in connection with covered contracts during workweeks in which the exclusion does not apply would count toward accrual of paid sick leave. The Department received no comments regarding these portions of § 13.5(a)(1) and adopts them as proposed.

Proposed § 13.5(a)(1)(i) explained that for purposes of Executive Order 13706 and part 13, "hours worked" would include all time for which an employee is or should be paid, meaning time an employee spends working or in paid time off status, including time when the employee is using paid sick leave or any other paid time off provided by the contractor. The proposed definition was different from the use of the term "hours worked" in other contexts and was to apply only for purposes of the Executive Order. It included (but was broader than) all time considered "hours worked" for purposes of the SCA and the FLSA, *i.e.,* all time an employee is suffered or permitted to work. 29 CFR 4.178; 29 CFR 785.11.

The Department explained that its proposed interpretation of "hours worked" under Executive Order 13706 to additionally include paid time off, although distinct from the FLSA and SCA definitions of the term, was analogous to the accrual of vacation leave under the SCA, where absences from work (with or without pay) generally count toward satisfaction of length of service requirements for vacation benefits. 29 CFR 4.173(b)(1). It was also consistent with the OPM regulation regarding leave accrual by federal employees, which provides that an employee accrues leave each pay period based on time she is "in a pay status." 5 CFR 630.202(a). The Department's proposed interpretation reflected its view that basing paid sick leave accrual on all time an employee is in pay status, rather than merely on when the employee is suffered or permitted to work, would be administratively easier (or no more difficult) for contractors to implement. The Department further noted in the NPRM that this interpretation generally would have minimal impact on the rate of an employee's accrual of paid sick leave and, with respect to many employees who work at least full time (or potentially even less) each week on or in connection with covered contracts, would have no impact on the total amount of paid sick leave accrued per year because such employees will reach the maximum 56 hours within each accrual year regardless of whether paid time off is included.

Many commenters, including the National Partnership, CAP Women's Initiative, NELP, NETWORK Lobby for Catholic Social Justice (NETWORK), Women Employed, and the AFL–CIO expressed support for the NPRM's definition of hours worked. But other commenters opposed it: Koga Engineering and Construction, Royal Contracting Company, Master Sheet Metal, Inc., the General Contractors Association of Hawaii, and Vigilant wrote that it is a basic premise of accruing leave that workers earn time off by working, EEAC believed it would be appropriate for "hours worked" to have the same meaning for purposes of this rulemaking as it does in the FMLA context; the SBLC believed the proposed definition would discourage employers from having generous time off policies; and the American Benefits Council, Seyfarth Shaw, and the Chamber/IFA commented that the proposed definition would be confusing to administer because it differs from State and local paid sick time laws.

After considering the input received from commenters, the Department has decided to change the definition of hours worked such that it does not include paid time off. Instead, the term "hours worked" will have the same meaning for purposes of Executive Order 13706 and part 13 as it does under the Fair Labor Standards Act, as described in 29 CFR part 785. The Department anticipates that this change will make administration of paid sick leave easier for those contractors who are familiar with this definition under other statutes and/or already apply it for purposes of complying with a State or local paid sick time law. Any contractor that prefers to calculate its employees' paid sick leave accrual based on hours worked and hours spent in paid time off status is permitted, though not required, to do so.

As it did in the NPRM, the Department reiterates that a contractor would only be required to count hours worked on or in connection with a covered contract, rather than hours worked on or in connection with a non-covered contract, toward paid sick leave accrual. For example, if an employee works on an SCA-covered contract for security services for 30 hours each pay period and works for the same contractor on a private contract for security services for an additional 30 hours each pay period, the contractor would only be required to allow that employee to accrue 1, rather than 2, hours of paid sick leave each pay period. Similarly, if an employee works for one contractor on a DBA-covered contract for construction for 2 months and then on a private contract for construction for 2 months, the contractor would only be required to allow the employee to accrue paid sick leave during the first 2 months. But the Department proposed to require contractors who wish to distinguish covered and non-covered hours worked for purposes of paid sick leave accrual to keep records that clearly reflect that distinction.

Specifically, proposed § 13.5(a)(1)(i) explained that to properly exclude time spent on non-covered work from an employee's hours worked that count toward the accrual of paid sick leave, a contractor must accurately identify in its records the employee's covered and non-covered hours worked. The Department's proposal explained that, in the absence of records or other proof adequately segregating the time—whether because of a contractor's inadequate recordkeeping, because the contractor preferred permitting the employee to more rapidly accrue paid sick leave rather than keeping such records, or for another reason—the employee would be presumed to have spent all paid time performing work on or in connection with a covered contract. This proposed policy was consistent with the treatment of hours worked on SCA- and non-SCA-covered contracts, *see* 29 CFR 4.178, 4.179, as well as the treatment of covered versus non-covered time under the Minimum Wage Executive Order rulemaking, *see* 79 FR 60660–61, 60672.

Several commenters expressed concern about segregating employees' covered and non-covered work time. SBA Advocacy wrote that such segregation would be difficult, in particular in the construction industry in which employees move between work on different contracts, for seasonal recreational businesses in which employees work in remote locations, and for contractors in general as to employees who do not work directly on contracts, such as accounting, delivery, and management staff. DLA Piper and the HR Policy Association asked for more information about the type of proof that would be sufficient; DLA Piper asked whether, for example, a list or copies of all invoices processed by an accounting clerk, including some that relate to covered contracts, would be required. EEAC, PSC, and DLA Piper asked if, with respect to employees working in connection with covered contracts (such as receptionists and mail room clerks), contractors would be permitted to make estimates based on a contractor's revenue or some other basis.

The Department believes that in most circumstances it will be simple, or at least practicable, to distinguish an employee's work on a covered contract from time spent on non-covered contracts, such as when a mechanic spends some time at a site of construction on a DBA-covered contract and some time at a site of construction on a private contract. But it appreciates that segregation of time will be more complicated in circumstances in which an employee works only in connection with covered contracts, such as, as the commenters noted, when a receptionist answers phone calls, or a mail room clerk sorts mail, regarding numerous projects, or when, as MCAA and SMACNA recognized, a contractor has employees in its off-site fabrication shop prefabricate pipe assemblies or ducts for delivery and installation at projects undertaken pursuant to both covered and non-covered contracts. Therefore, the Department has added to § 13.5(a)(1)(i) a statement allowing a contractor to estimate the portion of an employee's hours worked spent in connection with (but not on) covered contracts provided the estimate is reasonable and based on verifiable information.

As suggested by the commenters, such information could include the portion of a contractor's total revenue that derives from covered contracts if it is reasonable to assume that an employee's work time is roughly evenly divided across all of the contractor's work. If, for example, a contractor derives half of its revenue from covered contracts, the contractor would likely have a reasonable basis for estimating that employees in the mail room of the contractor's corporate headquarters spend half of their hours worked in connection with covered contracts. But if that contractor has offices in two locations, and all of its work at one of those locations pertains to covered contracts, the contractor could not reasonably assume that the staff in the mail room at that location worked in connection with covered contracts only 50 percent of the time.

An estimate of this type based on information other than a contractor's revenue could also be appropriate. For example, a contractor could estimate that a receptionist who handles incoming calls for a group of other employees who work on covered contracts during, on average, one third of their work time also spends one third of her hours worked in connection with covered contracts. Like the basis for an estimate, the period of time for which an estimate could appropriately be used would also vary depending upon the circumstances; for example, a contractor that claims the § 13.4(e) exclusion for its receptionist because at the time, only 5 percent of its revenue derived from covered contracts would not be able to continue to do so if the contractor is awarded a new covered contract that will account for 40 percent of its revenue for the next year.

Proposed § 13.5(a)(1)(ii) required a contractor to calculate an employee's accrual of paid sick leave no less frequently than at the conclusion of each workweek. The Department explained in the NPRM that it considered "workweek" to have the meaning explained in the FLSA regulations, *i.e.*, a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods—that need not coincide with the calendar week but must generally remain fixed for each employee. *See* 29 CFR 778.105. NECA, SBLC, Vigilant, and the National Defense Industrial Association (NDIA) urged the Department not to adopt this provision as proposed, asserting that contractors' systems are configured to account for time each pay period rather than as frequently as once a week. Several of these commenters requested that instead, the Department require accrual at the end of each pay period or, if contractors' pay periods occur less frequently than twice a month, then at least that often. The Department is adjusting the regulatory text based on these comments. Rather than requiring that paid sick leave accrue no less frequently than at the end of each workweek, § 13.5(a)(1)(ii) will require that accrual occur no less frequently than at the conclusion of each pay period or each month, whichever interval is shorter. This provision has no effect on a contractor's obligation under the SCA to have semimonthly (or more frequent) pay periods, *see* 29 CFR 4.6(h), or under the DBA to have weekly pay periods, *see* 40 U.S.C. 3142(c)(1), 29 CFR 5.5(a)(3). The Department anticipates that this added flexibility will benefit those contractors who currently track hours worked less frequently than each week, although it notes that contractors may still choose to calculate paid sick leave accrual each week, and will be required to do so if they have weekly pay periods. This change is also consistent with modifications to proposed § 13.5(a)(2), described below.

Proposed § 13.5(a)(1)(ii) also provided that a contractor was not required to allow employees to accrue paid sick leave in increments smaller than 1 hour for completion of any fraction of 30 hours worked. In other words, under the proposal, an employee could accrue 1 hour of paid sick leave after working a full 30 hours, rather than accruing any fraction of an hour for any fraction of 30 hours worked. Proposed § 13.5(a)(1)(ii) further required any remaining fraction of 30 hours to be added to hours worked for the same contractor in subsequent workweeks to reach the next 30 hours worked provided that the next workweek in which the employee performs on or in connection with a covered contract occurs within the same accrual year. (The term *accrual year* is defined in proposed § 13.2 and addressed in the discussion of § 13.5(b)(1) below.) Vigilant expressed approval of these provisions, and the Department adopts them essentially as proposed, although the references to "workweeks" have been changed to "pay periods" for consistency with the change to the first sentence of the provision.

The NPRM included an example of how § 13.5(a)(1)(ii) would operate in practice. The Department provides a similar example here, although it has modified the specifics to reflect how accrual would occur at the end of a pay period rather than after each workweek. Assume a contractor has 2-week pay periods, and an employee works on a covered concessions contract for 80 hours in pay period 1 and 35 hours in pay period 2. At the conclusion of pay period 1, the employee will have accrued 2 hours of paid sick leave based on his first 60 hours worked and, unless the employer chooses to allow accrual in increments smaller than 1 hour, will not have accrued any more paid sick leave based on the additional 20 hours he worked in that pay period. At the conclusion of pay period 2, the employee will have accrued 1 additional hour of paid sick leave based on the remaining 20 hours from pay period 1 plus his first 10 hours worked in pay period 2. The employee need not have accrued any paid sick leave based on the remaining 25 hours worked during pay period 2 (because 25 is less than 30). If the employee spends several subsequent weeks working for the contractor on a private contract and then returns to working on the covered concessions contract, under this provision, those remaining 25 hours would be added to his subsequent hours worked on the concessions contract for purposes of reaching his next accrued hour of paid sick leave (provided his return to the covered concessions contract occurred within the same accrual year as pay period 2). As noted in the proposal, an employer might wish to permit employees to accrue paid sick leave in fractions of an hour, perhaps because it finds the related recordkeeping less burdensome than keeping track of hours worked from previous workweeks, it allows for use of paid sick leave in increments smaller than 1 hour, or for some other reason. An employer may elect to do so provided all hours worked for the contractor on or in connection with covered contracts within the accrual year are counted toward an employee's paid sick leave accrual.

Proposed § 13.5(a)(1)(iii) addressed the accrual of paid sick leave for employees as to whom contractors are not obligated by another statute to keep records of hours worked. As the Department explained in the NPRM, for most employees on covered contracts, such as service employees on SCA-covered contracts, laborers and mechanics on DBA-covered contracts, and all employees performing work on or in connection with any covered contract whose wages are governed by the FLSA, contractors are already obligated by the SCA, DBA, or FLSA to keep records of employees' hours worked. 29 CFR 4.6(g)(1)(iii), 4.185 (SCA); 29 CFR 5.5(a)(3)(i) (DBA); 29 CFR 516.2(a)(7), 516.30(a) (FLSA). Therefore, as to those employees, contractors are already collecting the information necessary to calculate the accrual of paid sick leave. But for those employees who are employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541, contractors are not currently required by the SCA, DBA, or FLSA to keep such records. *See* 29 CFR 4.6(g)(1)(iii), 4.156, 4.185 (requiring that records be kept for "service employees" to whom the SCA applies and excluding from that category "persons employed in an executive, administrative, or professional capacity as those terms are defined in 29 CFR part 541); 29 CFR 5.5(a)(3)(i), 5.2(m) (requiring that records be kept for "laborers and mechanics" to whom the DBA applies and excluding from those terms "[p]ersons employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title"); 29 CFR 516.3 (excusing employers of "each employee in a bona fide executive, administrative, or professional capacity . . . as defined in part 541 of this chapter" from the FLSA requirement to maintain and preserve records of hours worked).

In order not to impose a new recordkeeping burden on employers of such employees, proposed § 13.5(a)(1)(iii) allowed contractors to choose to continue not to keep records of such employees' hours worked, but instead to allow the employees to accrue paid sick leave as though the employees were working on or in connection with a covered contract for 40 hours per week. Contractors could, under the proposed provision, choose to calculate paid sick leave accrual by tracking the employee's actual hours worked provided they permitted the relevant employees to accrue paid sick leave based on their actual hours worked consistently across workweeks rather than, for example, using the 40 hours assumption in workweeks during which an employee works more than 40 hours but not those in which the employee works fewer. Under the proposed approach, the Department would apply these principles to any employees exempt from the FLSA's minimum wage and overtime provisions and not covered by the SCA or DBA. The Department explained in the NPRM that this approach is consistent with FMLA recordkeeping regulations, under which there is a general requirement that FMLA-covered employers keep records of hours worked by employees eligible for FMLA leave but an exception with respect to employees who are not covered by or are exempt from the FLSA; employers of those employees need not keep such records so long as the employer presumes that the employees have met the hours requirement for FMLA eligibility. *See* 29 CFR 825.500(c)(1), (f). The Department received a supportive comment from Vigilant regarding the proposal to allow contractors to use this 40 hours assumption, and it adopts it as proposed.

Proposed § 13.5(a)(1)(iii) also provided that if an employee as to whom an employer is not otherwise required to keep a record of hours worked regularly works fewer than 40 hours per week on or in connection with covered contracts, whether because the employee's time is split between covered and non-covered contracts or because the employee is part-time, the contractor could allow the employee to accrue paid sick leave based on the employee's typical number of hours worked on covered contracts per workweek. The Department further explained in the NPRM that, although the contractor need not keep records of the employee's hours worked each week, to use a number less than 40 for this purpose, the contractor was required to have probative evidence of the employee's typical number of covered hours worked, such as payroll records showing that an employee who performs on a covered contract was paid for only 20 hours per week by the contractor.

PSC expressed concern about "intrusive second-guessing by [the Department's] auditors" regarding the determination of an employee's usual time spent on or in connection with covered contracts and suggested that the Department revise this provision to state that it would presume a contractor's estimate of the portion of time an employee exempt from the FLSA's minimum wage and overtime requirements spends working in connection with covered contracts is reasonable unless countered by a preponderance of the evidence. The Department is not adopting this suggestion because of the incentives it would create; more specifically, it would likely reward any contractor that chose not to keep records that could be the basis for a sound determination of how much time employees spend working in connection with covered contracts.

The Department has, however, modified the proposed regulatory text to alleviate the concerns of PSC and other commenters regarding the tracking of time of employees who work exclusively in connection with, rather than on, covered contracts. Specifically, § 13.5(a)(1)(iii) now provides that a contractor must have probative evidence to support using an assumed typical number of hours worked on or in connection with covered contracts that is less than 40 or, if the employee performs work in connection with rather than on covered contracts, a contractor may estimate the employee's typical number of hours worked in connection with covered contracts per workweek provided the estimate is reasonable and based on verifiable information. This language is the same as that used in § 13.5(a)(1)(i) with respect to employees as to whom contractors are obligated to track hours worked and is intended to provide the same flexibility for contractors as to employees who qualify for an exemption from the FLSA's minimum wage and overtime requirements.

Proposed § 13.5(a)(2) required a contractor to inform an employee, in writing, of the amount of paid sick leave that the employee has accrued but not used (i) no less than monthly, (ii) at any time when the employee makes a request to use paid sick leave, (iii) upon the employee's request for such information, but no more often than once a week, (iv) upon a separation from employment, and (v) upon reinstatement of paid sick leave pursuant to § 13.5(b)(3). Some of these requirements were based on FMLA regulations regarding notification to an employee of how much leave will be or has been counted against her FMLA entitlement, *see* 29 CFR 825.300(d)(6), but they were modified to account for the differences between FMLA leave and paid sick leave, including in the method of accrual. The fourth and fifth requirements were meant to ensure that employees who may be and ultimately are rehired by a contractor know how much paid sick leave they should and do have available upon such rehiring. In the NPRM, the Department explained that it was important that employees be able to determine whether absences will be paid (so they can, for example, schedule their own or their family members' doctors' appointments to occur after they have accrued sufficient paid sick leave), and that these notification requirements would not create a significant burden for contractors.

CPD, NWLC, the National Council of Jewish Women, Greater New Orleans Section, the National Association of Social Workers, the State Innovation Exchange, and the Coalition on Human Needs wrote that these various requirements would ensure that employees have the information they need to effectively use paid sick leave, and the Seattle Office of Labor Standards noted in particular that if workers cannot access information about their leave balances, they are less likely to use the benefit even when they are ill. The Chamber/IFA, the American Council of Engineering Companies (ACEC), NDIA, NECA, SBLC, Seyfarth Shaw, and the ERISA Industry Committee all asserted, however, that weekly notifications were too frequent and that responding to employee requests for accrual amounts would generate burdensome work and paperwork. Commenters offered varied alternative suggestions: IEC asked that the Department give contractors full discretion over when to inform employees how much paid sick leave they have accrued; EEAC and Vigilant requested that notifications be required quarterly; PSC believed notification in the ordinary course of payroll administration should be sufficient; and NDIA and Delta indicated that notification each pay period or at least twice a month would be preferable.

The Department has modified proposed § 13.5(a)(2) in light of these comments. Specifically, under the regulatory text as adopted, contractors will be required to inform each employee, in writing, of the amount of paid sick leave the employee has accrued but not used no less than once per pay period or per month, whichever interval is shorter, as well as upon a separation from employment and upon reinstatement of paid sick leave pursuant to paragraph (b)(4) of this section. The Department believes this revised provision appropriately balances the need to ensure that employees are informed about the paid sick leave they have available for use with the interests of contractors in administering paid sick leave in a manner that is not unnecessarily burdensome. As was true of a corresponding change to § 13.5(a)(ii), this provision has no effect on a contractor's obligation under the SCA to have at least semimonthly pay periods, *see* 29 CFR 4.6(h), or under the DBA to have weekly pay periods, *see* 40 U.S.C. 3142(c)(1), 29 CFR 5.5(a)(3). The Department also notes that contractors are free to provide notifications to employees more frequently than is required, including in response to employee requests.

PSC, EEAC and Roffman Horvitz, PLC asked in their comments that the Department allow contractors to satisfy the requirements of § 13.5(a)(2) with a self-service portal employees can access to check their paid sick leave accrual, as long as the contractor keeps the information updated. The Department intended its proposal to be understood to accommodate such a system. Indeed, in the discussion of proposed § 13.5(a)(2) in the NPRM, the Department noted that a contractor's existing procedure for informing employees of their available paid time off, such as notification accompanying each paycheck or an online system an employee can check at any time, could be used to satisfy or partially satisfy these accrual notification requirements provided it is written and clearly indicates the amount of paid sick leave an employee has accrued separately from indicating amounts of other types of paid time off available (except where the employer's paid time off policy satisfies the requirements of § 13.5(f)(5), described below). If the contractor customarily corresponds with or makes information available to its employees by electronic means, "written" for this purpose includes electronic transmissions. The Department has inserted language to this effect into the regulatory text to eliminate any confusion.

Finally, Vigilant commented with respect to proposed § 13.5(a)(2) that verbal notifications of an employee's amount of accrued paid sick leave should be sufficient. The Department believes written notifications are more useful for employees and not particularly burdensome for contractors, particularly because the requirement is modified to coincide with pay periods, when contractors will already be providing information to employees, and because the requirement may be satisfied by electronic communication, such as by email or an appropriate self-service portal. Accordingly, it has not modified this provision as requested.

Proposed § 13.5(a)(3) permitted a contractor to choose to provide an employee with at least 56 hours of paid sick leave at the beginning of each accrual year rather than allowing the employee to accrue such leave based on hours worked over time. As proposed, it further provided that in such circumstances, the contractor need not comply with the accrual requirements described in § 13.5(a)(1). The proposed section required the contractor to allow carryover of paid sick leave as required by § 13.5(b)(2), and although the contractor could limit the amount of paid sick leave an employee may carry over to no less than 56 hours, the contractor could not limit the amount of paid sick leave an employee has available for use at any point as is otherwise permitted by § 13.5(b)(3). The NPRM provided an example to illustrate the operation of these principles: if a contractor exercises this option and an employee carries over 16 hours of paid sick leave from one accrual year to the next (as described in the discussion of § 13.5(b)(2) below), the contractor must permit the employee to have 72 hours (16 hours plus 56 hours) of paid sick leave available for use as of the beginning of the second accrual year (because the contractor is not permitted to limit an employee's paid sick leave at any point in time as described in the discussion of § 13.5(b)(3) below).

Under § 13.5(c)(4), described below, the contractor may not limit the employee's use of that paid sick leave in the second (or any) accrual year, but the employee's use can effectively be limited if the contractor sets, as permitted by this proposed provision, a limit on the amount of paid sick leave an employee can carry over from year to year; in the example, if the employee who had 72 hours of paid sick leave at the beginning of accrual year 2 did not use any leave in that year, she could be permitted to carry over only 56 hours into accrual year 3. The Department explained in the NPRM that it believed this option would be beneficial to contractors that find the tracking of hours worked and/or calculations of paid sick leave accrual to be burdensome and would provide employees with the full amount of paid sick leave contemplated by the Executive Order at the beginning of each accrual year.

EEAC, the SBLC, Seyfarth Shaw, the HR Policy Association, the American Benefits Council, the ERISA Industry Committee, SHRM/CUPA–HR, and the Chamber/IFA all generally supported proposed § 13.5(a)(3) because they agree it is an advantage for contractors to be excused from tracking paid sick leave accrual, but these commenters strongly objected to the requirement under the proposed provision to carry over paid sick leave that was not used in one accrual year into the next. The commenters asserted that employees would unfairly benefit from having more than 56 hours of paid sick leave available at once and that under State and local paid sick time laws, the option to "frontload" leave benefits employees because they do not have to wait to accrue paid sick time before being able to use it and, in turn, benefits employers because they do not have to permit carryover. The NYC Department of Consumer Affairs and AFL–CIO also supported the proposed provision, noting that it was helpful, especially for small employers, to have the flexibility it creates, and did not suggest that it be modified.

After carefully considering these comments, the Department is not modifying the proposed provision as requested (although some of the proposed text has become § 13.5(a)(3)(i) because of other additions to the provision that constitute new subparagraphs (ii) and (iii), described below). First and most significantly, the Executive Order itself requires that paid sick leave carry over from one year to the next. 80 FR 54697. Second, the Department believes that this option, as designed, benefits contractors by permitting them to avoid the obligation to track paid sick leave accrual, which requires accounting for an employee's hours worked and performing calculations each pay period, and it would not be appropriate to also allow contractors who elect to use this option to reduce the total amount of paid sick leave an employee could accrue and use. Specifically, if a contractor does not exercise this option and as in the example described above, an employee carries over 16 hours of paid sick leave from one accrual year to the next, if the employee uses those 16 hours, he must be permitted to accrue 56 more, meaning he could (if he has reason to use the paid sick leave and enough hours worked to accrue the maximum number of paid sick leave hours the contractor permits) have 72 total hours of paid sick leave available for use over the course of accrual year 2—just as the employee in the example above has 72 hours (that she also might or might not have reason to use during the year).

Commenters also asked for specific additions to the proposed provision. EEAC noted that the NPRM did not address circumstances in which an employee starts work for a contractor who has chosen this option in the middle of an accrual year and suggested the Department provide that the employee should begin with as much paid sick leave as she would have been able to accrue based on her typical, predicted hours worked in the remainder of the year. The Department appreciates that these circumstances could arise and that it will not always be appropriate to provide a new employee with 56 hours of paid sick leave. Accordingly, it is adding as § 13.5(a)(3)(ii) regulatory text providing that if a contractor chooses to use the option described in § 13.5(a)(3) and the contractor hires an employee or newly assigns the employee to work on or in connection with a covered contract after the beginning of the accrual year, the contractor may provide the employee with a prorated amount of paid sick leave based on the number of pay periods remaining in the accrual year. Under this new provision, if, for instance, an employee was hired by a contractor to work full-time on a covered contract after one-third of the pay periods in the current accrual year had passed, that employee would be entitled to begin her employment with at least 37 hours (two-thirds of 56 hours, rounded to the nearest hour) of paid sick leave. The Department notes that if a contractor chooses an accrual year that begins on the date an employee begins work on or in connection with a covered contract, this issue will not arise and this new provision will not be relevant.

Vigilant asked that contractors be permitted to select this option as to only some employees, such as if they wish to track accrual for newly hired workers and switch to providing 56 hours of paid sick leave at the beginning of an employee's second year of employment. The Department agrees that contractors should have flexibility in deciding when and as to whom they choose this option. It may be, for example, that as to some employees, tracking accrual is simple, whereas for others it is more complicated, and a contractor wishes to treat those employees differently for that reason. Or a contractor might change timekeeping systems during the course of a covered contract and determine that one option has become preferable to another in later accrual years. Therefore, the Department has added § 13.5(a)(3)(iii), which provides that a contractor may use the option described in § 13.5(a)(3) as to any or all of its employees in any or all accrual years. This language is not intended to permit a contractor to change its accrual systems during an accrual year, but rather, at the beginning of a new accrual year. As with all actions a contractor takes with respect to paid sick leave, a contractor may not use the decision of whether to elect this option to avoid its obligations under the Executive Order.

Finally, the SBLC made two suggestions: first, that contractors be permitted to prorate the amount of leave employees who work less than full-time on or in connection with covered contracts receive at the beginning of an accrual year under this option, and second, that contractors be permitted to provide employees with paid sick leave each quarter, rather than each year, without tracking accrual, noting that under such a system, "rollover" of paid sick leave between quarters would be appropriate. The Department has considered these suggestions but has decided not to adopt either of them. Prorating the amount of leave provided under this option could be administratively complicated (it would require, for example, knowing in advance how much time an employee will work on or in connection with a covered contract over the course of a full year) and is unnecessary because, as explained above, employers now explicitly have the option of tracking accrual based on hours worked on or in connection with covered contracts for part-time employees even if they use the § 13.5(a)(3) option for full-time employees. Regarding a quarterly accrual system, the Department notes that most commenters responded positively to the proposed option to provide an alternative to tracking accrual, and adding another method of calculating accrual would introduce unnecessary confusion for both contractors and for purposes of enforcement by the Wage and Hour Division.

Proposed § 13.5(b) implemented the Executive Order's provisions, in sections 2(b), (d), and (j), regarding maximum accrual, carryover, and reinstatement of paid sick leave as well as non-payment for unused paid sick leave.

Proposed § 13.5(b)(1) allowed a contractor to limit the amount of paid sick leave an employee is permitted to accrue at not less than 56 hours in each accrual year. The Department received no comments on this portion of the provision, which implements section 2(b) of the Executive Order, and adopts it as proposed.

Proposed § 13.5(b)(1) also provided detail regarding an *accrual year,* a term defined in § 13.2. The Department proposed to explain that an accrual year is a 12-month period beginning on the date an employee's work on or in connection with a covered contract began or any other fixed date chosen by the contractor, such as the date a covered contract began, the date the contractor's fiscal year begins, a date relevant under State law, or the date a contractor uses for determining employees' leave entitlements under the FMLA pursuant to 29 CFR 825.200. Under the proposal, a contractor could choose its accrual year but was required to use a consistent option for all employees and could not select or change its accrual year in order to avoid the paid sick leave requirements of Executive Order 13706 and part 13. The NPRM explained that as under the FMLA, if a contractor does not select an accrual year, the option that provides the most beneficial outcome to the employee would be used. *See* 29 CFR 825.200(e).

EEAC commented that contractors should be permitted to choose different accrual years for groups of similarly situated employees, offering as examples employees who are covered by a CBA, those who are employed by the contractor as the result of a merger with or acquisition of a different company, or those as to whom different paid time off policies apply. Because the Department agrees that there could be circumstances in which it would be difficult for a contractor to select the same accrual year for all employees, such as if a large contractor employs some workers subject to a CBA that calls for the accrual year to begin on one date and others subject to a relevant State law that calls for a different date, it has modified the regulatory text to incorporate EEAC's suggestion. The Department notes, however, that the contractor must choose the same accrual year (or, if the contractor chooses an accrual year that begins on the date an employee begins work on or in connection with a covered contract, the same accrual year methodology) for similarly situated employees and, as noted at the proposal stage, may not select or change any employee's accrual year in order to avoid the paid sick leave requirements of the Order and part 13.

Proposed § 13.5(b)(2) provided that paid sick leave shall carry over from one accrual year to the next. The proposed language would mean that upon the date a contractor has selected as the beginning of the accrual year, an employee would continue to have available for use as much paid sick leave as the employee had accrued but not used as of the end of the previous accrual year. This portion of § 13.5(b)(2) implements section 2(d) of the Executive Order, and no commenter opposed it, so the Department adopts it as proposed.

Proposed § 13.5(b)(2) further provided that paid sick leave carried over from the previous accrual year would not count toward any limit the contractor sets on the annual accrual of paid sick leave. The NPRM explained that under this proposal, if an employee carries over 30 unused hours of paid sick leave from accrual year 1 to accrual year 2, for example, she must still be permitted to accrue up to 56 additional hours of paid sick leave in accrual year 2 rather than only 26 (because 30 plus 26 is 56), subject to the limitations described below. NAM opposed this portion of the proposed provision, asserting that it allows employees to accrue more than 56 hours in a year. The Department believes that the Executive Order's requirement that a contractor allow an employee to accrue up to 56 hours annually only has meaningful effect if an employee can accrue up to 56 hours of new paid sick leave in each accrual year rather than merely carry over unused paid sick leave from the previous accrual year. The Department notes that an employee's ability to accrue additional paid sick leave if she has carried over unused leave from the previous year is limited by § 13.5(b)(3) (which, as described below, allows a contractor to limit the amount of paid sick leave an employee has at any point in time) and that an employee's ability to use paid sick leave, regardless of the amount she has accrued, is limited by the set of reasons that justify such use listed in § 13.5(c)(1) (which, as described below, sets forth the purposes for which an employee may use paid sick leave). As an example, as noted by EEAC, if an employee accrues 56 hours of paid sick leave in accrual year 1 and uses no paid sick leave in year 1 or year 2, she could begin accrual year 3 with only 56 hours of leave, having accrued none in accrual year 2 (pursuant to § 13.5(b)(3)); in other words, the effect of this provision on an employee's ability to accrue paid sick leave is limited.

Accordingly, this provision is adopted as proposed.

Proposed § 13.5(b)(3) allowed a contractor to limit the amount of paid sick leave an employee is permitted to have available for use at any point to not less than 56 hours and further explained that even if an employee has accrued fewer than 56 hours of paid sick leave since the beginning of the accrual year, the employee need only be permitted to accrue additional paid sick leave if the employee has fewer than 56 hours available for use. The NPRM provided as an example a circumstance in which an employee carries over 56 hours of paid sick leave into a new accrual year; in that case, a contractor need not permit that employee to accrue any additional paid sick leave until she has used some portion of that leave. If and when she does use paid sick leave, she must be permitted to accrue additional paid sick leave, up to a limit of no less than 56 hours for the accrual year, beginning with hours worked in the pay period after she has used paid sick leave such that her amount of available leave is less than 56 hours. Similarly, as explained in the NPRM, if an employee carries over 16 hours of paid sick leave into a new accrual year, she must be permitted to accrue 40 additional hours of paid sick leave even if she does not use any paid sick leave while that accrual occurs. Once she has 56 hours of paid sick leave accrued, the contractor may prohibit her from accruing any additional leave unless, and until the pay period after, she uses some portion of the 56 hours. If she uses, for example, 24 hours of paid sick leave in the same accrual year (such that she has 32 hours remaining available for use), she must be permitted to accrue up to at least 16 more hours (in addition to the 40 hours she has already accrued during the accrual year) for a total of 56 hours accrued in that accrual year. If she did so, she would then have 48 hours of paid sick leave (32 previously available hours plus 16 newly accrued hours) available for use and could be limited to that amount until the next accrual year.

Numerous commenters, including Caring Across Generations, the American Association of University Women, the National Association of County and City Health Officials, and the National Hispanic Council on Aging, asked the Department to simplify the accrual system by limiting the amount of paid sick leave an employee can carry over from one accrual year to the next rather than the amount of paid sick leave an employee has available at any point in time. And Seyfarth Shaw noted that the Department's proposed system will be confusing for contractors because limiting the amount of paid sick leave an employee may have available for use deviates from the way many State and local paid sick time laws operate. Although the Department appreciates the commenters' interest in having paid sick leave accrual operate in the simplest manner possible, the Department declines to adopt this suggestion because it believes its proposed system to be faithful to the Executive Order, which provides in section 2(b) that "[a] contractor may not set a limit on the total accrual of paid sick leave per year, *or at any point in time,* at less than 56 hours." 80 FR 54697 (emphasis added). Accordingly, the Department adopts § 13.5(b)(3) as proposed. The Department notes, however, that consistent with the permissive language of § 13.5(b)(3), contractors would be in compliance with the Order and part 13 if they permitted employees to have available for use an amount of paid sick leave greater than 56 hours and if they allowed employees with more than 56 hours of paid sick leave available for use to carry over only 56 of those hours into the next year; in other words, a contractor may choose to use the simplified system the commenters prefer, based on ease of administration, compliance with a State or local paid sick time law, or for any other reason.

Proposed § 13.5(b)(4) implemented the second clause of section 2(d) of the Executive Order by requiring that paid sick leave be reinstated for employees rehired by the same contractor or a successor contractor within 12 months after a job separation. The proposed text specified that this reinstatement requirement applied whether the employee leaves and returns to a job on or in connection with a single covered contract or works for a single contractor on or in connection with more than one covered contract, regardless of whether the employee remains employed by the contractor to work on non-covered contracts in between periods of working on covered contracts. The NPRM offered as an example a situation in which a service employee on an SCA-covered contract accrued but did not use 12 hours of paid sick leave, moved to a different work site to perform work unrelated to a contract with the Federal Government (either with or not with the same employer), and after 6 months, returned to the original SCA-covered contract. In this example, the employee would begin back on the original job with 12 hours of paid sick leave available for use. Pursuant to §§ 13.5(a)(2) and 13.5(b)(1), if her first week back on the job is within the same accrual year during which she accrued those 12 hours, the contractor would be required to count any fraction of 30 hours worked in her previous time on the contract toward the accrual of her next hour of paid sick leave, but the contractor may limit her additional accrual in that accrual year to 44 hours such that she can only accrue 56 hours total in the accrual year.

Proposed § 13.5(b)(4) further explained that the reinstatement requirement also applied if an employee takes a job on or in connection with a covered successor contract after working for a different contractor on or in connection with the predecessor contract, including when an employee is entitled to a right of first refusal of employment from a successor contractor under Executive Order 13495. (The terms "successor contract" and "predecessor contract" were defined in proposed § 13.2, and the requirements that a predecessor contractor submit to a contracting agency, and a contracting agency provide to a successor contractor, a certified list of relevant employees' accrued, unused paid sick leave appeared in proposed §§ 13.26 and 13.11(f), respectively.) The NPRM offered the example of an employee performing work on a contract to sell food to the public in a National Park who has accrued 16 hours of paid sick leave. If that contract ends, a different contractor takes over the food stand, and the employee is rehired by the successor contractor, he would begin his new job with 16 hours of paid sick leave. In the NPRM, the Department invited comments on its interpretation of section 2(d) of the Executive Order to mean that the reinstatement requirement applied if an employee is rehired by a different contractor on or in connection with a covered successor contract after working on or in connection with the predecessor contract. The Department described its belief that the Executive Order's requirement to carry over previously accrued paid sick leave for employees "rehired by a covered contractor" should be interpreted to include different successor contractors who rehire employees from the predecessor contract. It further noted that SCA-covered successor contractors are generally required by the Nondisplacement Executive Order to provide a right of first refusal of employment to employees on the predecessor contract in positions for which they are qualified, and as a result, many covered successor contractors effectively "rehire" these employees, making it reasonable to interpret Executive Order 13706 to provide that such employees' accrued paid sick leave balances would carry over as well. The NPRM also explained that this interpretation would ensure that the carryover of accrued, unused leave would not depend on whether the successor contract is awarded to the same contractor that performed on the predecessor contract (in which case the Executive Order clearly mandates that employees either keep their accrued, unused paid sick leave or have it reinstated).

The Department's proposal recognized that the Government must ensure that it spends money wisely and it is imperative that contract actions result in the best value for the taxpayer. It further noted that the Government understands contractors may include the costs of benefits in overhead and it therefore may not (except in cost-type contracts) pay contractors based on their actual costs. For these reasons, the Department invited comments regarding the extent to which its interpretation of the reinstatement requirement could affect pricing and cost accounting, if at all, for covered contractors and contracting agencies, including any potential for paying twice for the same benefit—once to a predecessor contractor charging the Government for predicted use of paid sick leave during its contract term, and a second time to a successor contractor who would be obligated to pay for unused sick leave later used by its employees during the successor's contract, with the Government potentially bearing the added costs through higher contract prices.

The Department's proposal noted a potential scenario in which a contractor on a covered contract may have included in its bid the full cost of providing 56 hours of paid sick leave to every employee performing work on or in connection with the contract, and the contracting agency may treat the full amount of such leave as an allowable cost. At the end of the contract term, some employees will likely have balances of accrued but unused paid sick leave which could be carried over to a successor contractor. The Department specifically sought comment on how the current contractor and any different contractors bidding for the successor contract would account for this situation in their bid pricing. Finally, the Department invited comment as to the extent to which any potential impacts on pricing or cost accounting might be mitigated, including ways to mitigate any potential impact on subcontractors, small businesses, and prime contractors with covered supply chains. In providing comments on the feasibility of mitigation steps, the Department asked commenters to consider that the requirement for paid sick leave flows down to all subcontract tiers and that in other than cost-type contracts, the Government may not have insight into and does not pay contractors based on their actual costs.

CLASP, Demos, the Working Families Organization, NETWORK, the Diverse Elders Coalition, CAP Women's Initiative, Caring Across Generations, CPD, NELP, and Equal Rights Advocates supported the proposed provision, writing that reinstatement of leave by successor contractors could encourage employees to continue working on successor contracts, which would improve efficiency and reduce training costs for the contractor. Other commenters supported the proposal for additional reasons: The AFL–CIO noted that an employee's access to paid sick leave should not depend on which contractor wins the contract on which she works; the SEIU wrote that the retention of benefits is valuable to employees and therefore will promote continuity on covered contracts; the American Federation of State, County & Municipal Employees (AFSCME) wrote that any costs of reinstating leave could be included in contractors' bids, and the Building Trades asserted that the proposal advances the goals of the Executive Order. Other commenters, however, opposed the proposed provision: The PSC and the NAM argued that potential successor contractors would not know the costs of the paid sick leave they would have to reinstate at the time of bidding (further suggesting that if such reinstatement is required, a successor contractor should be entitled to a price adjustment after receiving the certified list of employees' paid sick leave accrual created by the predecessor contractor); the NAM also asserted that implementing this requirement would be confusing and contracting agencies would be charged twice for the same paid sick leave; and DLA Piper and the HR Policy Association believed it would be challenging to create a certified list of employees' paid sick leave accruals where tracking employees' time is difficult, that it was unclear what a successor contractor should do if it did not receive a certified list, and that there would be unfairness to successor contractors where an employee does so little covered work for the successor contractor that she would not have been able to accrue paid sick leave on the successor contract.

After careful consideration of these comments, the Department is promulgating the Final Rule without requiring that successor contractors reinstate paid sick leave to employees who worked on the predecessor contract. Although the Department appreciates the points made by the commenters who supported the provision and had proposed including it for those reasons, the Department finds the concerns of commenters opposed to the provision compelling. Because at this time, the Department has not identified a logistically viable mechanism to address the concerns expressed about costs, including to the government, the Department has removed the proposed provision. As noted elsewhere, other definitions and requirements included in the proposed rule to implement reinstatement by successor contractors—in particular, the requirements to create and provide a certified list of employees and their paid sick leave balances, as well as a recordkeeping requirement related to that list—also do not appear in this Final Rule.

Proposed § 13.5(b)(5) implemented section 2(j) of the Executive Order by providing that nothing in the Order or part 13 required a contractor to make a financial payment to an employee for accrued paid sick leave that has not been used upon a separation from employment. Although the Executive Order does not prohibit a contractor from making such payments should the contractor so choose, under the proposed regulatory text, doing so (whether voluntarily or pursuant to a CBA) would not affect that contractor's obligation to reinstate any accrued paid sick leave upon rehiring the employee within 12 months of the separation pursuant to § 13.5(b)(4). In other words, under proposed § 13.5(b)(5), a contractor could not avoid the requirement to reinstate paid sick leave when it rehires an employee by cashing out the leave at the time of the original separation from employment. The proposed interpretation was consistent with the Department's understanding that the Executive Order is meant to ensure that employees of Federal contractors have access to paid sick leave rather than its cash equivalent. The Department requested comments, however, regarding the impact of the proposed provision on contractors and employees, as well as the incidence of cash-out for paid time off or paid sick time under contractors' current policies or relevant CBAs.

StrategicHealthSolutions, LLC, NECA, the SBLC, the American Benefits Council, Vigilant, the Chamber/IFA, and NAM all commented that if a contractor pays an employee for accrued, unused paid sick leave, that contractor should no longer have the obligation to reinstate such leave if the employee returns to employment on a covered contract. EEAC, PSC, and Delta wrote more specifically that contractors subject to State or local laws requiring payment to employees for unused paid sick time should not have to reinstate such leave; and EEAC and DLA Piper suggested that contractors party to a CBA that requires payment to employees for unused leave should not have to reinstate such leave. The Building Trades, AFL–CIO, and A Better Balance similarly asked that employees be able to receive the cash value of unused paid sick leave upon separation from employment rather than have leave reinstated, although they suggested that the employee, rather than contractor, decide whether to exercise that option.

In light of these comments, the Department is modifying the regulatory text to provide that if a contractor makes a financial payment to an employee for accrued paid sick leave that has not been used upon a separation from employment, that contractor is no longer obligated to comply with the reinstatement of paid sick leave requirement in § 13.5(b)(4). This relief from the reinstatement obligation also applies regardless of the contractor's reason for making the payment—that is, whether it is required by State or local law, mandated by a CBA, or a voluntary decision. It applies only if the payment is in an amount equal to or greater than the value of the pay and benefits the employee would have received pursuant to § 13.5(c)(3) had the employee used the paid sick leave. Pursuant to the Executive Order itself, the Department is not changing the portion of the provision that notes a contractor is not required by the Order or part 13 to make such a payment. The Department is neither requiring contractors to allow employees to choose whether to accept payment for unused paid sick leave nor prohibiting contractors from giving employees such a choice.

Proposed § 13.5(c) described the purposes for which an employee may use paid sick leave, thereby implementing section 2(c) of the Executive Order, and addressed the calculation of the use of paid sick leave.

Proposed § 13.5(c)(1) required, subject to the conditions described in § 13.5(d) and (e) and the amount of paid sick leave the employee has available for use, a contractor to permit an employee to use paid sick leave to be absent from work for that contractor on or in connection with a covered contract for four reasons. The Department received only positive comments regarding the four proposed provisions describing the reasons for leave—in particular, CLASP, Caring Across Generations, Demos, the Working Families Organization, NELP, the CAP Women's Initiative, Jobs With Justice, Young Invincibles, Lift Louisiana, the National Hispanic Council on Aging, the National Council of Jewish Women, and the Coalition on Human Needs, among others, supported the enumerated uses of paid sick leave—and it adopts that list as proposed.

First, § 13.5(c)(1)(i) permits an employee to use paid sick leave if she is absent because of her own physical or mental illness, injury, or medical condition. As noted in the NPRM and discussed above, these terms, defined in § 13.2, are meant to be understood broadly.

Second, § 13.5(c)(1)(ii) permits an employee to use paid sick leave if she is absent because she is obtaining diagnosis, care, or preventive care from a health care provider. The Department also interprets the terms *obtaining diagnosis, care, or preventive care from a health care provider* and *health care provider,* defined in § 13.2 and discussed above, broadly.

Third, § 13.5(c)(1)(iii) permits an employee to use paid sick leave if she is absent because she is caring for her child, parent, spouse, domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship who has any of the conditions or needs for diagnosis, care, or preventive care referred to in § 13.5(c)(1)(i) or (ii) or is otherwise in need of care. The terms *child, parent, spouse, domestic partner,* and *individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship* are defined in § 13.2. As the Department explained in the NPRM, it understands the use of these terms in the Executive Order to be an indication that the category of individuals for whom an employee can use paid sick leave to care is expansive. As also noted in the NPRM, the individual for whom the employee is caring could have any of the broadly understood conditions or needs referred to in § 13.5(c)(1)(i) or (ii). For example, an employee may use paid sick leave to be with a child home from school with a cold or to accompany his spouse to an appointment at a fertility clinic.

This provision also refers to an individual who is "otherwise in need of care," language that appears in section 2(c) of the Executive Order. In the NPRM, the Department interpreted this phrase to refer to non-medical caregiving for an individual who has a general need for assistance related to the individual's underlying health condition, noting as an example that an employee may use paid sick leave to provide his grandfather, who has dementia, unpaid assistance with bathing, dressing, and eating if the grandfather's usual paid personal care attendant is unable to keep her regular schedule. AARP supported the Department's inclusion of care for older adults, and the Department reiterates its interpretation here.

Fourth, § 13.5(c)(1)(iv) permits an employee to use paid sick leave if the absence is because of domestic violence, sexual assault, or stalking, if the time absent from work is for the purposes otherwise described in § 13.5(c)(1)(i) or (ii) or to obtain additional counseling, seek relocation, seek assistance from a victim services organization, take related legal action, including preparation for or participation in any related civil or criminal legal proceeding, or assist an individual related to the employee as described in § 13.5(c)(1)(iii) in engaging in any of these activities. The terms used in § 13.5(c)(1)(iv) (*domestic violence,* which includes the terms *spouse, domestic partner, intimate partner,* and *family violence; sexual assault; stalking; obtain additional counseling, seek relocation, seek assistance from a victim services organization, or take related legal action; victim services organization;* and *related legal action* or *related civil or criminal legal proceeding*) are defined in § 13.2 and interpreted broadly in keeping with the purpose of ensuring that victims of domestic violence, sexual assault, or stalking are able to obtain the care, safety, and legal protections they need without losing wages or their jobs and that employees can assist such victims who are family members or like family in doing so.

For example, as noted in the NPRM, an employee who is a victim of domestic violence could use a day of paid sick leave to prepare for a meeting with an attorney, travel to the attorney's office, have the meeting to discuss her legal options, and travel home; a victim could use a day of paid sick leave to go to a courthouse to determine the process for filing a petition for a civil protection order, complete any necessary paperwork, and file that paperwork with the court and use another full day to attend proceedings at the court in support of that application, including mandatory mediation. For this purpose, assisting another individual who is a victim of domestic violence, sexual assault, or stalking includes, but is not limited to, accompanying the victim to see a health care provider, attorney, social worker, victim advocate, or other individual who provides services the victim needs as a result of the domestic violence, sexual assault, or stalking. If the individual the employee is assisting is a minor victim of domestic violence or child sexual abuse, the employee could use paid sick leave to, for example, seek legal protections for the victim (including filing a police report and/or seeking a civil protection order), medical treatment for the victim, or emergency relocation services.

As the Department explained in the discussion of proposed § 13.5(c)(1) in the NPRM, use of paid sick leave is contractor, rather than contract, specific, meaning that an employee who has accrued paid sick leave working on or in connection with one covered contract could use the leave for time she would otherwise have been working on or in connection with another covered contract for the same contractor. For example, if an employee had accrued 4 hours of paid sick leave over the course of several pay periods during which he worked for a single contractor in connection with one covered contract for 60 hours and another two covered contracts for 30 hours each, he could use his accrued paid sick leave during time he was scheduled to perform work in connection with any of the three contracts, or any other covered contract, on behalf of the same contractor. This explanation applies to the provision as adopted.

The Department also noted in the NPRM that under proposed § 13.5(c)(1), an employee need only be permitted to use paid sick leave during time the employee would otherwise have spent working on or in connection with a covered contract rather than time spent performing other work (such as on a private contract), even if that work is for the same contractor. Numerous commenters, including the National Partnership, A Better Balance, CPD, and the National Council of Jewish Women, Greater New Orleans Section, asked that the Department amend this portion of the provision to require contractors to allow employees to use paid sick leave at any time, regardless of whether they would otherwise have been performing work on or in connection with a covered contract, asserting the Department's proposed system would be difficult to administer. Although the Department is sympathetic to the commenters' concerns, it does not believe it is appropriate given the limits of the Executive Order's scope to require that contractors permit employees to use paid sick leave at times they would not be performing work on or in connection with a covered contract. The Department notes, however, that as explained in the discussion of the anti-interference provision in § 13.6(a) below, a contractor is prohibited from scheduling an employee's covered and non-covered work for the purpose of preventing an employee from using paid sick leave.

Relatedly, the Hawaii Employers Council posed a question regarding the implications of an employee's using paid sick leave on a day when he would have worked for half the day on a covered contract and half the day on a non-covered contract. The Department clarifies that the contractor would be obligated, provided all other relevant requirements are met, to allow the employee to use paid sick leave for the portion of the day during which she would have been working on the covered contract. In the absence of another requirement (such as one imposed by a CBA, a State or local paid sick time law, or the FMLA) and if the employer has records or other proof adequately segregating the time the employee is performing the non-covered work, it is at the employer's discretion how to address the employee's need for leave during the remainder of the day.

The Department has modified the text of § 13.5(c)(1) to provide that a contractor must permit an employee to use paid sick leave to be absent from work for that contractor during time the employee would have been performing work on or in connection with a covered contract or, if the contractor estimates the employee's hours worked in connection with such contracts for purposes of accrual, during any work time. Two aspects of this language are notable. First, as in the proposed text, this language does not prohibit an employer from permitting employees to use paid sick leave during time they would have been performing non-covered work, an approach that AGC and Roffman Horvitz suggest may be particularly suitable for covered construction contractors whose workforces may move regularly between covered and non-covered work. A contractor may choose to do so, and the Department clarifies, in response to ABC's comment, that a contractor would not be penalized for doing so; specifically, if a contractor has a more generous policy regarding when employees may use paid sick leave than is necessary under the Order and part 13 such that, for example, an employee could use all 56 hours of his accrued paid sick leave during a period when he was working exclusively on a private contract, the contractor is not obligated to provide any additional paid sick leave for use during time the employee spends performing work on or in connection with covered contracts.

Second, the revised language provides that if a contractor chooses to estimate rather than track the amount of time an employee spends performing work in connection with covered contracts as permitted by § 13.5(a)(1)(i) or (iii), that contractor must permit the employee to use her paid sick leave at any time she would have been working for the contractor. As explained in the NPRM, if a contractor wishes to distinguish an employee's covered and non-covered time for purposes of (accrual and) use of paid sick leave, it is the contractor's responsibility to keep adequate records distinguishing between an employee's covered and non-covered work, and any denial of a request to use paid sick leave because the leave would occur while an employee is performing work that is not covered by Executive Order 13706 or part 13 must be supported by records or other proof demonstrating that fact. The implication of choosing to calculate an employee's paid sick leave based on an estimate rather than track actual covered and non-covered hours worked is that the contractor does not have proof of the actual time the employee spends performing covered work, and therefore it would not be possible for the contractor to properly restrict the employee's use of paid sick leave to that time.

Finally, the Department notes that as explained in the NPRM, if an employee falls within the 20 percent of hours worked exclusion created by § 13.4(e) for some workweeks but not others, the employee must be permitted to use paid sick leave at any time the employee would have been working on or in connection with covered contracts (or, if the contractor estimates the employee's hours worked in connection with such contracts for purposes of accrual, during any work time), regardless of whether that time falls during a workweek in which the exclusion applies with respect to accrual. As explained in the proposed rule, this approach was designed to avoid complications that would otherwise arise in responding to requests to use paid sick leave accrued by such employees. Specifically, an employee could request to use paid sick leave during a week in which it was not clear at the time of the request (because it would not be known until the end of the week) whether the employee met the 20 percent threshold; under this approach, in such circumstances, the contractor must permit the use of paid sick leave (assuming all relevant requirements for use are met) rather than deny the request or provide an uncertain response to the employee.

Proposed § 13.5(c)(2) required a contractor to account for an employee's use of paid sick leave in increments of no greater than 1 hour. In other words, under the proposal, although a contractor was permitted to choose to allow employees to use paid sick leave in increments of smaller than 1 hour (such as half an hour or 15 minutes), it was not permitted to require employees to use paid sick leave in increments of any more than 1 hour. The NPRM explained that, for example, if an employee needs to be an hour late for work because he accompanied his sister to a chemotherapy appointment that morning, his employer must permit him to use 1 hour of paid sick leave (rather than, for instance, requiring him to take a full day off or use a full day's leave).

Several commenters asked that the Department amend this provision: EEAC asked the Department to make the minimum increment of leave 4 hours, because scheduling a replacement worker can be difficult if an employee misses only a short period of work; the SBLC suggested that contractors be permitted to require employees to use a full day of paid sick leave if they request to use more than 75 percent of their normally scheduled work hours; A4A asked that the minimum increment for airline flight crew employees be 1 day; and the American Benefits Council noted that it would be expensive for contractors that currently track attendance in greater increments to implement this requirement. The United Food and Commercial Workers International Union (UFCW), on the other hand, asked that the Department require contractors to allow employees to use paid sick leave in increments smaller than 1 hour if they already keep other time records in fractions of an hour. The Department has considered each of these suggestions but declines to adopt any of them. A contractor may limit an employee's accrual of paid sick leave to 56 hours, or seven 8-hour days, per year. If an employee were required to use 4 or 8 hours of that leave at a time even when she only needs to be absent from work for a shorter duration, she would more rapidly deplete the amount of paid sick leave she has available for use than if she were permitted to use only the smaller increments she needed. Furthermore, employees will typically accrue paid sick leave over time, meaning they will often have far less than 56 hours available for use. If, for example, an employee who has 10 hours of paid sick leave available for use needs to leave work on a covered contract just 1 hour early to take his daughter to a doctor's appointment, but he could be required to use 4 hours of paid sick leave, he would then have only 6 hours of paid sick leave—less than a day—available if the following week his daughter is sick and needs to stay home from school. Such outcomes would not advance the purposes of the Executive Order because they would make the paid sick leave benefit less meaningful for employees and could discourage employees from obtaining preventive health care for themselves and their families. The Department recognizes, however, that the smaller the minimum increment of paid sick leave required, the greater potential exists for administrative burden on contractors; it therefore declines to require, although it continues to allow, contractors to account for paid sick leave in increments smaller than 1 hour.

Proposed § 13.5(c)(2)(i) explained that a contractor could not reduce an employee's accrued paid sick leave by more than the amount of leave the employee actually takes, and a contractor could not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for the leave, provided that the leave is counted using an increment of no greater than 1 hour. This language was based on FMLA regulations regarding the use of FMLA leave. *See* 29 CFR 825.205(a). The Department explained in the NPRM that this provision means that if a contractor chooses to waive its increment of leave policy in order to return an employee to work—for example, if an employee arrives a half hour late to work because he was at an appointment with a psychologist and the contractor waives its normal 1-hour increment of leave and puts the employee to work immediately—the contractor would be required to treat the employee as having used no more than the amount of leave the employee actually used, half an hour. *See* 78 FR 8867 (discussing relevant language codified in 29 CFR 825.205(a)). Under no circumstances could a contractor treat an employee as having used paid sick leave for any time that employee was working. The Department received no comments regarding § 13.5(c)(2)(i) and adopts it as proposed, but with minor, non-substantive edits for consistency with language used in other provisions.

Proposed § 13.5(c)(2)(ii) explained that the amount of paid sick leave used could not exceed the hours an employee would have worked if the need for leave had not arisen. For example, as explained in the NPRM, if an employee is scheduled to work from 9am to 3pm, and she is absent from work from 10:30am to 12:30pm to take her father to a doctor's appointment, a contractor could deduct no more than 2 hours of paid sick leave from her accrued paid sick leave. Similarly, if the employee is scheduled to work from 9 a.m. to 3 p.m. and she is absent from work for the entire day to care for her sick child, a contractor may deduct no more than 6 hours of paid sick leave from her accrued paid sick leave. Further, the NPRM noted, if an employee is using paid sick leave at a time when she could have worked beyond her scheduled hours but would not have been required to do so, the contractor could not treat the employee as having used paid sick leave for those optional hours. For example, if an employee scheduled to work from 9 a.m. to 3 p.m. could have chosen to stay until 7 p.m. that night to earn overtime, but she was absent for the entire day, a contractor could not deduct more than 6 hours of paid sick leave from her accrued paid sick leave. The proposed provision was consistent with the FMLA regulation at 29 CFR 825.205(c) ("Voluntary overtime hours that an employee does not work due to an FMLA-qualifying reason may not be counted against the employee's FMLA leave entitlement."). In response to comments from AAR and Delta, the Department clarifies that these examples were meant to distinguish voluntary overtime from mandatory overtime; if an employee was scheduled to work from 9am to 7pm and was absent for the entire day, he would have used (and, pursuant to § 13.5(c)(3), must receive regular pay and benefits for) 10 hours of paid sick leave regardless of whether a portion of that time would have constituted overtime. The Department did not receive requests to amend § 13.5(c)(2)(ii) and adopts it as proposed.

In the NPRM, the Department requested comments regarding whether it should add a physical impossibility exception, as exists under the FMLA regulations at 29 CFR 825.205(a)(2), to the 1-hour minimum increment requirement. Under such a provision, in situations in which an employee is physically unable to access the worksite after the start of the shift or to depart from the workplace prior to the end of the shift, a contractor would be permitted to require the employee to continue to use paid sick leave for as long as the physical impossibility remains. Examples that arise in the FMLA context are flight attendants whose scheduled flight departs, train conductors whose scheduled train departs, and laboratory technicians who work in "clean rooms" that must remain sealed. The Department sought comment regarding the categories of covered contracts and employees entitled to paid sick leave under Executive Order 13706 and part 13 with respect to which similar circumstances could arise and the implications of a physical impossibility provision for contractors and employees who perform on or in connection with those contracts.

AAR, A4A, Delta, EEAC, and the SBLC asked that the Department include a physical impossibility exception to the minimum increment set forth in § 13.5(c)(2). Based on these requests, the Department has included such a provision, modeled on the language of the analogous FMLA provision, as § 13.5(c)(2)(iii). The new language provides that if it is physically impossible for an employee using paid sick leave to commence or end work mid-way through a shift, such as if a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed "clean room" during a certain period of time, and no equivalent position is available, the entire period that the employee is forced to be absent constitutes paid sick leave. The period of the physical impossibility is limited to the period during which the contractor is unable to permit the employee to work prior to the use of paid sick leave or return the employee to the same or an equivalent position due to the physical impossibility after the use of paid sick leave.

The Department notes that as under the FMLA, this provision is "intended to make a limited allowance for the practical realities of the airline, railroad, and other industries with unique workplaces in which it is physically impossible for employees to leave work early or start work late." Final Rule, The Family and Medical Leave Act,, 78 FR 8833, 8869 (Feb. 6, 2013); *see also* FOH ¶39e01(d)(3) ("The 'physical impossibility' provision is intended to be narrowly construed and applied only in instances of true physical impossibility."). Furthermore, as under the FMLA, "the physical impossibility rule is protective of employees who may be subject to disciplinary action because they need to take leave beyond that required" by the reason for which they are using paid sick leave. *Id.* Under this new provision, all leave taken due to physical impossibility will count as paid sick leave. Finally, the Department notes that "an equivalent position" as used in § 13.5(c)(2)(i) has the same meaning described in the FMLA regulations at 29 CFR 825.215. Therefore, "[a]n equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority." 29 CFR 825.215(a).

Proposed § 13.5(c)(3) required a contractor to provide to an employee using paid sick leave the same pay and benefits the employee would have received had the employee not used paid sick leave. In other words, while using paid sick leave, employees paid on a salary basis may not face any deduction in pay, and employees paid hourly must receive the same hourly rate of pay they would have earned had they been present at work. In addition, employees must receive the same benefits while using paid sick leave that they would have were they present at work; for example, contractors must continue to make contributions to any fringe benefit plan (such as a health insurance plan or retirement account) for time employees are using paid sick leave and count time toward the earning of other benefits (for example, the accrual of vacation time), although, as explained above, the time an employee is using paid sick leave does not constitute hours worked for purposes of paid sick leave accrual. As noted in the NPRM, under this provision, employees whose wages are governed by the SCA or DBA would receive the same wages required under those statutes, including health and welfare and other fringe benefits or the cash equivalent thereof, as they would have earned had they been present at work instead of using paid sick leave.

TrueBlue, Inc. posed a question in its comment regarding the proper rate of pay when an employee uses paid sick leave at a time when she is earning a different hourly amount that she was when she accrued the paid sick leave. As explained in the NPRM, an employee who receives different pay and benefits for different portions of her work (for example, an employee who works as a carpenter on one DBA-covered contract and a skilled laborer on another DBA-covered contract on which she works for the same contractor), the pay and benefits due while the employee uses paid sick leave is to be determined based on which work she would have been performing at the time she uses the leave. The employee's pay rate at the time she accrued the paid sick leave is not relevant.

Delta asked that the Department amend this provision to state that employees need not receive premium pay they would otherwise have received if using paid sick leave, and Vigilant similarly asked the Department to state that employees receive only straight time, rather than overtime, pay while using paid sick leave. To provide clarity in response to these comments, the Department has added the word "regular" before "pay" in the regulatory text. As indicated in the regulatory text, this addition is meant to indicate that only payments that would be included in the calculation of the employee's regular rate for hours worked under the FLSA (or basic rate for purposes of the Contract Work Hours and Safety Standards Act, 40 U.S.C. 3701 *et seq.* (CWHSSA)) must be provided to an employee using paid sick leave to fulfill the obligation to provide the same pay to that employee. The relevant FLSA principles (adopted under *CWHSSA,* see 29 CFR 5.15(c)) are set forth at 29 CFR part 778.

AGC indicated that it believed this provision required that contractors provide employees with their pay and benefits in cash rather than, for example, as contributions to fringe benefit trust funds. The Department wishes to clarify it did not intend this result; employees using paid sick leave must receive the same pay and benefits they would have had they not been absent from work, and any benefits should generally be provided in the same manner as an employee receives them at other times. For example, if a contractor provides its employees with health insurance coverage by making monthly payments to a third-party insurer on behalf of each employee, the contractor must not make any reduction in such payments to account for time an employee used paid sick leave. Or if a contractor satisfies its DBA health and welfare requirements by making contributions to a benefit fund of a certain amount per hour that an employee works on DBA-covered contracts, it must continue to make the same payments when an employee is using paid sick leave. To the extent a contractor is unable to provide the same benefits during time an employee is using paid sick leave that it does when an employee is working, such as because the benefit plan to which the contractor makes contributions will not accept them for non-work time and an amendment to the plan is not feasible, the contractor may instead provide cash or another benefit of the same or greater value as the benefit it cannot provide. The Department notes that this exception to the general requirement to provide the same benefits is limited to circumstances in which doing so is infeasible.

The Department adopts § 13.5(c)(3) essentially as proposed, but with a minor modification (the words "had the employee not used paid sick leave" are replaced with "had the employee not been absent from work") for technical accuracy.

Proposed § 13.5(c)(4) prohibited a contractor from limiting the amount of paid sick leave an employee may use per year or at once. In other words, although a contractor could limit an employee's accrual of paid sick leave to 56 hours per year, a contractor could not prohibit the employee from, for example, using 16 hours carried over from the year 1, accruing 56 additional hours, and then using all 56 hours accrued in year 2 even though her total use in year 2 would exceed 56 hours. Under the proposed text, an employer also could not limit the amount of paid sick leave an employee may use at one time. For example, an employer could not establish a policy prohibiting employees from using any particular number of hours of paid sick leave in a single workweek. Similarly, an employer could not deny an employee's request to use paid sick leave for 2 full days in a row based on the length of time requested (as long as the employee had accrued sufficient paid sick leave to cover the time). Seyfarth Shaw, the Chamber/IFA, and the American Benefits Council strongly encouraged the Department not to prohibit contractors from setting a limit on use per year, and specifically asked that the Department allow contractors to limit use of paid sick leave to 56 hours per year. Seyfarth Shaw suggested in the alternative than an 80-hour usage cap would be appropriate. The Department has considered these suggestions but has decided not to adopt them because the Executive Order does not call for a cap on the amount of paid sick leave an employee can use in a year but does effectively create limits on use by allowing for limits on accrual, which are implemented in § 13.5(b). In light of this reasoning, the Department is amending the regulatory text to clarify that an employee's use of paid sick leave may be limited by the amount of paid sick leave an employee has available for use.

Proposed § 13.5(c)(5) prohibited a contractor from making an employee's use of paid sick leave contingent on the employee's finding a replacement worker to cover any work time to be missed or the fulfillment of the contractor's operational needs. This language implemented section 2(e) of the Executive Order and made explicit the important point that the intent of the Executive Order could only be fulfilled if employees are entitled to use paid sick leave even if the need for such leave arises at a time that is inconvenient for a contractor. PSC, AAR, and EEAC urged the Department to indicate in the regulations that employees should consult with contractors about scheduling foreseeable paid sick leave, noting that language to that effect appears in the FMLA regulations. PSC pointed to the difficulties that would arise if, for example, the four security guards a contractor sends to a Federal courthouse all request to use paid sick leave for doctor's appointments on the same morning. Although the Department is not altering the fundamental premise of this provision, it has amended the regulatory language in recognition of these commenters' concerns. Specifically, it has inserted language modeled on 29 CFR 825.302(e), the FMLA provision to which the commenters referred; the new text provides that an employee is encouraged to make a reasonable effort to schedule preventive care or another foreseeable need to use paid sick leave to suit the needs of both the contractor and employee, and a contractor may ask an employee to make a reasonable effort to schedule foreseeable absences for paid sick leave so as to not disrupt unduly the contractor's operations, but a contractor may not make an employee's use of paid sick leave contingent on the employee's finding a replacement worker to cover any work time to be missed or on the fulfillment of the contractor's operational needs. The Department notes that because employees will have far less paid sick leave than they do FMLA leave and because paid sick leave will often involve far less serious health conditions than are involved when an employee takes FMLA leave, the risk of disruption is not as high in this context, so no greater protections for employers are necessary.

Proposed § 13.5(d) implemented section 2(h) of Executive Order 13706 by addressing an employee's request to use paid sick leave. Proposed § 13.5(d)(1) required a contractor to permit an employee to use any or all of the employee's available paid sick leave upon the oral or written request of an employee that includes information sufficient to inform the contractor that the employee is seeking to be absent from work for a purpose described in § 13.5(c)(1) and, to the extent reasonably feasible, the anticipated duration of the leave. Proposed § 13.5(d)(1) further required the request to be directed to the appropriate personnel pursuant to a contractor's policy or, in the absence of a formal policy, any personnel who typically receive requests for other types of leave or otherwise address scheduling issues on behalf of the contractor.

The NPRM explained that employees could request paid sick leave by any oral or written method, including in person, by phone, via email, or with a note reasonably calculated to provide timely notice of the employee's intent to take leave, although as explained below, in response to comments, the Department now notes that a contractor's policy may provide specific methods of communicating a request. Additionally, although the request needed to contain sufficient information for a contractor to determine whether it is a proper use of paid sick leave, and the contractor could ask questions tailored to making that determination, the request was not required to contain extensive or detailed information about the reason for the leave and a contractor is not permitted to require such information. Specifically, under the proposed approach, the employee needed only to provide information sufficient to inform the contractor that she wished to miss work for a reason that is a permissible use of paid sick leave and was not required to specify all symptoms or details of the need for leave. The Department has inserted language to this effect into the regulatory text, included as part of § 13.5(d)(1)(i), to ensure clarity.

As also noted in the NPRM and now provided in § 13.5(d)(1)(i), an employee's request to use paid sick leave need not include a specific reference to the Executive Order or part 13 or even use the words "sick leave" or "paid sick leave"; this language is modeled on a portion of the FMLA regulations regarding the content of an employee's notice to an employer of the need to use FMLA leave. *See* 29 CFR 825.301(b) ("An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave."); *see also* 29 CFR 825.302(c). Under § 13.5(d)(1)(i), an employee could simply state, for example, that the employee has a cold, a dentist appointment, or an appointment with an attorney regarding a domestic violence matter. In such cases, a contractor could not ask (for purposes of approving or rejecting the request to use paid sick leave) when the cold began or how severe it is, which dentist the employee is seeing or for what purpose, or for any detail regarding the circumstances of the domestic violence.

The NPRM further explained that under the proposed provision, an employee was not required to include in her request extensive details regarding the employee's relationship with an individual for whom the employee wished to care in the time absent from work; she only needed to inform the contractor that she has a family or family-like relationship with the individual. The Department has added this point to § 13.5(d)(1)(i) for clarity. As explained in the NPRM, simply stating, for example, that the employee's son has a stomach bug, the employee's wife was injured in a car accident, or the employee's father needs assistance going to a doctor's appointment was sufficient under this proposed approach. For a request for paid sick leave involving providing care for an individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship, the employee need only assert that a family or family-like relationship exists, such as by stating that the employee needs to care for her ill grandmother or needs to accompany a man who is like a brother to him to a doctor's appointment. As also noted in the NPRM, although a contractor may ask questions to determine if the use of paid sick leave is justified, such as inquiring of an employee who asks to take leave to care for a close friend who was in a car accident whether that friend is someone whom the employee considers to be like family, the contractor could not demand intimate details upon receiving a positive response to such an inquiry. Although the Department recognizes that paid sick leave is available for only particular uses, it interprets Executive Order 13706 as intending to provide paid sick leave in a manner that is not burdensome for employees and does not allow significant intrusion into their personal lives by their employers.

The NPRM also explained that under proposed § 13.5(d)(1), the request to use paid sick leave should provide an estimate of the timing and amount of such leave needed to the extent reasonably feasible. This requirement is satisfied by stating that the sick employee hopes only to be out for 1 day, that the child's dentist appointment is on a particular date at 10 a.m. and is not anticipated to take more than an hour, or that the appointment with the attorney related to a domestic violence matter is on a particular date at 2 p.m. and will likely continue for the remainder of the work day. The contractor may not hold an employee to the estimate provided in the request; for example, the sick employee could return to work in the afternoon if he recovers more quickly than he expected, and an employee can use more than an hour of paid sick leave (provided he has more than 1 hour available for use) if the dentist appointment runs longer than anticipated. To ensure that this point is clear to the regulated community, the Department has included it as § 13.5(d)(1)(ii).

Finally, the Department explained in the NPRM that under proposed § 13.5(d)(1), an employee's request to use paid sick leave would be acceptable if the employee directs it to the appropriate personnel pursuant to a contractor's policy or, in the absence of a formal policy, any personnel who typically receive requests for other types of leave on behalf of the contractor, such as a supervisor or human resources department staff. A few commenters addressed the use of an employer's usual procedures for requesting time off of work. AAR asked that the Department allow contractors to use their normal procedures; EEAC asked that the Department explicitly require employees to use a contractor's policy; Vigilant asked that the Department state it is usually reasonable to comply with the contractor's call-in policy; and the UFCW asked the Department to clarify whether a contractor may deny an employee's request for paid sick leave because the employee failed to use the contractor's typical procedures.

Because not all contractor policies will comply with the requirements of the Executive Order (for example, a policy might not permit an employee to make oral or written requests for leave as described in section 2(h) of the Order), the Department has not modified the relevant proposed text, which now appears as § 13.5(d)(1)(iii), in response to these comments; because a contractor's policy may govern how an employee must make requests to use paid sick leave, however, the Department provides more detail here about the provision's meaning. Under the regulatory text as proposed and adopted, if a contractor has a policy regarding to whom an employee should submit leave requests, it may require the employee to direct her request to use paid sick leave to particular personnel pursuant to that policy. The policy may include particular procedures to use to contact the specified personnel, such as a designated phone number or email address, as long as—pursuant to the Executive Order's requirement that contractors accept "oral or written" requests, 80 FR 54698—the employee may communicate the request by at least one oral and at least one written method. If the employee directs a request to someone who is not the individual or individuals identified in the contractor's policy, the recipient may formally reject the request or explain that she is without authority to respond to it, in either case informing the employee of the correct personnel to whom to direct a new request, or the recipient may forward the request to the correct personnel herself.

Finally, the Department noted in the NPRM that pursuant to §§ 13.5(e)(1)(ii) and 13.25(d), when an employee requests leave for the purposes described in proposed § 13.5(c)(1)(iv), *i.e.,* for absences related to being a victim of domestic violence, sexual assault, or stalking, the contractor shall maintain confidentiality about the domestic abuse, sexual assault, or stalking, unless the employee consents or when disclosure is required by law. For completeness and clarity, the Department has added to the regulatory text, as § 13.5(d)(1)(iv), a general reference to the confidentiality requirements described in § 13.25(d), which apply to information a contractor obtains in the course of receiving requests to use paid sick leave for any purpose as well as to information an employee may provide pursuant to the certification and documentation provisions described below.

Proposed § 13.5(d)(2) provided that if the need to use paid sick leave is foreseeable, the employee's request shall be made at least 7 calendar days in advance, whereas if the employee is unable to request leave at least 7 calendar days in advance, the request shall be made as soon as is practicable. The term *as soon as is practicable* is defined in § 13.2. Proposed § 13.5(d)(2) further provided that when an employee becomes aware of a need to use paid sick leave less than 7 calendar days in advance, it should typically be practicable for the employee to make a request for leave either the day the employee becomes aware of the need to use paid sick leave or the next business day, but notes that in all cases, the determination of when an employee could practicably make a request must take into account the individual facts and circumstances.

The Department explained in the NPRM that it would consider any request made on the day the employee becomes aware of the need to take paid sick leave or the following business day to have been made as soon as was practicable; although it would not presume that requests made beyond that time frame were made as soon as practicable, the facts and circumstances of the specific situation could be such that despite the longer delay, the employee did in fact notify the employer as soon as was possible and practical. As explained in the NPRM, for example, if an employee makes an appointment for his daughter to have an annual exam with her doctor 2 weeks in the future, the employee should ask to use paid sick leave to take his daughter to the appointment at least 7 calendar days before the date on which it is scheduled. If instead the nurse at the employee's daughter's school called one afternoon to say the daughter had a high fever and he needed to take her out of school right away, he could plainly not have requested leave 7 days in advance, and he should instead request leave as soon as is practicable. Depending on the circumstances, such as how much attention the daughter needed, whether the employee had access to a phone or computer, and/or whether the person to whom the request would be directed was available, in this situation, as soon as practicable could be as the employee was preparing to leave work to get his daughter, when he got home with his daughter, later that evening (perhaps after she was asleep), or the next morning (assuming the following day was a business day). If, on the other hand, the employee himself was in a serious car accident, was taken to the hospital, and had surgery the next day, he could not practicably have requested leave the day of the accident or of the surgery (*i.e.,* the day he became aware of the need for leave or the following day).

AAR commented that under the FMLA, foreseeable requests for leave are to be made 30 days in advance, and there is no reason to have a shorter period of 7 days in the paid sick leave context. But the 7-day time frame implements section 2(h) of the Executive Order, which specifically provides that requests be made "at least 7 calendar days in advance where the need for the leave is foreseeable," so the Department cannot accept this suggestion. In other words, an employer may not require notice more than 7 days in advance of the employee's intent to use leave for a foreseeable purpose. The Department also notes that because paid sick leave will often involve shorter periods of absence than FMLA leave, which can be up to 12 weeks in duration, it will generally not be as difficult for contractors to plan around employee absences in the paid sick leave context. The Department adopts § 13.5(d)(2) as proposed but with minor, non-substantive modifications for clarity.

The NPRM further explained, and the Department reiterates, that if an employee did not comply with the requirements of § 13.5(d)(2), a contractor could properly deny the employee's request to use paid sick leave. For example, if an employee arranges a doctor's appointment for his son 3 weeks in advance but does not submit a request to use paid sick leave until 2 days before the appointment, the contractor may properly deny that request. Denial of the request would not be proper, however, if the need for leave was not foreseeable and the employee made the request as soon as was practicable, such as if upon making the request 2 days in advance, the employee explained that his husband had planned to take their son to the appointment, but the husband learned on the morning the employee submitted the request that the husband would be unavailable at the time of the appointment, and the couple decided that the employee would have to take the son instead.

Proposed § 13.5(d)(3) addressed a contractor's response to an employee's request to use paid sick leave. Proposed § 13.5(d)(3)(i) permitted a contractor to communicate its grant of a request to use paid sick leave either orally or in writing provided that the contractor also complied with the requirement in § 13.5(a)(2) to inform the employee in writing of the amount of paid sick leave the employee has available for use. The Department did not receive comments regarding this provision specifically but has modified it to reflect that § 13.5(a)(2) no longer requires a contractor to inform an employee of the amount of paid sick leave she has available for use upon each request to use paid sick leave and to note that a written communication may be provided electronically, if the contractor customarily corresponds with or makes information available to its employees by such means.

Proposed § 13.5(d)(3)(ii) required a contractor to communicate any denial of a request to use paid sick leave in writing, with an explanation for the denial. PSC commented that a contractor's denial of a request to use paid sick leave should not have to be in writing. The Department is not adopting this suggestion because it believes written denials are advantageous for both employees and contractors. By providing the employee with a written statement of the reason for the denial, the contractor most effectively communicates what types of requests will be denied in the future and ensures that the WHD has a written record of the contractor's rationale in the event the employee were to file an interference complaint. EEAC asked that the Department be explicit that it considers electronic communication to satisfy this requirement. The Department believes it is appropriate for a contractor to communicate denials via electronic means, such as an email or text message, provided that the contractor customarily corresponds with or makes information available to its employees by such means; it has added language to this effect to the regulatory text.

Proposed § 13.5(d)(3)(ii) further provided that denial is appropriate if, for example, the employee did not provide sufficient information about the need for paid sick leave; the reason given is not consistent with the uses of paid sick leave described in § 13.5(c)(1); the employee did not indicate when the need would arise; the employee has not accrued, and will not have accrued by the date of leave anticipated in the request, a sufficient amount of paid sick leave to cover the request (in which case, if the employee will have any paid sick leave available for use, only a partial denial would be appropriate); or the request is to use paid sick leave during time the employee is scheduled to be performing non-covered work. The proposed text also explained that if the denial is based on insufficient information provided in the request, such as if the employee did not state the time of an appointment with a health care provider, the contractor must permit the employee to submit a new, corrected request. The Department further proposed that if the denial is based on an employee's request to use paid sick leave during time she is scheduled to be performing non-covered work, the denial must be supported by records adequately segregating the employee's time spent on covered and non-covered contracts. Seyfarth Shaw commented that this list of reasons a contractor may properly deny a request to use paid sick leave is helpful for contractors seeking to avoid accusations of interfering with employees' rights. The Department appreciates that contractors must be able to administer paid sick leave in a reasonable manner, and adopts this text as proposed.

IEC, the American Staffing Association, and TrueBlue, Inc. requested that the Department permit a contractor to prohibit an employee from using paid sick leave until the employee has worked for the contractor for 90 days. Although the Department recognizes that such a delay may be consistent with some contractors' existing practices, the Department declines to adopt this suggestion for purposes of the Executive Order because the Order itself provides for no such delay and the Department believes the purposes of providing access to paid sick leave are best fulfilled by ensuring that employees have such access throughout their employment, including early in their tenure with a new employer.

Proposed § 13.5(d)(3)(iii) required a contractor to respond to any request to use paid sick leave as soon as is practicable after the request is made. As proposed, it further explained that, although the determination of when it is practicable for a contractor to provide a response would take into account the individual facts and circumstances, it should in many circumstances be practicable for the contractor to respond to a request immediately or within a few hours. The proposed provision further explained that in some instances, such as if it is unclear at the time of the request whether the employee will be working on or in connection with a covered or non-covered contract at the time for which paid sick leave is requested, as soon as practicable could mean within a day or no longer than within a few days. PSC, the American Benefits Council, and Vigilant objected to the Department's suggestion that a contractor could respond to a request immediately or within a few hours; in particular, Vigilant noted that in many cases, the individual who receives the request would have to check with the human resources department to determine whether the employee had paid sick leave available for use before responding to the employee. The Department does not disagree with the comments but also does not believe modification of the proposed regulatory text is necessary. In some circumstances, such as if a contractor with only a small number of employees who knows they have all accrued some paid sick leave faces a request from an employee to leave work 1 hour early because his son is sick, or if a large contractor has an information technology system in place that allows a supervisor or human resources professional who handles leave requests to immediately check how much paid sick leave an employee has available for use, an immediate or very prompt response will be possible. As the regulatory text acknowledges, under other circumstances—such as if the human resources office with paid sick leave accrual information is unreachable at the time the request is made or the employee's schedule at the time he needs to be absent is not yet determined—there will be reasons that the response to a request will necessarily be delayed. The Department does not mean to, and did not, indicate that a very short time frame for response will always be required; its language is meant instead to indicate that employers should respond to requests to use paid sick leave as promptly as is reasonable under the circumstances.

Proposed § 13.5(e) implemented section 2(i) of the Executive Order, which addresses certification and documentation for leave of 3 or more consecutive workdays.

Under proposed § 13.5(e)(1)(i), a contractor could require certification issued by a health care provider to verify the need for paid sick leave used for the purposes listed in proposed § 13.5(c)(1)(i), (ii), or (iii) only if the employee is absent for 3 or more consecutive full workdays. Under the proposed provision, a contractor could not require certification to justify the use of paid sick leave for any amount of time shorter than 3 consecutive full workdays. For instance, if an employee is scheduled to work from 9am to 5pm on Monday, Tuesday, and Wednesday, and he is unable to come to work at all during those times because he is hospitalized due to a severe infection, his employer could require that he provide certification issued by a health care provider. On the other hand, if the employee uses 4 hours of paid sick leave on Monday because his daughter's school nurse calls in the early afternoon to say his daughter has a fever and must be taken home, all 8 hours on Tuesday because he stays home with his ill daughter, and another 2 hours on Wednesday because his daughter is not well enough to go to school on time, his employer could not require certification because he has not used paid sick leave for all of his scheduled time on 3 consecutive full workdays. (The definition of *certification issued by a health care provider* appears in § 13.2.) Proposed § 13.5(e)(1)(i) further required the contractor to protect the confidentiality of any certification as required by § 13.25(d). The Department received no comments specifically regarding this provision and adopts it as proposed but with a minor correction to accurately reflect that the use of paid sick leave would be for one of the purposes described in § 13.5(c)(1)(i), (ii), or (iii), rather than all of them.

Proposed § 13.5(e)(1)(ii) addressed documentation to verify the use of paid sick leave for the purposes listed in § 13.5(c)(1)(iv), *i.e.,* for absences related to domestic violence, sexual assault, or stalking. Specifically, it permitted a contractor to require documentation from an appropriate individual or organization to verify the need for such leave only if an employee uses paid sick leave on 3 or more consecutive full workdays for such purposes. The NPRM explained that such documentation could come from any person involved in providing or assisting with the care, counseling, relocation, assistance of a victim services organization, or related legal action, such as, but not limited to, a health care provider, counselor, employee of the victim services organization, or attorney. The Women's Law Project, NWLC, and a group of organizations "dedicated to preventing, addressing, and ending domestic violence and sexual assault" suggested that the Department move this explanatory text to the regulation itself to prevent any confusion among contractors about the broad set of possible sources of acceptable documentation. These commenters also asked that the Department add clergy members, as well as family and close friends, to the illustrative list of individuals who can provide the documentation, and that the Department permit self-certification because there are instances in which an employee has not told anyone about the domestic violence, sexual assault, or stalking situation she faces. Because the Department agrees with these commenters that the broad scope of possible documentation for the varied and difficult circumstances related to domestic violence, sexual assault, and stalking was not fully articulated in the proposed regulatory text, and in the interest of minimizing any burden on victims who wish to limit the number of people to whom they reveal information about the situations they are facing, the Department has modified the text of § 13.5(e)(1)(ii) to incorporate each of these suggestions. The Department notes that the paid sick time laws in Massachusetts and Seattle also permit self-certification when leave is used for purposes like those described in § 13.5(c)(1)(iv). *See* 90 Mass. Code Regs. 33.06(2)(b)(vi); Seattle, Wash. Mun. Code § 14.16.030(F)(2)(d).

Proposed § 13.5(e)(1)(ii) also provided that a contractor may only require that such documentation contain the minimum necessary information establishing the need for the employee to be absent from work. This portion of the provision was not the subject of any comments and is adopted as proposed. As explained in the NPRM, the documentation could, for example, consist of a note from a social worker at a victim services organization stating that the employee received services from the organization related to being a victim of domestic violence and moved to a new home for reasons related to the domestic violence, as well as a receipt from a moving company or a note from a landlord that indicates the date(s) of the move; it need not name the perpetrator of the domestic violence, the nature of the acts that constitute domestic violence, the addresses of the old or new homes, or any other details beyond those sufficient to make clear that the time was used for a purpose that justifies the use of paid sick leave. As another example, documentation could consist of a letter from a legal services attorney or sexual assault victim advocate who is assisting an employee who is a victim of sexual assault in completing the paperwork related to and filing for a civil protection order or restraining order, explaining that the employee spent time (consisting of most business hours over 3 consecutive days) with the attorney or advocate preparing for the hearing, including completing the petition for the court's order and obtaining a time for the hearing as well as attending the hearing, including waiting at the courthouse and attending the proceedings; the letter would not need to explain the circumstances of the sexual assault, name the person(s) accused of the sexual assault, or otherwise provide any details beyond those sufficient to justify the need to use paid sick leave. Similarly, if the employee used 3 or more consecutive full workdays of paid sick leave to fly across the country to be with her daughter who is a victim of sexual assault to provide support related to an administrative hearing at the university the daughter attends, documentation could consist of the boarding passes from the employee's plane flights and emails from a university official to the daughter setting the date of the hearing, without providing details about the specific subject matter of the hearing.

Proposed § 13.5(e)(1)(ii) prohibited a contractor from disclosing any verification information and reiterated that the contractor must maintain confidentiality about the domestic abuse, sexual assault, or stalking as required by § 13.25(d). This sentence is adopted as proposed.

PSC and AGC urged the Department to permit contractors to request certification for leave of less than 3 days if an employee's use of paid sick leave occurs in a pattern that the employer believes suggests abuse (such as if an employee repeatedly uses paid sick leave on Fridays or Mondays). Because the Executive Order provides that a contractor may only require certification or documentation if an employee is absent for 3 or more consecutive days, 80 FR 54698, the Department declines to adopt the suggestion that in some circumstances, contractors be permitted to require certification or documentation for shorter periods of leave. The Department further addresses suspected abuse of paid sick leave by employees, including by noting that contractors may investigate such situations, in the discussion of § 13.6 below.

Proposed § 13.5(e)(2), which was derived from the FMLA regulations at 29 CFR 825.122(k), provided that if certification or documentation is to verify the illness, injury, or condition, need for diagnosis, care, or preventive care, or activity related to domestic violence, sexual assault, or stalking of an individual related to the employee as described in § 13.5(c)(1)(iii), a contractor could also require the employee to provide reasonable documentation or a statement of the family or family-like relationship. Proposed § 13.5(e)(2) further explained that this documentation could take the form of a simple written statement from the employee or could be a legal or other document proving the relationship, such as a birth certificate or court order. EEAC noted its approval of this proposed requirement, and the Department adopts it as proposed. As noted in the NPRM, like under the FMLA, such a written statement from the employee need not be notarized. Additionally, a contractor is entitled to examine any legal or other documentation provided, but the employee is entitled to the return of any official document submitted for this purpose, such as a birth certificate. The Department also notes that if an employee has already submitted proof of a family or family-like relationship to the contractor for some other purpose, such as providing a marriage certificate in order to obtain health care benefits for the employee's spouse, such proof is sufficient to confirm the family relationship for purposes of paid sick leave, and the contractor may not require additional documentation.

Proposed § 13.5(e)(3) addressed timing with respect to certification and documentation. Proposed § 13.5(e)(3)(i) allowed a contractor to require certification or documentation only if the contractor informs an employee before the employee returns to work that certification or documentation would be required to verify the use of paid sick leave if the employee is absent for 3 or more consecutive full workdays. The Department viewed this time limit as necessary because without notice at the time the employee or individual cared for by the employee has the condition or need justifying the use of paid sick leave, it could become difficult or even impossible for the employee to obtain certification. For example, if an employee has the flu for 4 days, without knowing that the contractor wishes her to provide certification from a health care provider verifying that she was sick, she might well recover fully without contacting a doctor. The Department further explained in the NPRM but not the regulatory text that a contractor's general policy, if made clear to employees (such as in an employee handbook), requiring certification of the use of paid sick leave for absences of 3 or more consecutive full workdays would suffice to meet this requirement.

The AFL–CIO was generally supportive of this provision. Other commenters had conflicting views regarding whether notification in an employee handbook should be sufficient to meet this obligation: EEAC asked that a statement that such notice would fulfill this requirement appear in the regulatory text, whereas the Center for WorkLife Law suggested that the Department disallow such general notice but instead require actual notice to an employee at the time the employee is using leave (a requirement that would be consistent with the analogous FMLA provision, 29 CFR 825.305(a), which provides that "[a]n employer must give notice of a requirement for certification each time a certification is required").

Because the Department recognizes both the importance of employees being notified of the need to acquire certification or documentation and the potential burden on contractors that would be associated with informing each employee of its policy each time she requested to use leave, the Department is addressing these comments by adding to § 13.5(e)(3) a statement that the contractor may inform an employee of this requirement each time the employee requests to use or does use paid sick leave, or the contractor may inform employees of a general policy to require certification or documentation for absences of 3 or more consecutive full workdays if it does so in a manner reasonably calculated to provide actual notice of the requirement to employees. Whether employees have received actual notice will depend on the particular circumstances, but in general, the Department will not consider simply including an explanation of the requirement in a lengthy handbook to be sufficient to show the employer has ensured that its employees had actual notice. Explaining the policy orally when an employee is hired, reiterating the policy periodically in email reminders or at human resources trainings, and including it in an employee handbook to which the employee can refer at later dates, however, would satisfy the actual notice requirement, as would prominently posting the policy on a Web page from which employees can submit electronic requests to use paid sick leave.

Under proposed § 13.5(e)(3)(ii), a contractor could require the employee to provide certification or documentation within 30 days of the first day of the 3 or more consecutive full workdays of paid sick leave but could not set a shorter deadline for its submission. This requirement is set forth in section 2(i) of the Executive Order. 80 FR 54698. No commenter addressed it, and it is adopted as proposed.

Proposed § 13.5(e)(3)(iii) addressed the period between an employee's using paid sick leave for which a contractor properly requires certification or documentation and the employee's submission of such certification and documentation, as well as how a contractor can respond to insufficient certification or documentation. It is adopted largely as proposed, but with modifications as described. First, proposed § 13.5(e)(3)(iii) required that while a contractor is waiting for or reviewing certification or documentation, it must treat the employee's otherwise proper request for 3 or more consecutive full workdays of paid sick leave as valid. Vigilant asked that the Department change this provision such that the contractor would not treat an employee's absence as paid sick leave until after receiving sufficient certification or documentation. The Department recognizes that because it is not possible to immediately resolve the issue of whether an employee's absence of 3 or more days from work is properly treated as time using paid sick leave, either the contractor or the employee must bear the risk of an incorrect assumption while the determination is pending. Permitting an employer to wait to pay an employee for the time would create a significant deterrent to the use of paid sick leave at times when an employee's need is likely greatest (because relatively longer leave will often be for an acute or severe issue). For these reasons, and because recoupment of payments made for paid sick leave after a proper retroactive denial of that leave is permitted under the Order and part 13 in the circumstances explained below, the Department believes it is more appropriate to ensure that the employee receives the pay and benefits she would have earned had she been working than to delay such payment to the employee.

Proposed § 13.5(e)(3)(iii) also explained that if the contractor ultimately does not receive certification or documentation, or if the certification or documentation the employee provides is insufficient to verify the employee's need for paid sick leave, the contractor could, within 10 calendar days of the deadline for receiving the certification or documentation or within 10 calendar days of the receipt of the insufficient certification or documentation, whichever occurs first, retroactively deny the employee's request to use paid sick leave.

The Department explained in the NPRM that certification or documentation could be insufficient, for example, because it did not describe a need for leave consistent with the permitted reasons for using paid sick leave or because, if the leave was for a purpose other than that described in § 13.5(c)(1)(iv), it was not created or signed by a health care provider or a health care provider's representative. The Center for WorkLife Law commented that the Department should require the contractor to give an employee notice that her certification or documentation is insufficient and allow her at least 5 days to cure the deficiency. Because the Department agrees that it is appropriate to give employees, who will often be unfamiliar with the rules regarding certification and documentation, a second chance to justify their use of a substantial portion of their accrued paid sick leave, the Department has modified the regulatory text to implement this suggestion. Specifically, § 13.5(e)(3)(iii) now provides that if an employee provides certification or documentation that is insufficient to verify the employee's need for paid sick leave, the contractor shall notify the employee of the deficiency and allow the employee at least 5 days to provide new or supplemental certification or documentation. If after 30 days the employee has not provided any certification or documentation, or if after the 5 or more days allowed for resubmission the employee has either provided no new or supplemental certification or documentation or the new certification or documentation is still insufficient to verify the employee's need for paid sick leave, the contractor may, within 10 calendar days of the employee's deadline for providing sufficient certification or documentation, retroactively deny the employee's request to use paid sick leave.

Proposed § 13.5(e)(3)(iii) further provided that if the contractor retroactively rejected the employee's request, the contractor could recover the value of the pay and benefits the employee received but to which the employee was not entitled, including through deduction from any sums due to the employee (*e.g.*, unpaid wages, vacation pay, profit sharing, etc.), provided such deductions do not otherwise violate applicable Federal or State wage payment or other laws. This language was derived from the FMLA regulations regarding the consequences of an employee's failure to return to work after an employer paid for health or non-health benefit premiums while an employee was on FMLA leave. *See* 29 CFR 825.213(f). If a contractor retroactively denied an employee's request to use paid sick leave, the NPRM explained, the contractor was required to reinstate the amount of paid sick leave the employee was treated as having used to the employee.

Delta commented that the NPRM did not address a contractor's options if a State law does not permit recoupment of wages paid and suggested that the contractor be permitted to treat the absence as paid sick leave but nevertheless count the absence against the employee in the contractor's time and attendance policy. The Department does not agree with this suggestion. If a contractor could properly retroactively deny an employee's request to use paid sick leave but may not recoup relevant payments made, the contractor has two options. It may treat the time as paid sick leave, in which case the contractor must comply with all of the requirements of the Order and part 13 with respect to that time, including the prohibitions on interference and discrimination (that is, it may not count the absence against the employee under its attendance policy) but the employee will have less paid sick leave available for use going forward. Or it may elect not to treat the time as paid sick leave, in which case it may count the absence against the employee under its attendance policy but it must restore the hours of paid sick leave the employee attempted to use to the amount of paid sick leave the employee has available for use. This portion of the provision is therefore adopted as proposed, except that the reference to Federal or State wage payment laws has been corrected to refer to Federal, State, or local wage payment laws.

Proposed § 13.5(e)(4) permitted a contractor to contact the health care provider or other individual who created or signed the certification or documentation only for purposes of authenticating the document or clarifying its contents and further explained that the contractor could not request additional details about the medical or other condition referenced, seek a second opinion, or otherwise question the substance of the certification. Under the proposal, authentication meant verifying that the health care provider or other individual did in fact create or sign the certification. Clarifying meant asking what illegible handwriting or other unreadable text says or asking for an explanation of the meaning of words used or information contained in the certification. Under the proposal, which was consistent with requirements regarding certification under the FMLA, *see* 29 CFR 825.307, a contractor could not ask the health care provider or other individual who created or signed the certification or other documentation for more information than necessary to verify that the employee was justified in using paid sick leave. The specific information required would vary depending upon the reason for the leave. For example, as explained in the NPRM, if an employee was home sick or injured for 3 days, any certification would need to contain some information about the medical condition (such as that it was the flu or a badly sprained ankle) to verify that the condition existed and lasted 3 or more days, but if an employee was a patient in a hospital for 3 days, the certification would not need to specify the condition for which the employee was being treated, because he was clearly receiving care from a health care provider while using paid sick leave. No commenter suggested modification of this portion of the provision, and the Department adopts it as proposed.

Proposed § 13.5(e)(4) further required the contractor to use a human resources professional, a leave administrator, or a management official if making contact with the health care provider or other individual who created or signed the certification or documentation. This requirement was derived from a regulatory provision under the FMLA. *See* 29 CFR 825.307(a). The proposed text went on to prohibit the employee's direct supervisor from contacting the employee's health care provider unless there is no other appropriate individual who can do so. The proposed requirement was also based on a similar provision in the FMLA regulations, 29 CFR 825.307(a), but unlike that provision, it did not contain a complete prohibition on an employee's direct supervisor contacting the health care provider. In explaining this distinction, the Department noted that although the Department sought to protect the privacy of employees (who might not wish to share personal medical or other information with a supervisor) to the extent possible, it recognized that the Executive Order applies to contractors that are not covered by the FMLA because their businesses are not of the requisite size, and so it believed the limited proposed exception was necessary. EEAC commented that it was helpful for the Department to be clear about who is permitted to seek authentication or clarification. Roffman Horvitz, on the other hand, believed the proposed provision placed too many requirements on contractors and should instead describe the necessary training for seeking authentication or clarification and allow the contractor to select the person who would complete those tasks. The Department adopts this portion of the provision as proposed, noting in response to Roffman Horvitz that the regulatory language allows contractors significant leeway in determining who may contact the health care provider or other professional and the limits that it does create are necessary to protect employees' privacy.

Proposed § 13.5(e)(4) also addressed the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, Pub. L. 104–191, 110 Stat. 1936 (1996), which governs the privacy of individually identifiable health information created or held by HIPAA-covered entities and the requirements of which are set forth at 45 CFR parts 160 and 164. Specifically, it provided that the HIPAA Privacy Rule requirements must be satisfied when individually identifiable health information of an employee is shared with a contractor by a HIPAA-covered health care provider. As is true for purposes of the FMLA, if an employee's certification is unclear and the employee chooses not to provide the contractor with authorization allowing the contractor to clarify the certification with the health care provider (and does not otherwise clarify the certification), the proposed rule permitted the contractor to deny an employee's request to use paid sick leave. *See* 29 CFR 825.307(a). The Department received no requests to change this language and adopts it as proposed.

Proposed § 13.5(f) addressed the interaction between the paid sick leave required by Executive Order 13706 and part 13 with other laws as well as contractors' paid time off policies. Proposed § 13.5(f)(1) implemented section 2(l) of the Executive Order by providing that nothing in the Order or part 13 excused noncompliance with or superseded any applicable Federal or State law, any applicable law or municipal ordinance, or a CBA requiring greater paid sick leave or leave rights than those established under the Executive Order and part 13. The Department received no comments regarding this provision and adopts it as proposed.

Proposed § 13.5(f)(2) addressed the interaction between paid sick leave and the requirements of the SCA and DBA, thereby implementing section 2(f) of the Executive Order. Proposed § 13.5(f)(2)(i) explained that paid sick leave required by Executive Order 13706 and part 13 was in addition to a contractor's obligations under the SCA and DBA, and a contractor would not receive credit toward its prevailing wage or fringe benefit obligations under those Acts for any paid sick leave provided in satisfaction of the requirements of Executive Order 13706 and part 13. The SCA and DBA both provide that fringe benefits furnished to employees in compliance with their requirements do not include any benefits "required by Federal, State, or local law." 41 U.S.C. 6703(2) (SCA); 40 U.S.C. 3141(2)(B) (DBA); *see also* 29 CFR 4.171(c) ("No benefit required by any other Federal law or by any State or local law, such as unemployment compensation, workers' compensation, or social security, is a fringe benefit for purposes of the [SCA]."); 29 CFR 5.29 ("The [DBA] excludes fringe benefits which a contractor or subcontractor is obligated to provide under other Federal, State, or local law. No credit may be taken under the [DBA] for the payments made for such benefits. For example, payment[s] for workmen's compensation insurance under either a compulsory or elective State statute are not considered payments for fringe benefits under the [DBA]."). Because paid sick leave provided in accordance with the Executive Order and part 13 is required by law, the Department reasoned, consistent with the Executive Order's express language, that such paid sick leave cannot count toward the fulfillment of SCA or DBA obligations.

Proposed § 13.5(f)(2)(ii) allowed a contractor to count the value of any paid sick time provided in excess of the requirements of Executive Order 13706 and part 13 (and any other law) toward its obligations under the SCA or DBA in keeping with the requirements of those Acts. In particular, the NPRM explained that a contractor could take credit for such paid sick time provided in compliance with the SCA requirements regarding fringe benefits as described in

29 CFR 4.170 through 4.177 or with the DBA requirements regarding fringe benefits as described in 29 CFR 5.20 through 5.32, as applicable.

Several commenters disagreed with the Department's position as expressed in § 13.5(f)(2). AGC commented that paid sick leave is a contractual, rather than legal, requirement and therefore should not be excluded from a contractor's fulfillment of its DBA fringe benefit obligations. ABC commented that not giving contractors credit toward their DBA obligations for the cost of providing paid sick leave amounts to imposing a double payment penalty on those contractors. PSC urged the Department to count a contractor's existing paid time off policy used to satisfy its obligations under the Order and part 13 (as permitted by § 13.5(f)(5)) toward its SCA obligations. The Building Trades urged the Department to conclude that if a contractor provides paid sick leave in a manner sufficient for it to qualify as a "bona fide fringe benefit" for purposes of the SCA or DBA, that contractor should be permitted to take credit for irrevocable contributions to a paid sick leave plan toward its SCA or DBA obligations. The Department does not agree with these commenters' rationales or suggestions. Paid sick leave is required by Executive Order 13706 and part 13, which are sources of law, and therefore under the SCA and DBA, as well as the Order's own terms, it cannot be used to fulfill SCA or DBA obligations. That result applies regardless of how the contractor satisfies its obligations under the Order, including by doing so with a paid time off policy or with a funded plan (which, as newly explicitly noted in § 13.8, described below, is permitted). The Department does not believe it is inappropriate that DBA (or SCA) contractors will have to comply with two legal obligations: Fulfilling the requirements of the Executive Order, which provides employees access to paid sick leave, and fulfilling the requirements of the DBA (and SCA), which requires paying employees prevailing wages and fringe benefits. Accordingly, § 13.5(f)(2) is adopted as proposed.

The Department reiterates that to the extent contractors provide leave benefits in excess of those required by the Order and part 13, the value of the excess benefit (if not required under another law) may be counted toward SCA or DBA obligations. For example, if a contractor provides paid sick leave pursuant to the Order and part 13 but also voluntarily provides its employees an additional 16 hours of paid sick time, the value of that additional 16 hours may be counted toward its SCA or DBA obligations (to the extent permitted by those statutes and their implementing regulations). Or if a contractor's paid time off policy provides more than 56 hours of leave and a contractor tracks and records the amount of paid time off employees use for the purposes described in § 13.5(c)(1), the contractor may count paid time off an employee uses for other purposes toward its SCA or DBA obligations (to the extent permitted by those statutes and their implementing regulations). For SCA-covered contracts, such obligations could include the required health and welfare benefit or required vacation time.

The Chamber/IFA asked how paid sick time that is provided for in a CBA would be treated under section 4(c) of the SCA, 29 U.S.C. 6707(c), which generally requires that a successor contractor under the SCA may not pay service employees less than the wages and fringe benefits they would have received under a predecessor contractor's CBA. The response to this question will depend on the terms and circumstances of the paid leave provided for in the CBA, but will be determined based on two primary principles. First, "a[n SCA] contractor may satisfy its fringe benefit obligations under any wage determination 'by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash' in accordance with [SCA requirements]." 29 CFR 4.163(j). In other words, that a CBA provides for any particular benefit, such as paid time off, does not mean the successor contractor subject to a wage determination issued under section 4(c) must provide that same benefit. Second, benefits that are required by law, including paid sick leave required by the Executive Order and part 13, cannot count toward the fulfillment of SCA (or DBA) obligations.

Proposed § 13.5(f)(3) addressed the interaction of paid sick leave required by Executive Order 13706 and part 13 with the FMLA. It provided that a contractor's obligations under the Executive Order and part 13 would have no effect on its obligations to comply with, or ability to act pursuant to, the FMLA. It further provided that paid sick leave could be substituted for (that is, may run concurrently with) unpaid FMLA leave under the same conditions as other paid time off pursuant to 29 CFR 825.207. It also explained that as to time off that is designated as FMLA leave and for which an employee uses paid sick leave, all notices and certifications that satisfy the FMLA requirements set forth at 29 CFR 825.300 through 825.308 would satisfy the request for leave and certification requirements of § 13.5(d) and (e).

For example, although under the Executive Order and part 13 an employee's request to use paid sick leave need only be made at least 7 days in advance if the need for leave is foreseeable, under the FMLA, such notice must be made at least 30 days in advance pursuant to 29 CFR 825.302(a). If an employee seeks to use paid sick leave for an FMLA-qualifying reason (and thus both types of leave will run concurrently), such as if she needs major surgery, the contractor may require that she comply with the FMLA's notice requirements, which will satisfy the requirements of the Executive Order and part 13; specifically, when she notifies the contractor of the date of her surgery (that is 30 days in the future or as soon as practicable) and likely recovery period, she will have complied with the requirements of § 13.5(d) to provide oral or written notice of a need for leave that justifies the use of paid sick leave, and the expected duration of the leave, at least 7 days in advance or as soon as practicable.

Similarly, although under the Executive Order and part 13 a contractor may not require certification of the need to use paid sick leave unless the employee uses more than 3 consecutive full workdays of paid sick leave, a contractor is permitted to require certification from an employee for a shorter period of FMLA-designated leave as provided in 29 CFR 825.305. If an employee is concurrently using paid sick leave and FMLA leave, a contractor may require certification as permitted under the FMLA even if certification for paid sick leave would not be permitted under Executive Order 13706 and part 13 (such as, for example, if the employee only needed to use 1 day of leave). If that certification supported the use of FMLA leave for an employee's serious health condition, it would be more than sufficient to serve as the certification issued by a health care provider for use of 3 consecutive full workdays of paid sick leave should such certification become necessary. Even if the certification was insufficient to demonstrate that an employee was entitled to use FMLA leave (such as because although the employee is ill, the illness did not meet the definition of a serious health condition), it could nevertheless be sufficient to meet the requirements of the Executive Order and part 13. The Department received no comments specific to the interaction of paid sick leave and FMLA leave and therefore adopts this provision as proposed.

EEAC asked the Department, presumably in response to the portion of this provision stating that paid sick leave can run concurrently with FMLA leave, to state that paid sick leave also runs concurrently with other types of paid leave. The Department has made clear in § 13.5(f)(4), discussed below, that for purposes of this rulemaking, a contractor can fulfill its obligation to provide paid sick leave under the Order and part 13 as well as satisfy the requirements of a State or local paid sick time law with one type of paid leave that complies with both the Order and such a law. Nothing in the regulations prohibits a contractor from fulfilling other legal obligations by providing leave that also satisfies its obligations under the Executive Order and part 13. (The Department notes, however, that the converse is not necessarily true: Leave that satisfies a contractor's obligations under the Executive Order and part 13 may not necessarily satisfy or be used to satisfy other legal obligations, such as those arising under the SCA and DBA.)

Proposed § 13.5(f)(4) addressed the interaction of paid sick leave required by Executive Order 13706 and part 13 with paid sick time required by State or local law. As proposed, it explained that a contractor's compliance with a State or local law requiring that employees be provided with paid sick time does not excuse the contractor from compliance with its obligations under the Executive Order 13706 or part 13. It noted, however, that a contractor is permitted to satisfy its obligations under the Order and part 13 by providing paid sick time that fulfills the requirements of a State or local law provided that the paid sick time is accrued and could be used in a manner that meets or exceeds the requirements of the Order and part 13.

The American Benefits Council, Seyfarth Shaw, the Chamber/IFA, and TrueBlue, Inc. asked that the Department provide that a contractor can fulfill its requirements under the Executive Order and part 13 by complying with any applicable State or local paid sick time law, emphasizing the burdens on contractors who would be required to comply with this Federal requirement in addition to State or local (or sometimes both) requirements. The Department declines to adopt this suggestion because it would often result in employees covered by a State or local paid sick time law having access to less paid sick time, or paid sick time that is available for fewer uses, than is required under the Executive Order. Furthermore, contractors have experience complying with a variety of Federal, State, and local laws, so although the Department recognizes that contractors operating in States and localities with paid sick time laws may have greater obligations than those operating elsewhere, this is not a situation unique to paid sick time or that is unduly burdensome.

NWLC, the National Hispanic Council on Aging, the Maine Women's Lobby, UltraViolet Education Fund, and Innovation Ohio suggested that the Department provide more detail about the ways in which a contractor must satisfy the requirements of the Executive Order while also complying with a State or local paid sick time law, in particular by specifying that a contractor subject to both the Order and a State or local paid sick time law must provide leave that meets or exceeds the Order's accrual, use, and other requirements. The Department intended to make these points in the NPRM, and reiterates them here; it has also inserted language to this effect into the regulatory text—which is otherwise adopted as proposed—to be as clear as possible about contractors' obligations in jurisdictions in which a State or local paid sick time law applies.

Specifically, as explained in the NPRM, a contractor whose employees perform work on or in connection with covered contracts in States, counties, or municipalities that have statutes or ordinances requiring that employees be provided with paid sick time must comply with both those laws and the Executive Order. But that contractor would be permitted, at least for purposes of the Executive Order and part 13, to fulfill both obligations simultaneously. If, for example, a State law requires that employees receive up to 40 hours of paid sick time, a contractor is not necessarily required to provide employees performing work on or in connection with covered contracts in that State an additional 56 hours of paid sick leave; if the contractor provides paid sick time in compliance with both the State law and the Executive Order and part 13, the contractor need only provide up to 56 hours total of paid sick leave. (The NYC Department of Consumer Affairs indicated in its comment that this example would apply to New York City's paid sick time ordinance.)

The Department further explained in the NPRM that because the requirements of State and local laws and the Order and part 13 will rarely be identical, to satisfy both, a contractor will likely need to comply with the requirements that are more generous to employees. For example, a contractor could satisfy both a county law that requires employees to earn at least 1 hour of paid sick time for every 40 hours worked and the Executive Order by allowing employees to earn 1 hour of paid sick leave for every 30 hours worked. Or a contractor could satisfy both a State statute that allows employers to limit employees' use of paid sick time to 40 hours per year and the Executive Order by not limiting use per year on a basis other than the amount of leave an employee has available for use. Similarly, a contractor could satisfy both a municipal ordinance that does not permit an employer to require certification of the reason for using paid sick time under any circumstances and the Executive Order and part 13 by choosing not to require certification for the use of paid sick time even if an employee uses such leave for more than 3 consecutive days.

Proposed § 13.5(f)(5) addressed the interaction between the paid sick leave requirements of Executive Order 13706 and part 13 and an employer's paid time off policies, explaining first that the Order and part 13 need not have any effect on a contractor's voluntary paid time off policy, whether provided pursuant to a CBA or otherwise. The Department's proposal noted that whether as a practical matter the requirement to provide paid sick leave under the Order and part 13 affects the amount or types of other leave a contractor provides or a union negotiates is not an issue within the Department's rulemaking authority. The Department received no comments specifically addressing this portion of the provision and adopts it as proposed, though it now appears as § 13.5(f)(5)(i) because of adjustments to the provision described below. The timing of the Order's application to employees whose covered work is governed by a CBA is addressed in § 13.4(f).

Proposed § 13.5(f)(5) also implemented section 2(g) of the Order by providing that a contractor's existing paid time off policy (if provided in addition to the fulfillment of SCA or DBA obligations, if applicable) would satisfy the requirements of the Executive Order and part 13 if various conditions were met. First, the proposed provision explained that the paid time off was to be made available to all employees described in § 13.3(a)(2) (other than those excluded by § 13.4(e)). Second, under the proposal, employees were to be permitted to use the paid time off for at least all of the purposes described in § 13.5(c)(1). Those purposes, described in detail in the discussion of that provision, are those for which an employee must be permitted to use paid sick leave: (1) A physical or mental illness, injury, or medical condition; (2) obtaining diagnosis, care, or preventive care from a health care provider; (3) caring for the employee's child, parent, spouse, domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship for the reasons detailed in the provision; or (4) domestic violence, sexual assault, or stalking, if the time absent from work is for the purposes detailed in the provision. Third, the paid time off was to be provided in a manner and an amount sufficient to comply with the rules and restrictions regarding the accrual of paid sick leave set forth in § 13.5(a) and regarding maximum accrual, carryover, reinstatement, and payment for unused leave set forth in § 13.5(b). Fourth, the paid time off was to be provided pursuant to policies sufficient to comply with the rules and restrictions regarding use of paid sick leave set forth in § 13.5(c), requests for leave set forth in § 13.5(d), and certification and documentation set forth in § 13.5(e), at least with respect to any paid time off used for the purposes described in § 13.5(c)(1). Finally, the paid time off was to be protected by the prohibitions against interference, discrimination, and recordkeeping violations described in § 13.6 and the prohibition against waiver of rights described in § 13.7, at least with respect to any paid time off used for the purposes described in § 13.5(c)(1).

EEAC, the Chamber/IFA, the American Benefits Council, and PSC wrote that requiring contractors with paid time off policies to comply with the Executive Order's requirements is too burdensome, and that any paid time off policy that allows for 56 hours or more of leave should satisfy a contractor's obligations under the Order regardless of whether it meets the other requirements for accrual and use of paid sick leave specified in part 13. Some commenters identified specific requirements they found problematic: Seyfarth Shaw wrote that being unable to limit an employee's use of leave during an accrual year would be challenging for contractors and would lead many of them to abandon their existing paid time off policies; PSC asked that the recordkeeping requirements of part 13 not apply to paid time off policies; Delta wrote that the carryover requirement conflicted with its existing paid time off policy; and EEAC interpreted the Order to mean that any paid time off policy that complies with the terms of the Order, which it distinguished from what it asserted were additional requirements set forth in part 13, would satisfy a contractor's obligations. The Chamber/IFA and SHRM/CUPA–HR suggested that the Department identify the most crucial requirements of the Order and part 13 and permit contractors with paid time off policies to comply only with those. SHRM/CUPA–HR also asked for clarification of whether if an employee uses all of her paid time off for purposes other than those the Order specifies (such as vacation), the contractor is obligated to provide additional paid sick leave to that employee.

After careful consideration of these comments, the Department declines to adopt the commenters' suggestions that contractors with paid time off policies that provide employees with less than is required by this rulemaking be excused from complying with the requirements described in the Order and part 13. The Department believes the best interpretation of section 2(g) of the Order is that it allows contractors that already provide paid time off under policies that are equivalent to or more generous than those described in the Order and part 13 to avoid an obligation to provide an additional 56 hours of paid sick leave. Thus, employers who make available to employees entitled to paid sick leave pursuant to the Executive Order 56 hours of paid time off under policies that are equivalent to or more generous than those described in the Order and part 13 have fulfilled their obligations, regardless of whether their employees use that paid leave for the purposes designated by the Order or for other purposes deemed permissible by their employers, such as vacation. The key to compliance with the Order and part 13 is that employers with paid time off policies provide access to no less than 56 hours of paid leave under the required conditions, and that any such leave used for the purposes described in § 13.5(c)(1) is covered by the relevant protections form part 13, not whether employees choose to use their paid time off for the purposes covered by the Order and part 13. In this way, the Order and part 13 maintain the flexibility and discretion that many employers and employees value in paid time off policies.

This flexibility and discretion, however, should not be understood to excuse contractors that provide paid time off that is not equally protective of employees' access to paid absences for the reasons described in § 13.5(c)(1) from fulfilling the requirements of the Order and part 13. For example, if a contractor offered a paid time off policy under which each employee had 7 days of paid leave he could use for any purpose but an employee was required to use a full day of leave at a time even if he only needed to be absent for an hour to go to a doctor's appointment, or if the contractor could deny a request to use leave for any reason, including if the office is busy at the time an employee's child is sick, that contractor's employees would not have the meaningful access to paid sick leave the Order and part 13 are meant to confer and therefore the Department is not adopting commenters' suggestion that such a policy would fulfill the contractor's obligations under the Order.

With respect to EEAC's interpretation that the Order requires paid time off policies to comply with the Order itself but not what it considers to be additional regulatory requirements (such as recordkeeping requirements, the requirement to notify employees of the amount of paid sick leave they have accrued, the requirement to establish an accrual year, or the requirement not to make impermissible deductions from the pay and benefits an employee receives when using paid sick leave), the Department disagrees with the commenter's premise. The Order contemplates that regulations will be integral to carrying out its purposes, and accordingly directs the Secretary to issue regulations that are necessary and appropriate to implement the Order. 80 FR 54698. Part 13 constitutes the Department's interpretation of what the Order requires and how contractors will comply with it; each regulatory provision, rather than being an extraneous or additional requirement beyond what the Order demands, is a necessary and appropriate part of a complete scheme to give the Order its full intended effect. For example, the Order specifically authorizes the Secretary to include in its implementing regulations requirements regarding recordkeeping, and the records part 13 requires contractors to make and maintain will be essential to any WHD investigation of a possible violation of the Order. In addition, the Order refers to paid sick leave accrual in the course of a year without defining "year"; the definition of and requirements regarding establishing an "accrual year" give contractors the information and instructions they need to comply with their obligations.

The Department is therefore adopting § 13.5(f)(5) with the language proposed, which now appears as § 13.5(f)(5)(ii), but it is also clarifying, as § 13.5(f)(5)(iii) and as discussed here, how its provisions apply if a contractor's paid time off policy provides more than 56 hours of leave each year. The Department recognizes that (1) employers often provide paid time off rather than separate vacation and sick leave because they and their employees value the flexibility inherent in not distinguishing types of leave and (2) the intent of the Order was to ensure that employees have access to up to 56 hours of paid leave for the purposes described in § 13.5(c)(1). Therefore, the regulatory text now explicitly provides that a contractor satisfying the requirements of the Executive Order and part 13 with a paid time off policy that provides more than 56 hours of leave per accrual year may choose to either (1) provide all paid time off as described in § 13.5(f)(5)(ii) or (2) track, and make and maintain records reflecting, the amount of paid time off an employee uses for the purposes described in § 13.5(c)(1), in which case the contractor need only provide, for each accrual year, up to 56 hours of paid time off the employee requests to use for such purposes in compliance with the Order and part 13.

In other words, to ensure that 56 hours of paid time off is protected under the Order, if a contractor chooses to track, and make and maintain records reflecting, the amount of paid time off an employee uses for the purposes described in § 13.5(c)(1), the contractor need only provide, for each accrual year, up to 56 hours that an employee requests to use for such purposes in compliance with the rules and requirements of the Executive Order and part 13. If a contractor does not choose to track, and make and maintain records reflecting, the amount of paid time off an employee uses for the purposes described in § 13.5(c)(1), all of an employee's requests to use paid time off for such purposes must be provided in compliance with the Order and part 13. Regardless of whether a contractor distinguishes between paid time off used for the purposes described in § 13.5(c)(1) and paid time off used for other purposes, the contractor is not required to provide any additional paid sick leave or paid time off beyond the amount provided by the contractor's paid time off policy that satisfies the conditions described in § 13.5(f)(5).

For example, assume a contractor provides 120 hours of paid time off per accrual year. That contractor could decide to track and record the amount of paid time off each employee uses for the purposes described in § 13.5(c)(1), meaning that it formally distinguishes between leave used for such purposes and for other purposes and maintains documentation designed to ensure that it and each of its employees know how much paid time off an employee has used for the purposes described in § 13.5(c)(1) (and therefore how many out of at least 56 hours per accrual year the employee has remaining for use subject to the protections of the Order and part 13). If the contractor made such a choice, an employee who uses 56 hours for the purposes described in § 13.5(c)(1) early in the accrual year would not be entitled to Order's protections for her remaining 64 hours of paid time off regardless of the purposes for which she requests to use them. On the other hand, an employee who uses 64 hours of paid time off for other purposes (such as vacation) early in the year would still be entitled to use any or all of her remaining 56 hours of leave for such purposes subject to all of the protections required by the Order and part 13. Under this approach, a contractor must make up to 56 hours of paid time off per accrual year available for an employee's use for the purposes described in § 13.5(c)(1), but an employee might not choose to use any or all of her leave in that manner. For example, an employee who uses 80 hours of paid time off for vacation early in the year would only be entitled to use up to 40 remaining hours of leave for the purposes described in § 13.5(c)(1) subject to the protections required by the Order and part 13, and if she used those 40 hours for another vacation, she would have no paid leave remaining that her contractor would be obligated to provide for the purposes described in § 13.5(c)(1).

If a contractor that provides 120 hours of paid time off chooses not to track and record the amount of paid time off employees use for the purposes described in § 13.5(c)(1), its obligations would differ because it would not have information to demonstrate that an employee had in fact used her full entitlement to up to 56 hours of paid leave for the purposes described in § 13.5(c)(1). For example, if one of the contractor's employees uses 56 hours of leave early in the accrual year for reasons that the contractor did not document (even if the contractor was informally aware of those reasons), the employee would still be entitled to use any or all of her 64 remaining hours of paid time off for the purposes described in § 13.5(c)(1) subject to the protections of the Order and part 13.

As these examples demonstrate, whether a contractor chooses to keep track of the purposes for which paid time off is used determines whether it may limit the amount of paid time off as to which it must, if the leave is used for a purpose described in § 13.5(c)(1), provide all of the protections of the Order and part 13. But whichever option the contractor selects, it need not provide more paid time off than it offers in its policy (in this example, 120 hours) per accrual year irrespective of the purposes for which an employee actually uses her leave.

Accordingly, § 13.5(f)(5) as adopted still provides that a contractor's paid time off policy must in significant measure comply with the requirements of the Order and part 13, but the Department clarifies that contractors who fulfill their obligations under the Order and part 13 with a paid time off policy have both the option to formally distinguish between uses of leave and other flexibilities as described below. The following discussion offers details regarding how a paid time off policy used to fulfill a contractor's obligations under the Order and part 13 could operate.

As noted in the regulatory text and above, to satisfy the obligations of the Order and part 13, a contractor's paid time off policy must comply with all of the requirements of §§ 13.5(a) and 13.5(b) or, if the contractor chooses to track and record the amount of paid time off employees use for the purposes described in § 13.5(c)(1), the contractor must comply with those provisions with respect to up to 56 hours per accrual year of paid time off an employee requests to use for such purposes. The accrual-related requirements of the Executive Order and part 13 with which a contractor's paid time off policy must comply include allowing employees to accrue at least 1 hour of leave for every 30 hours worked (as hours worked are defined for purposes of the FLSA) without limiting annual accrual at any less than 56 hours and providing leave that accrues at least each pay period or each month as under § 13.5(a)(1)(ii). A contractor may assume for purposes of accrual of leave under its paid time off policy that employees whose hours it is not otherwise required by statute to track work 40 hours per week as described in § 13.5(a)(1)(iii). A contractor also has the option of providing employees with at least 56 hours of paid time off at the beginning of each accrual year as described in § 13.5(a)(3).

A contractor may choose to fulfill its obligations pursuant to § 13.5(f)(5) with a paid time off policy that provides more leave than is required, either by allowing for more rapid accrual (for example, by providing employees who work 80 hours in a pay period with 4 hours of paid time off for each pay period) or by providing more than 56 hours of paid time off at the beginning of each year. It is in these circumstances that the contractor's choice to track and record the reasons for which employees use leave becomes relevant, as noted throughout this discussion.

The requirement in § 13.5(a)(2) that a contractor notify employees of the amount of paid sick leave they have accrued also applies to paid time off policies that fulfill a contractor's obligations under the Order and part 13. In a circumstance in which a contractor does not track and record which paid time off an employee uses for the purposes described in § 13.5(c)(1), the contractor would comply with this requirement by informing an employee of an amount of paid time off generally, rather than paid sick leave specifically, available for use. In other words, because paid sick leave is typically not designated separately when an employer offers a paid time off policy, in this context, a contractor need only provide notice of the amount of paid time off an employee has available for use no less than once each pay period or each month (whichever interval is shorter) as well as upon a separation from employment and upon any reinstatement of leave if an employee is rehired within 12 months. If, however, a contractor chooses to track and record paid time off used for the purposes described in § 13.5(c)(1), the contractor would comply with this requirement by informing an employee of the amount of paid time off available for use for those purposes with the full protections required by the Order and part 13. A contractor would be free to follow its usual policy for informing employees of how much paid time off they have available overall if that amount differs (or to adopt any other practice it wished with respect to that time).

Additionally, a paid time off policy used to fulfill a contractor's obligations under the Order and part 13 must allow carryover of leave from the previous accrual year as provided in § 13.5(b)(2). But a contractor need only allow carryover of up to 56 hours of paid time off even if its policy provides more than 56 hours of leave, although this requirement applies differently depending on whether a contractor chooses to track and record the amount of paid sick leave an employee uses for the purposes described in § 13.5(c)(1). For example, assume that under a particular contractor's paid time off policy, employees who regularly work 8-hours days, 5 days per week accrue a half day of paid time off each semi-monthly pay period, so they receive 12 days total per year, and the contractor does not track and record the reason the employee uses paid time off. If one employee used all 12 days in year 1 (for vacation, the purposes described in § 13.5(c)(1), or some combination of both), she would not carry over any paid time off into year 2. If another employee used 7 days in year 1 (for any purpose), a contractor would be required to permit her to carry over her remaining 5 days into year 2. If a third employee used no paid time off in year 1, however, the contractor would only be required to allow her to carry over 7 of her 12 days into year 2. (Consistent with § 13.5(b)(3), a contractor may choose to limit an employee's additional accrual in year 2 until she has less than 7 days of paid time off available.)

If instead a contractor had a paid time off policy with the same accrual practices but the contractor did choose to track and record which leave employees used for the purposes described in § 13.5(c)(1), application of the carryover requirement would in some circumstances depend on how much leave each employee had so used. If an employee used all 12 days in year 1 (in this case, regardless of whether she used it all for vacation or used some for vacation and some for the purposes described in § 13.5(c)(1)), she would not carry over any paid time off into year 2. If another employee used 7 days in year 1 for vacation, the contractor would be required to permit her to carry over her remaining 5 days into year 2 (and to use as much of those 40 hours, in addition to as much of 56 additional hours accrued in year 2, as she requested during year 2 for the purposes described in § 13.5(c)(1)). But if the employee used 7 days of paid time off because she was sick, the contractor would not be required to permit her to carry over any remaining paid time off into year 2. If instead the employee had used 5 days because she was sick and 2 days for vacation, the contractor would only be required to permit her to carry over 2 of her remaining 5 days of paid time off into year 2 (and to use as much of those 16 hours, in addition to as much of 56 additional hours accrued in year 2, as she requested during year 2 for the purposes described in § 13.5(c)(1)). If a third employee used no paid time off in year 1, the contractor would be required to allow her to carry over 7 of her 12 days into year 2. (Consistent with § 13.5(b)(3), the contractor would be permitted to limit an employee's additional accrual in year 2 until she had less than 7 days of paid time off available to use for the purposes described in § 13.5(c)(1).)

If a contractor's paid time off policy provides leave at the beginning of each year rather than allowing employees to accrue it over time (as is permitted under § 13.5(a)(3)), employees still need only begin the subsequent year with as much leave as would have been required under the Order and part 13. Under § 13.5(a)(3), if a contractor provides 56 hours of paid sick leave at the beginning of the accrual year, an employee must receive 56 additional hours of paid sick leave even if he has carried over some paid sick leave from the previous accrual year. In practice, these requirements mean that an employee of a contractor who has chosen the § 13.5(a)(3) option could begin accrual years after the first year with as much as 112 hours of paid sick leave. Accordingly, if a contractor provides employees with 10 days of paid time off at the beginning of each year, employees who use all of their leave (regardless of the purposes for which the leave is used or whether the contractor tracks and records such purposes) may begin subsequent years with only 10 days, but those who have not used all of their leave must be permitted either to carry over up to 4 days of unused paid time off (even if they have more) such that they begin the year with up to 14 days (that is, 112 hours) of leave or, if a contractor tracks and records leave used for the purposes described in § 13.5(c)(1), as much paid time off as is unused and required to be available for such purposes (because the employee has used less than any amount carried over plus up to 56 newly accrued hours for such purposes). Alternatively, if an employee begins new accrual years with 112 hours or more of paid time off, whether he has carried over some of that time from the previous year or has received new leave at or above that amount, the Department would consider a contractor to have met its carryover obligation. In such circumstances, a contractor that tracks and records the amount of paid time off employees use for the purposes described in § 13.5(c)(1) must permit employees to use up to 112 hours of paid time off for such purposes in compliance with the requirements of the Order and part 13 in accrual years after the first, consistent with § 13.5(a)(3).

Paid time off policies used to satisfy the requirements of the Order and part 13 pursuant to § 13.5(f)(5) must also comply with the requirement to reinstate leave for an employee rehired by the same contractor within 12 months of a job separation. As with carryover, however, only up to 56 hours of paid time off must be reinstated even if employees have greater amounts of leave upon separation. The precise amount will depend upon how much paid time off an employee has remaining and, if a contractor tracks and records the amount of paid time off used for the purposes described in

§ 13.5(c)(1), how much of that time the contractor must permit an employee to use for such purposes based on the employee's prior use in that accrual year. Because the Department has modified § 13.5(b)(5) to provide that if a contractor pays separating employees for unused paid sick leave, no reinstatement of the leave is required, the same relief from the obligation could apply to paid time off policies.

Under § 13.5(f)(5), a contractor may only use its paid time off policy to satisfy its obligations under the Order and part 13 if, when an employee seeks to use or does use leave for the purposes described in § 13.5(c)(1) (all of which must be permissible uses of the paid time off), the request and use of the leave comply with all of the requirements of §§ 13.5(c), (d), (e), § 13.6, and § 13.7. These requirements apply to all paid time off used for the purposes described in § 13.5(c)(1) regardless of whether the contractor tracks and records such time.

The following examples illustrate how a contractor may treat paid time off used for different purposes differently and the implications of a contractor's choice to track and record the use of paid time off for the purposes described in § 13.5(c)(1).

When paid time off is used for a purpose described in § 13.5(c)(1), employees must be permitted to use leave in increments of no greater than 1 hour. A contractor may, however, require employees using paid time off for other reasons (such as vacation) to use paid time off in larger increments, such as half or full days. Therefore, if an employee asked to come to work 2 hours late one day so he could attend an event at his daughter's school, a contractor could require the employee to take the entire day off; if the employee asked to come to work 2 hours late because he needed to take his daughter to see her pediatrician, however, the contractor would have to permit the employee to use only 2 hours of paid time off.

If that contractor's paid time off policy provides 10 days of leave each year, and the employee had already used 7 (8-hour) days of paid time off that year to be absent from work because his daughter was sick, the contractor's obligation to comply with the requirements of §§ 13.5(c), (d), (e), § 13.6, and § 13.7 with respect to the employee's additional request to take his daughter to the pediatrician would depend upon how the contractor managed its paid time off policy. Specifically, if the contractor chose not to track and record the reasons for which an employee had used paid time off, it would be required to approve the employee's request to use only 2 hours of paid time off. But if the contractor had kept a record noting that the employee's previous requests to use paid time off were for a purpose described in § 13.5(c)(1) (in this case, caring for his daughter when she was ill), it would have already fulfilled its obligations under the Order and this part and would be free to require that the employee use a full day of leave. Furthermore, if the employee had already used all 10 days of paid time off, regardless of the reason for his absences or whether the contractor tracked those reasons, the contractor would be free to deny the employee's request for 2 additional hours of paid leave. As another example of how a contractor can treat paid time off used for different purposes differently, a contractor would be obligated not to make the use of paid time off requested for a purpose described in § 13.5(c)(1) contingent on finding a replacement worker or fulfilling operational needs, although it would be free to deny requests for vacation for those reasons.

The Department noted in the discussion of § 13.5(f)(5) in the NPRM that a paid time off policy used to satisfy a contractor's obligations under the Order and part 13 may not set limits on the amount of leave that may be used per year or at once; in the Final Rule, this requirement in § 13.5(c)(4) is clarified to make explicit that use may be limited by the amount of paid sick leave an employee has available. The Department similarly clarifies here that compliance with this requirement in the context of a paid time off policy involves either not limiting use per year, at least for the purposes described in § 13.5(c)(1), to an amount of leave less than the total amount an employee has accrued under the contractor's policy, or not limiting use per year to less than 56 hours of leave (or any amount of leave carried over plus up to 56 hours of paid time off newly accrued in the accrual year) for the purposes described in § 13.5(c)(1), subject to the amount of paid time off an employee has remaining, if the contractor tracks and records such use and chooses to limit leave for such purposes.

For instance, if a contractor's policy provided employees with 120 hours of leave per year to use for any purpose and the contractor did not track the purposes for which employees used leave, a contractor could limit use per year to 120 hours. For example, the contractor could permissibly deny an employee's request to use paid time off to care for his frail grandmother after the employee had used all 120 hours in that year (for vacation or any other purpose). By contrast, a contractor that does track and record the reasons an employee uses paid time off could, for example, deny an employee's request to use paid time off to meet with a counselor regarding domestic violence after an employee (who did not carry over any leave from the previous accrual year) had already used 56 hours of paid time off for that reason even though the employee had additional, unused hours of paid time off that year. That contractor could also deny that request if the employee had already used all of her paid time off for the year, even if she had only used 10 hours for purposes described in § 13.5(c)(1) and the rest for vacation.

As noted above, a contractor using its paid time off policy to satisfy its obligations under the Order and part 13 must comply with all of the requirements of § 13.5(d) (which addresses employee requests to use paid sick leave and contractors' responses to such requests) with respect to leave used for any purpose described in § 13.5(c)(1) (or to the amount of such leave as to which the contractor must comply with the Order and part 13, if the contractor tracks and records leave used for the purposes described in § 13.5(c)(1)). For example, consistent with that provision, a contractor may not require employees to make requests for leave (at least when used for a purpose described in § 13.5(c)(1) and if the contractor is required to comply with the Order and part 13 with respect to the leave) more than 7 days in advance of the need or as soon as is practicable if the need for leave is not foreseeable. In addition, under a paid time off policy used to fulfill a contractor's obligations under the Order and part 13 pursuant to § 13.5(f)(5), a contractor's denial of a request to take leave, at least when requested for the purposes required under § 13.5(c)(1) and if the contractor is required to comply with the Order and part 13 with respect to the leave, must be explained in writing that is in accordance with the permissible reasons for denial under part 13.

Contractors have the option of complying with these and other provisions of § 13.5(c) and (d) (and (e), and §§ 13.6 and 13.7) as to all paid time off or distinguishing between leave used for the purposes described in § 13.5(c)(1) and other purposes (such as vacation time) even if they do not choose to track and record the amount of time used for the purposes described in § 13.5(c)(1). For example, a contractor could approve any requests to use paid time off made at least 7 days in advance if foreseeable, or as soon as practicable if not foreseeable, regardless of the reason for the absence, or a contractor could require requests to use paid time off for vacation to be made 30 days in advance but allow requests to use paid time off for illness (as well as the other uses of paid sick leave described in § 13.5(c)(1)) to be made no more than 7 days in advance if foreseeable or as soon as practicable if not foreseeable.

The rules regarding certification or documentation of the reason for an absence of 3 or more full consecutive days in § 13.5(e) are also applicable to a paid time off policy used to satisfy the requirements of the Order and part 13, at least with respect to paid time off used for the purposes required by § 13.5(c)(1). If the contractor tracks and records the amount of leave used for the purposes described in § 13.5(c)(1), however, it would be required to comply with § 13.5(e) with respect to paid time off an employee uses for the purposes described in § 13.5(c)(1) only to the extent such leave is within the amount of leave as to which the contractor must comply with the Order and part 13 (that is, up to 56 hours in the first accrual year and up to any amount carried over plus 56 hours in subsequent accrual years). If a contractor's paid time off policy allows the use of leave for a broad range of purposes, that contractor might never require such certification or documentation, in which case there would be no conflict with § 13.5(e). Similarly, although the recordkeeping requirements of part 13 apply to contractors who fulfill their obligations under the Order with paid time off policies, to the extent the contractor does not deny requests for leave or require certification or documentation to justify the use of leave, no such records will exist or, therefore, need to be maintained.

As noted in the NPRM, a contractor may only use its paid time off policy to satisfy its obligations under the Order and part 13 if, at least when an employee seeks to use or does use leave for the purposes described in § 13.5(c)(1) and if the contractor (that tracks and records the amount of leave used for the purposes described in § 13.5(c)(1)) is required to comply with the Order and part 13 with respect to the leave, that leave is treated as protected by the prohibitions on interference and discrimination as required by § 13.6, meaning that, for example, the request for or use of leave could not be used as a negative factor in any hiring or promotion decision and could not be the basis for discipline, including by being counted in a no fault attendance policy.

The Department notes that the option to track and record time as described in this discussion is not reflected in the recordkeeping requirements set forth in § 13.25 because making and maintaining documentation of the purposes for which employees use paid time off is a choice rather than an obligation. If, however, a contractor wishes to limit the amount of paid time off employees may use for the purposes described in § 13.5(c)(1))—and, more significantly, as to which it must comply with the Order and part 13—the burden is on the contractor to create and keep adequate documentation showing that it has in fact allowed an employee to receive the required benefits such that it is subsequently permitted to deny an employee of them. No particular form of documentation is required; a contractor may develop any system for tracking when paid time off is used for a purpose described in § 13.5(c)(1) it chooses as long as the contractor has accurate records (that could be reviewed during a WHD investigation) and employees are properly notified of the amount of paid time off they have available for such purposes.

The Department reiterates that a contractor has a choice between amending an existing paid time off policy to operate as described here or instead providing paid sick leave that is separate from its more general leave policy. For example, if a contractor does not permit an employee to use paid time off for the purposes described in § 13.5(c)(1)(iv) related to domestic violence, sexual assault, or stalking, its paid time off policy would not satisfy its obligations under the Executive Order and part 13 as provided in § 13.5(f)(5). Accordingly, the contractor could choose to amend its paid time off policy to permit leave for these additional purposes or could provide paid sick leave pursuant to the Order and part 13 in addition to paid time off. Similarly, if a contractor's policy allowed the contractor to deny an employee's request for leave to be used for one of the purposes described in § 13.5(c)(1) based on operational needs, that policy would not satisfy the contractor's obligations under the Executive Order and part 13, and the contractor could either adjust its policy or distinguish between paid sick leave (which it would provide in keeping with the requirements of the Order and part 13) and other types of paid time off it provides (which it could provide in any manner it wishes, so long as it complies with any other applicable laws). And if a contractor with a paid time off policy that provides more than 56 hours of paid time off does not wish to comply with the requirements of the Order and part 13 as described with respect to all of the leave its policy allows or to track and record the amount of leave used for the purposes described in § 13.5(c)(1), it can instead provide paid sick leave separately from paid time off.

Finally, as noted in the NPRM, although a contractor need not treat vacation or other uses of leave under its paid time off policy identically to the way it treats paid sick leave, the Department will consider any aspects of a paid time off policy that create significant barriers to an employee's using the time for the purposes described in § 13.5(c)(1) as interference with the employee's accrual or use under the Order or part 13 in violation of § 13.6(a) or, if appropriate, as discrimination in violation of § 13.6(b), meaning that the paid time off policy would not satisfy the contractor's obligations under the Order and part 13. For example, although a contractor need not allow vacation time to be taken in 1-hour increments, a contractor would not be in compliance with § 13.6(a) if it were to require employees to use all of the time provided in its paid time off policy at once should the employee ask to take vacation, such that any employee who took any vacation in an accrual year would automatically have no paid time off remaining for the purposes described in § 13.5(c)(1). (This example does not imply that an employee cannot choose to use all of her paid time off for vacation such that she has no paid leave remaining in the event a need to be absent from work for one of the reasons described in § 13.5(c)(1) arises; it signifies only that a contractor cannot deliberately make it difficult to make a different choice.) Similarly, a contractor's paid time off policy would not comply with § 13.6(a) if the contractor required employees to request leave for vacation 1 month in advance and would not allow an employee who had scheduled such leave and who became, or had a family member who became, unexpectedly ill to instead use paid time off for that purpose (and cancel the other upcoming leave, or take it as unpaid leave).

Section 13.6 Prohibited Acts

Proposed § 13.6 described and prohibited acts that constitute violations of the requirements of Executive Order 13706 and part 13.

Proposed § 13.6(a)(1) prohibited a contractor from interfering with an employee's accrual or use of paid sick leave as required by Executive Order 13706 or part 13. Proposed § 13.6(a)(2) included a non-exclusive list of examples of interference. The first example was miscalculating the amount of paid sick leave an employee has accrued, such as if a contractor does not include all of an employee's hours worked in calculating accrual. A second was denying or unreasonably delaying a response to a proper request to use paid sick leave, such as if a contractor denies a request to use paid sick leave for an appointment with a clinical social worker because the contractor mistakenly believes a clinical social worker is not a health care provider, or if a contractor denies a request to use paid sick leave to accompany the employee's sister to a court proceeding regarding stalking because the contractor does not believe an employee can use paid sick leave for a family member's legal proceeding related to stalking, or if a contractor does not respond to an employee's timely request for paid sick leave until after the need for leave has passed (provided the request was made sufficiently in advance of the need).

In addition, the Department explained that as proposed, interference included discouraging an employee from using paid sick leave or reducing an employee's accrued paid sick leave by more than the amount of such leave used. Transferring the employee to work on non-covered contracts to prevent the accrual or use of paid sick leave, including scheduling an employee's non-covered work to fall at the time for which the employee has requested to use paid sick leave for the purpose of avoiding approving the request (rather than for a lawful reason, such as for a legitimate business purpose), would also constitute interference. Finally, under the NPRM, interference also included disclosing confidential information received in certification or other documentation provided to verify the need to use paid sick leave or making the use of paid sick leave contingent on the employee's finding a replacement worker or the fulfillment of the contractor's operational needs.

Proposed § 13.6(b) was an anti-discrimination provision implementing section 2(k) of Executive Order 13706. Proposed § 13.6(b)(1) prohibited a contractor from discharging or in any other manner discriminating against an employee for: (i) Using, or attempting to use, paid sick leave as provided for under Executive Order 13706 and part 13; (ii) filing any complaint, initiating any proceeding, or otherwise asserting any right or claim under Executive Order 13706 and part 13; (iii) cooperating in any investigation or testifying in any proceeding under Executive Order 13706 and part 13; or (iv) informing any other person about his or her rights under Executive Order 13706 and part 13.

Proposed § 13.6(b)(2) addressed what constitutes discrimination, a term the Department intended to be understood broadly, by noting that discrimination included, but was not limited to, a contractor's considering any of the activities described in § 13.6(b)(1) as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions, or a contractor's counting paid sick leave under a no fault attendance policy. *See* 29 CFR 825.220(c) (analogous provision under FMLA regulations). Under this proposed provision, a contractor could not, for example, reassign an employee to fewer or less preferable shifts, to a less well paid position, or to a non-covered contract because he used paid sick leave. The proposed provision also prohibited a contractor, in deciding whether to hire an employee to work on or in connection with a covered contract, to consider as a factor that the contractor would be required to reinstate the employee's unused paid sick leave from prior covered work pursuant to § 13.5(b)(4).

In the NPRM, the Department noted that this proposed provision would serve the important purpose of ensuring effective enforcement of the Executive Order, which will depend on complaints from employees, and reiterated several interpretations of the provision it had discussed in the Minimum Wage Executive Order rulemaking in connection with a comparable anti-discrimination provision. 79 FR 60666–67. First, consistent with the Supreme Court's interpretation of the FLSA's anti-retaliation provision, § 13.6(b) would protect employees who file oral as well as written complaints. *See Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011). Furthermore, as under the FLSA, the anti-discrimination provision under part 13 would protect employees who complain to the Department as well as those who complain internally to their employers about alleged violations of the Order or part 13. *See, e.g., Minor* v. *Bostwick Laboratories*, 669 F.3d 428, 438 (4th Cir. 2012); *Hagan* v. *Echostar Satellite, LLC*, 529 F.3d 617, 626 (5th Cir. 2008); *Lambert* v. *Ackerley*, 180 F.3d 997, 1008 (9th Cir. 1999) (en banc); *Valerio* v. *Putnam Associates*, 173 F.3d 35, 43 (1st Cir. 1999); *EEOC* v. *Romeo Community Sch.*, 976 F.2d 985, 989 (6th Cir. 1992).

The Department further noted in the NPRM that the anti-discrimination provision would apply in situations where there is no current employment relationship between the parties; for example, it would protect from retaliation by a prospective or former employer that is a covered contractor. This position was consistent with the Department's interpretation of the FLSA's anti-retaliation provision, which it considers to extend to job applicants. As explained in the Minimum Wage Executive Order rulemaking, however, the Department recognizes that the U.S. Court of Appeals for the Fourth Circuit has disagreed with its interpretation with respect to the coverage of job applicants, *see Dellinger* v. *Science Applications Int'l Corp.*, 649 F.3d 226 (4th Cir. 2011), and the Department therefore would not enforce its interpretation on this issue in that circuit. *See* 79 FR 60667. To the extent the application of the FLSA's anti-retaliation provision to job applicants or internal complaints is definitively resolved through the judicial process by the Supreme Court or otherwise, the Department would interpret the anti-retaliation provision under the Executive Order in accordance with such precedent. *Id.*

Commenters generally addressed the interference and discrimination provisions together. Several commenters, including Demos, NELP, the National Council of Jewish Women, NETWORK, Women Employed, and the Diverse Elders Coalition, commented that these provisions were crucial protections for workers, who would otherwise face punishment from employers for using paid sick leave or be deterred from asking to use paid sick leave in the first place. The NYC Department of Consumer Affairs similarly commented that these provisions are fundamental because without them, the paid sick leave benefit is merely illusory. The Department adopts the provisions as proposed.

AGC commented that contractors needed to be able to address employee abuse of paid sick leave without being in jeopardy of violating these provisions. The Department recognizes that there will be circumstances in which an employer becomes aware that an employee has fraudulently used paid sick leave, such as by lying about being sick or having a doctor's appointment. As in the FMLA context, an employee who engages in fraud is not entitled to the benefits or protections afforded by the Executive Order or part 13. *See* 29 CFR 825.216(d) ("An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions."). Accordingly, although a contractor may not impose requirements on an employee's use of paid sick leave specifically prohibited by the Order or part 13 (such as by requiring certification of uses of paid sick leave that are shorter than 3 full consecutive days) or otherwise discourage an employee's legitimate use of paid sick leave (such as by disciplining an employee on the basis of abuse of paid sick leave privileges that is suspected but not verified), a contractor may investigate situations in which it believes an employee has committed fraud. If a contractor determines, based on a reasonable investigation of the circumstances, that an employee has abused paid sick leave, it may respond appropriately, such as by recouping (to the extent permitted by law) pay and benefits provided when the employee used paid sick leave based on a request premised on false information or by imposing discipline on the employee. In the absence of verification of abuse, however, a contractor must permit an employee to accrue and use paid sick leave according to the requirements of part 13.

For example, assume an employee requests to use paid sick leave to be absent every other Monday for several weeks, explaining that her wife has doctors' appointments and needs her care, and the contractor suspects she is actually taking long weekend trips to a vacation home. The contractor can tell the employee that it suspects she is making fraudulent requests for leave because it doubts her husband only needs to see the doctor on days adjacent to weekends. In response, the employee could provide additional information about her need to be absent from work, such as by explaining that her wife has cancer and receives radiation treatments every other Monday, or by voluntarily providing certification (such as a note from the wife's oncologist). In that case, the contractor would not have violated the provisions of § 13.6, and the contractor would be assured that the employee's requests to use paid sick leave merited approval. As another example, assume an employee requests to use paid sick leave because his son is sick, but when his manager goes out to lunch during the work day, she runs into the employee at a local bar without his son, and upon her confronting the employee, he admits that he was not truthful about the reason he wanted to take the day off. In that case, the contractor would not have violated the provisions of § 13.6, and the contractor would know it need not have approved the employee's request for paid sick leave. The contractor would be free to (among other possible options) rescind such approval, decline to pay the employee for that day, and count the day against the employee in its time and attendance policy.

Finally, Vigilant asked that the Department state that if an employee is absent from work despite not having enough paid sick leave to cover the time, the contractor may count the additional time against the employee pursuant to its attendance policy. The Department takes no position in this rulemaking regarding what actions a contractor may take with regard to time absent from work that is not—and should not have been—designated as paid sick leave, though it notes that part 13 does not absolve contractors from complying with any other relevant law regarding such actions and that whether a particular action constitutes interference or discrimination under § 13.6 (such as a contractor's taking action against an employee who was absent for a full day after the human resources department erroneously told him he had 8 hours of paid sick leave although he actually had only 4) will depend on the circumstances.

Proposed § 13.6(c) provided that a contractor's failure to make and maintain or to make available to the WHD records for inspection, copying, and transcription as required by § 13.25, or any other failure to comply with the requirements of that provision, constituted a violation of Executive Order 13706, part 13, and the underlying contract. This proposed provision was derived from paragraph (g)(3) of the contract clause included in the Minimum Wage Executive Order Final Rule as well as analogous provisions in the SCA and DBA. 29 CFR 4.6(g)(3) (SCA); 29 CFR 5.5(a)(3)(iii) (DBA). The Department received no comments specifically regarding this provision (though it notes that other comments regarding recordkeeping and remedies for violations of part 13 are discussed below), and adopts it as proposed.

Section 13.7 Waiver of Rights

Proposed § 13.7 provided that employees cannot waive, nor may contractors induce employees to waive, their rights under Executive Order 13706 or part 13. The Department explained in the NPRM that it had included a provision prohibiting the waiver of rights in the regulations implementing the Minimum Wage Executive Order. 79 FR 60667.

The NPRM noted that, as the Department had explained in the Minimum Wage Executive Order rulemaking, an employee's rights and remedies under the FLSA, including payment of minimum wage and back wages, cannot be waived or abridged by contract. 79 FR 60667 (citing *Tony & Susan Alamo Found.* v. *Sec'y of Labor,* 471 U.S. 290, 302 (1985); *Barrentine* v. *Arkansas-Best Freight Sys., Inc.,* 450 U.S. 728, 740 (1981); *D.A. Schulte, Inc.* v. *Gangi,* 328 U.S. 108, 112–16 (1946); *Brooklyn Sav. Bank* v. *O'Neil,* 324 U.S. 697, 706–07 (1945)). The Supreme Court has explained that "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate," *Barrentine,* 450 U.S. at 740 (quoting *Brooklyn Sav. Bank,* 324 U.S. at 707), and that FLSA rights are not subject to waiver because they serve an important public interest by protecting employers against unfair methods of competition in the national economy, *see Tony & Susan Alamo Found.,* 471 U.S. at 302. Similarly, under the SCA regulations, releases and waivers executed by employees for unpaid SCA wages (and fringe benefits) are without legal effect. 29 CFR 4.187(d). The Department believed it was appropriate to adopt this policy in the NPRM because the interests underlying the issuance of Executive Order 13706 would be similarly thwarted by permitting workers to waive their rights under the Order or part 13.

EEAC urged the Department to limit the waiver of rights provision to prospective waivers, that is, to allow an employee to waive claims to any remedy for an employer's past violations of the paid sick leave requirements of the Order and part 13. EEAC asserted that the FLSA and FMLA permit waiver of claims based on past employer conduct, and that prohibiting such waiver under this Order would interfere with an employee's ability to release or settle, rather than litigate, employment-related matters.

The Department disagrees with the commenter's rationale. It is correct that, although the FLSA and FMLA prohibit any prospective waiver of rights, employees have some ability to settle or release claims based on past employer conduct. *See, e.g.,* 29 U.S.C. 218c(b)(2) ("The rights and remedies [under the FLSA] may not be waived by any agreement, policy, form, or condition of employment."); 29 U.S.C. 216(c) (providing that an employee may agree, under the supervision of the Secretary, to accept payment of compensation owed and, upon full payment, waive rights to unpaid compensation); *Cheeks* v. *Freeport Pancake House, Inc.,* 796 F.3d 199 (2d Cir. 2015) (describing the history of and limitations on waiver of rights under FLSA); 29 CFR 825.220(d) ("[E]mployees . . . cannot 'trade off' the right to take FMLA leave against some other benefit offered by the employer. This does not prevent the settlement or release of FMLA claims by employees based on past employer conduct."). Those statutes, however, grant to an employee a private right of action, 29 U.S.C. 216(b) (FLSA); 29 CFR 825.400(a)(2) (FMLA), whereas Executive Order 13706 does not enable employees to pursue claims of violations of the Order on their own behalf, but rather vests enforcement authority in the Secretary to initiate an investigation of alleged violations, obtain compliance where violations are discovered, and participate in enforcement proceedings against a contractor where such violations are disputed. *See* 80 FR 54699. Therefore, as a preliminary matter, waivers of contractor liability, if they were permitted, would be limited: At most, an employee could agree not to file a complaint with the WHD or not to cooperate with an investigation or enforcement action the WHD was pursuing.

Furthermore, such an agreement would deprive the Secretary of important notice, testimony, and evidence needed to determine whether a violation has occurred and would therefore limit the Secretary's ability to obtain specific relief for employees whose rights have been curtailed and to vindicate the general public interest in ensuring that employees who work on or in connection with covered contracts have access to paid sick leave. The SCA also does not create a private right of action, instead vesting sole enforcement authority in the Secretary, 29 CFR 4.189, 4.191, and it prohibits all releases or waivers for unpaid wages and fringe benefits due without distinguishing between prospective waiver and waiver of claims based on past employer conduct, 29 CFR 4.187(d). For these reasons as well as those explained in the Minimum Wage Executive Order rulemaking and reiterated in the NPRM, permitting any waiver of rights under the Order would be inconsistent with public policy and the Order's purposes.

Section 13.8 Multiemployer Plans or Other Funds, Plans, or Programs

Some commenters, including MCAA, AGC, and North American Dismantling Corp., noted what they perceived to be the difficulty of monitoring paid sick leave accrual and reinstatement in the construction industry, in which employees may work for a contractor on a short-term basis, sometimes more than once over the course of a year. As explained in the discussion of employee coverage, a worker's seasonal or part-time status does not affect a contractor's obligations under the Order and part 13—including to track hours worked on with a covered contract, which contractors with DBA-covered contracts will already do, and to reinstate paid sick leave upon rehiring an employee within 12 months of a separation from employment—although in practice, the employee's accrual and use of paid sick leave will be limited by his work schedule. The Department recognizes that in situations like those described by these commenters, some employers resolve the issues such transient employment can raise by providing benefits to employees by contributing to multiemployer plans negotiated pursuant to CBAs. The Building Trades specifically explained that in the construction industry, multiemployer plans that provide benefits such as health insurance, pension benefits, or vacation time are common. They therefore asked that the Department allow contractors to create multiemployer plans to jointly provide paid sick leave to comply with the Order and part 13 as employees move between different contractors' projects. AGC similarly requested that, if the Order and part 13 must apply to laborers and mechanics, the Department permit contractors to fulfill their paid sick leave obligations by making payments into a multiemployer plan on behalf of covered workers, noting that some existing multiemployer plans already provide for paid time off.

In response to these comments, the Department has added a new provision, § 13.8(a), to the Final Rule providing that a contractor may fulfill its obligations under Executive Order 13706 and this part jointly with other contractors—that is, as though all of the contractors are a single contractor for purposes of Executive Order 13706 and part 13—through a multiemployer plan that provides paid sick leave in compliance with the rules and requirements of Executive Order 13706 and this part. (The term *multiemployer plan* is defined in § 13.2.) This new provision also provides that regardless of what functions the plan performs, each contractor remains responsible for any violation of the Order or part 13 that occurs during its employment of the employee.

Under § 13.8(a), if employees who work on or in connection with covered contracts receive access to paid sick leave through a multiemployer plan, the contractors that make contributions to that plan on behalf of the employees satisfy their obligations under the Order and part 13 as though they are all a single employer for purposes of Executive Order 13706 and part 13. For example, assume an employee is a member of a union that has a CBA with Contractors A and B that provides that the employers will contribute to a multiemployer plan to provide paid sick leave that complies with the requirements of the Executive Order and part 13. If that employee works for Contractor A on a DBA contract for a single pay period and accrues 2 hours of paid sick leave, and she subsequently works for Contractor B on a different DBA contract for several pay periods, the employee would begin the job for Contractor B with 2 hours of paid sick leave available for use and would accrue additional paid sick leave that would be added to those 2 hours for purposes of the accrual cap (of no less than 56 hours) for which the CBA provides. In such a scenario, Contractor A and Contractor B are separately responsible for complying with the Order and part 13 as to the employee's accrual and use of paid sick leave while working for each respective employer; for example, if Contractor B denied an employee's valid request to use paid sick leave the employee accrued while working for Contractor A, Contractor B would have violated § 13.6, and Contractor A would not be responsible for that violation. To the extent the plan or any third party that administers the plan plays a role in administering paid sick leave—for example, by tracking accrual, notifying employees of the amounts of paid sick leave they have accrued but not used, responding to employee requests to use paid sick leave, or providing employees with the pay and benefits to which they are entitled while using paid sick leave—the contractor for which the employee is working at the time such actions are taken is responsible for ensuring that the plan performs those functions in compliance with the requirements of the Order and part 13.

AGC asked that the Department revise the proposed regulations to allow contractors to fulfill their paid sick leave obligations by contributing to a funded plan outside the multiemployer plan context, whether a contractor creates such a plan pursuant to a CBA or not. The Department did not intend any proposed regulatory provision or other interpretation in the NPRM to prohibit a contractor from providing paid sick leave by contributing to a plan, as long as the contractor's employees have access to paid sick leave that meets all of the requirements of the Order and part 13. For purposes of clarity and completeness, the Department has added to the regulations, as § 13.8(b), a provision stating that nothing in part 13 prohibits a contractor from providing paid sick leave through a fund, plan, or program. The new provision also notes that regardless of the manner in which a contractor provides paid sick leave or what functions any fund, plan, or program performs, the contractor remains responsible for any violation of the Order or part 13 with respect to any of its employees. In other words, a contractor would be free to delegate to a fund, plan, or program—terms the Department intends to have the meaning they do for purposes of the DBA, *see* 29 CFR 5.27 ("The phrase 'fund, plan, or program' is merely intended to recognize the various types of arrangements commonly used to provide fringe benefits through employer contributions.")—any or all of its responsibilities under the Order and part 13. For example, the plan might simply provide pay and benefits to an employee using paid sick leave upon receiving instructions from a contractor to do so, or it could also notify employees of their amounts of accrued paid sick leave and even approve or deny requests to use the leave. The contractor would remain ultimately responsible, however, for ensuring that its obligations under the Order and part 13 are satisfied, and the contractor would be liable for any violations of the Order and part 13 regardless of whether it has made proper contributions to the plan.

Finally, the Department notes that nothing in § 13.8 (or any other provision of part 13) has any effect on any claims procedure or enforcement standards under ERISA that apply to plans that provide paid sick leave.

Subpart B—Federal Government Requirements

Subpart B of part 13, which is largely modeled on subpart B of the Minimum Wage Executive Order implementing regulations, 29 CFR 10.11–10.12, establishes the requirements for the Federal Government to implement and comply with Executive Order 13706. Section 13.11 addresses contracting agency requirements, and § 13.12 explains the requirements placed upon the Department of Labor.

Section 13.11 Contracting Agency Requirements

Proposed § 13.11(a) implemented section 2(a) of Executive Order 13706 by directing that the contracting agency include the Executive Order paid sick leave contract clause set forth in appendix A of part 13 in all covered contracts and solicitations for such contracts, as described in § 13.3, except for procurement contracts subject to the FAR. Proposed § 13.11(a) further provided that the required contract clause directs, as a condition of payment, that all employees performing work on or in connection with covered contracts be permitted to accrue and use paid sick leave as required by Executive Order 13706 and part 13. It also provided that for procurement contracts subject to the FAR, contracting agencies must use the contract clause set forth in the FAR to implement part 13, and that the FAR clause will accomplish the same purposes as the clause set forth in appendix A and be consistent with the requirements set forth in part 13. The Department explained in the NPRM that proposed § 13.11(a) was effectively identical to 29 CFR 10.11(a), the analogous provision in the Minimum Wage Executive Order Final Rule.

PSC commented that contractors' compliance with the Order and part 13 should not be a condition of payment, arguing in part that this requirement could expose contractors to liability under the False Claims Act. As described in greater detail below in the discussion of subpart C, the Department declines to alter this provision because section 2(a) of the Order specifically requires a contract clause that renders compliance with the Order a condition of payment. *See* 80 FR 54697. The Department therefore adopts § 13.11(a) in the Final Rule as proposed.

The Department reiterates that, as noted in the NPRM, inserting the full contract clause in a covered contract is an effective and practical means of ensuring that contractors receive notice of their obligations under the Executive Order and part 13, and the Department therefore prefers that covered contracts include the contract clause in full. As discussed in the NPRM and below in the discussion of subpart C, however, particular facts and circumstances may establish that the contracting agency or contractor sufficiently apprised the prime or lower-tier contractor that the Executive Order applied to the contract despite the failure to include the contract clause in full in the contract. *See Nat'l Electro-Coatings, Inc.* v. *Brock,* No. C86–2188, 1988 WL 125784 (N.D. Ohio July 13, 1988); *In the Matter of Progressive Design & Build, Inc.,* WAB Case No. 87–31, 1990 WL 484308 (WAB Feb. 21, 1990). In such circumstances, the contract clause may be deemed to have been incorporated by reference in the covered contract. For example, the full contract clause will be deemed to have been incorporated by reference in a covered contract if the contract provides that "Executive Order 13706—Establishing Paid Sick Leave for Federal Contractors, and its implementing regulations, including the applicable contract clause, are incorporated by reference into this contract as if fully set forth in this contract" and includes a citation to a Web page that contains the contract clause in full, to the provision of the Code of Federal Regulations containing the contract clause set forth at appendix A to part 13, or to the provision of the FAR containing the contract clause promulgated by the FARC to implement part 13.

Proposed § 13.11(b) explained a contracting agency's obligations in the event that it fails to include the contract clause in a covered contract. Proposed § 13.11(b) first provided that where the Department of Labor or the contracting agency discovers or determines, whether before or subsequent to a contract award, that the contracting agency made an erroneous determination that Executive Order 13706 and part 13 did not apply to a particular contract and/or failed to include the applicable contract clause in a contract to which the Executive Order and part 13 apply, the contracting agency, on its own initiative or within 15 calendar days of notification by an authorized representative of the Department of Labor, would incorporate the clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination). The proposed language mirrored the analogous provision in the Minimum Wage Executive Order's Final Rule, *see* 29 CFR 10.11(b), which the Department developed based on similar authority existing under the analogous SCA, *see* 29 CFR 4.5(c), and DBA, *see* 29 CFR 1.6(f), implementing regulations.

Roffman Horvitz suggested that it would be unfair to impose a retroactive obligation when a contracting officer or the Department discovers after the contract has begun that the contract clause was omitted. AGC requested that the Department require contracting agencies to use the adjustments, or change-order, process to govern any cost increases related to retroactively incorporating the contract clause. PSC similarly requested that the Department expressly require a price or cost adjustment when a contracting agency fails to include the contract clause in a covered contract.

After carefully considering these comments, the Department adopts § 13.11(b) without change. The Order directs the Department to the extent practicable to incorporate procedures and enforcement processes that exist under the SCA, DBA, and Minimum Wage Executive Order. The Department's approach incorporates the procedure used under the Minimum Wage Executive Order (which the Department derived from similar SCA and DBA procedures) when a contracting agency has failed to include the contract clause and does not limit a contracting agency's authority to pay any necessary additional costs. Furthermore, the Department believes, as it did with respect to the Minimum Wage Executive Order rulemaking, that this procedure will promote compliance with the Order consistent with section 4(a) of the Order.

Proposed § 13.11(c) provided that a contracting officer would, upon his or her own action or upon written request of the Administrator, withhold or cause to be withheld from the prime contractor under the contract or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be necessary to pay employees the full amount owed to compensate for any violation of Executive Order 13706 or part 13. It further provided that in the event of any such violation, the agency may, after authorization or by direction of the Administrator and written notification to the contractor, take action to cause suspension of any further payment or advance of funds until such violations have ceased. Such amounts would be based on the estimated monetary relief, including any pay and/or benefits denied or lost by reason of the violation, or other monetary losses sustained as a direct result of the violation as described in § 13.44.

The SCA, DBA, and Minimum Wage Executive Order's implementing regulations provide for withholding to ensure the availability of monies for payment to covered workers when a contractor or subcontractor has failed to comply with its obligations to pay required wages (including fringe benefits where applicable). 29 CFR 4.6(i) (SCA); 29 CFR 5.5(a)(2) (DBA); 29 CFR 10.11(c) (Executive Order 13658). The Department reasoned that withholding likewise is an appropriate remedy under this Executive Order because the Order directs the Department to adopt enforcement processes from the SCA, DBA, and Minimum Wage Executive Order to the extent practicable and to exercise authority to obtain compliance with the Order. 80 FR 54699. Consistent with withholding procedures under the SCA and DBA, which were also adopted in the Minimum Wage Executive Order rulemaking, proposed § 13.11(c) would allow the contracting agency and the Department to withhold or cause to be withheld funds from the prime contractor not only under the contract on which violations of the paid sick leave requirements of Executive Order 13706 and part 13 occurred, but also under any other contract that the prime contractor has entered into with the Federal Government. 29 CFR 4.6(i) (SCA); 29 CFR 5.5(a)(2) (DBA); 29 CFR 10.11(c) (Executive Order 13658).

Proposed § 13.11(c) also provided that any failure to comply with the requirements of Executive Order 13706 or part 13 could be grounds for termination of the right to proceed with the contract work. Under the proposed rule, in such event, the contracting agency could enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost. This language was essentially identical to language included in the analogous provision in the Minimum Wage Executive Order rulemaking. *See* 79 FR 60724 (codified at 29 CFR 10.11(c)).

AGC requested that contracting officers not have authority to withhold payments to a prime contractor, asserting that contracting officers lack a standard upon which to determine that an alleged violation rises to the level of an actual or actionable violation and that it would accordingly be suitable to compel contracting officers to forward all allegations of noncompliance to the Department for investigation. As the Department noted above, the proposed provision, consistent with the Order's directive to incorporate procedures and enforcement processes under the SCA, DBA and Minimum Wage Executive Order, mirrors regulations under the SCA, DBA, and Minimum Wage Executive Order that authorize contracting officers to withhold monies from accrued payments or advances as may be considered necessary to pay employees the full amount owed to compensate for any violation of the DBA, SCA, or Minimum Wage Executive Order. In addition, the Department believes that authorizing contracting officers to withhold in the circumstances contemplated by § 13.11(c) will help the Department to obtain compliance with the Order's requirements consistent with section 4(a) of the Order. Although the Department anticipates that contracting officers typically will effectuate withholding in response to written requests from the Administrator, the Department also believes that contracting officers should have the authority (as they do under the SCA, DBA and Minimum Wage Executive Order) to withhold on their own action when such withholding may be necessary to pay employees the full amount owed to compensate for any violation of Executive Order 13706 or part 13.

AGC also suggested that the Department prohibit contracting agencies from canceling or terminating a contract that fails to include the paid sick leave contract clause. The Department wishes to reaffirm that the authority of a contracting agency to cancel or terminate a contract is conditioned on a contractor's failure to comply with the Order or part 13. The Department modeled this authority on a contracting agency's authority to cancel a contract under the Minimum Wage Executive Order, *see* 29 CFR 10.11(c), which itself reflected a contracting agency's power under the SCA, *see* 29 CFR 4.6(i), and DBA, *see* 29 CFR 5.5(a)(7). Because the Order instructs the Department to incorporate enforcement processes under the Minimum Wage Executive Order, SCA, and DBA to the extent practicable, and because the Department believes the possibility of contract termination by a contracting agency due to a contractor's failure to comply with the Order will advance the Department's efforts to obtain compliance with the Order, the Department declines to adopt the commenter's suggestion. For all of the reasons described, the Department adopts § 13.11(c) as proposed, except that it has corrected an inadvertent omission: The second sentence now provides that an agency may act to suspend not just a payment or advance, but also a guarantee of funds consistent with the DBA regulations at 29 CFR 5.5(a)(2) (as well as paragraph (d) of the contract clause in appendix A as proposed and adopted).

Proposed § 13.11(d) described a contracting agency's responsibility to suspend further payment or advance of funds to a contractor that fails to make available for inspection, copying, and transcription any of the records identified in § 13.25. The proposal required contracting agencies to take action to suspend payment or advance of funds under these circumstances upon their own action, or upon the direction of the Administrator and notification of the contractor. Proposed § 13.11(d) was derived from paragraph (g)(3) of the Minimum Wage Executive

Order contract clause, 79 FR 60731, and was consistent with the analogous provisions of the SCA and DBA regulations, 29 CFR 4.6(g)(3) (SCA); 29 CFR 5.5(a)(3)(iii) (DBA). The Department did not receive any comments on proposed § 13.11(d) and therefore adopts the provision as proposed except that it corrects the same omission of a reference to suspending a guarantee of funds described with respect to § 13.11(c).

Proposed § 13.11(e) described a contracting agency's responsibility to forward to the WHD any complaint alleging a contractor's non-compliance with Executive Order 13706 or part 13, as well as any information related to the complaint. Although the Department proposed in § 13.41 that complaints be filed with the WHD rather than with contracting agencies, the Department recognized that some employees or other interested parties nonetheless could file formal or informal complaints concerning alleged violations of the Executive Order or part 13 with contracting agencies. Proposed § 13.11(e)(1) therefore specifically required the contracting agency to transmit the complaint-related information identified in proposed § 13.11(e)(2) to the WHD's Office of Government Contracts Enforcement within 14 calendar days of receipt of a complaint alleging a violation of the Executive Order or part 13, or within 14 calendar days of being contacted by the WHD regarding any such complaint.

Proposed § 13.11(e)(2) described the contents of any transmission under proposed § 13.11(e)(1). Specifically, it provided that the contracting agency would forward to the Office of Government Contracts Enforcement any: (i) Complaint of contractor noncompliance with Executive Order 13706 or part 13; (ii) available statements by the worker, contractor, or any other person regarding the alleged violation; (iii) evidence that the Executive Order paid sick leave contract clause was included in the contract; (iv) information concerning known settlement negotiations between the parties, if applicable; and (v) any other relevant facts known to the contracting agency or other information requested by the WHD.

Proposed § 13.11(e) was nearly identical to 29 CFR 10.11(d) as promulgated by the Minimum Wage Executive Order Final Rule, which was derived from analogous provisions in the Department's regulations implementing the Nondisplacement Executive Order. 79 FR 60669 (citing 29 CFR 9.11(d)). In the NPRM, the Department stated that proposed § 13.11(e), which included an obligation to send such complaint-related information to the WHD even absent a specific request (*e.g.*, when a complaint was filed with a contracting agency rather than with the WHD), was appropriate because prompt receipt of such information from the relevant contracting agency would allow the Department to fulfill its charge under the Order to obtain compliance with the Order. 80 FR 54699. The proposed requirement was consistent with the requirements in the Minimum Wage Executive Order rulemaking. The Department did not receive any comments on proposed § 13.11(e) and therefore implements the provision as proposed.

Proposed § 13.11(f) stated that a contracting officer would provide to a successor contractor any predecessor contractor's certified list, provided to the contracting officer pursuant to proposed § 13.26, of the amounts of unused paid sick leave that employees have accrued. The Department intended this requirement to facilitate compliance by successor contractors with § 13.5(b)(4), which required that paid sick leave be reinstated for employees rehired by a successor contractor within 12 months of the job separation from the predecessor contractor. Because that provision does not appear in the Final Rule, as explained above, the Department has also removed this provision from the Final Rule.

Section 13.12 Department of Labor Requirements

Proposed § 13.12 set forth the Department's obligations under the Executive Order. Proposed § 13.12(a) addressed notice-related requirements. Specifically, proposed § 13.12(a)(1) stated that the Administrator would publish and maintain on Wage Determinations OnLine (WDOL), *http://www.wdol.gov*, or any successor Web site, a notice that Executive Order 13706 creates a requirement to allow employees performing work on or in connection with contracts covered by Executive Order 13706 and part 13 to accrue and use paid sick leave, as well as an indication of where to find more complete information about that requirement. Proposed § 13.12(a)(2) provided that the Administrator would also publish a notice on all wage determinations issued under the DBA and SCA that Executive Order 13706 creates a requirement to allow employees performing work on or in connection with contracts covered by Executive Order 13706 and part 13 to accrue and use paid sick leave, as well as an indication of where to find more complete information about that requirement.

Many commenters, including the NYC Department of Consumer Affairs and the Center for the Study of Social Policy, supported the Department's proposal to create a notice poster. The Department adopts § 13.12(a) as proposed and will publish the notice poster on the WHD Web site.

Proposed § 13.12(b), which was modeled on 29 CFR 10.12(d) as promulgated by the Minimum Wage Executive Order rulemaking, addressed the Department's obligation to notify a contractor of a request to the contracting agency for the withholding of funds or a request for the suspension of payment or advance of funds. As explained above, § 13.11(c) authorizes the Administrator to direct that payments due on the covered contract or any other contract between the contractor and the Federal Government be withheld as may be considered necessary to provide for monetary relief for violations of Executive Order 13706 or part 13, and § 13.11(d) authorizes the Administrator to direct that the contracting agency suspend payment, advance, or guarantee of funds. If the Administrator made the requests contemplated by § 13.11(c) or (d), proposed § 13.12(b) would require the Administrator and/or the contracting agency to notify the affected prime contractor of the Administrator's withholding request to the contracting agency. Although it is only necessary that one party—either the Administrator or the contracting agency—provide the notice, the other can choose in its discretion to provide notice as well. The Department did not receive any comments addressing proposed § 13.12(b) and implements the provision as proposed, although it has inserted a reference to a guarantee of funds for the reasons explained in the discussion of § 13.11(c).

Subpart C—Contractor Requirements

Subpart C of part 13 describes the requirements with which contractors must comply under Executive Order 13706 and part 13. It sets forth the obligations to include the applicable paid sick leave contract clause in subcontracts and lower-tier contracts as well as to comply with the contract clause. It also sets forth contractor requirements pertaining to deductions, kickbacks, recordkeeping, notice, and timing of pay.

Section 13.21 Contract Clause

Proposed § 13.21(a), which implemented section 2(a) of the Order and was adopted from 29 CFR 10.21 as promulgated by the Minimum Wage

Executive Order Final Rule, required the contractor, as a condition of payment, to abide by the terms of the applicable paid sick leave contract clause referred to in § 13.11(a). The applicable contract clause would contain the requirements with which the contractor must comply on the covered contract. PSC requested that the Department remove the language in proposed § 13.21(a) rendering compliance with the Order and part 13 a "condition of payment." PSC asserted this language exposes contractors to potential False Claims Act liability and is unnecessary because the Department proposed sufficient remedial options in § 13.44. However, section 2(a) of the Executive Order specifically requires a contract clause that renders compliance with the Order a condition of payment. 80 FR 54697. Thus, the Department declines to accept PSC's suggestion and adopts § 13.21 in the Final Rule as proposed.

Proposed § 13.21(b) required that contractors include the applicable contract clause in any covered subcontracts and, as a condition of payment, that subcontractors include the clause in all lower-tier subcontracts. Under the proposal, the prime contractor and upper-tier contractors would be responsible for compliance by any subcontractor or lower-tier subcontractor with Executive Order 13706 and part 13, regardless of whether the contract clause was included in the subcontract. This responsibility on the part of prime and upper-tier contractors for subcontractor compliance, which is commonly referred to as "flow-down" liability, paralleled that of the SCA, DBA, and Minimum Wage Executive Order. *See* 29 CFR 4.114(b) (SCA); 29 CFR 5.5(a)(6) (DBA); 29 CFR 10.21(b) (Executive Order 13658).

EEAC and Vigilant requested that covered contractors be permitted to incorporate the contract clause by reference into covered subcontracts. As the Department noted with respect to insertion of the contract clause in the discussion of § 13.11(a), the Department prefers that contractors include the contract clause in full in covered contracts, including covered subcontracts. However, there may be facts and circumstances establishing that the contractor sufficiently apprised the lower-tier subcontractor that the Order applies to the subcontract despite the contractor's failure to include the contract clause in full in the covered subcontract. The Department notes, for example, that the full contract clause will be deemed to have been incorporated by reference in a covered subcontract if the subcontract provides that "Executive Order 13706—Establishing Paid Sick Leave for Federal Contractors, and its implementing regulations, including the applicable contract clause, are incorporated by reference into this contract as if fully set forth in this contract" and includes a citation to a Web page that contains the contract clause in full, to the provision of the Code of Federal Regulations containing the contract clause set forth at appendix A to part 13, or to the provision of the FAR containing the contract clause promulgated by the FARC to implement part 13.

AGC requested that the Department delete the final sentence of proposed § 13.21(b), which imposes flow-down liability on upper-tier contractors. AGC specifically asserts that it is more difficult for upper-tier contractors to monitor lower-tier contractors' compliance with the Order's requirements than it is to monitor such contractors' compliance with DBA requirements. ABC similarly contended it will be difficult for upper-tier contractors to monitor lower-tier contractors' compliance with the Order, noting, as did AGC, that employees working for lower-tier contractors with which upper-tier contractors subcontract may have accrued paid sick leave on other covered contracts. The Chamber/IFA requested that the Department detail the types of activities that upper-tier contractors would be expected to conduct in order to ensure compliance by subcontractors. NECA contended the cost of lower-tier compliance oversight will increase project costs and that the Department should accordingly consider alternative enforcement mechanisms. Finally, Vigilant questioned the Department's authority to impose flow-down liability, suggesting that an upper-tier contractor's sole responsibility should be to incorporate the contract clause in its subcontract.

After careful consideration of the comments received, the Department has decided to adopt § 13.21(b) as proposed. In response to the comments submitted by the Chamber/IFA and NECA, as well as comments from AGC and ABC asserting that upper-tier contractors' oversight of lower-tier contractors here may present challenges not present under the DBA and SCA, the Department notes that covered contractors are required to insert the applicable contract clause in subcontracts in order to inform covered subcontractors of the requirements with which they must comply, and that covered contractors have the latitude to implement additional measures to promote compliance by subcontractors, including emphasizing to subcontractors that the Executive Order and part 13 apply to employees performing work on or in connection with covered subcontracts and directing covered subcontractors to the portions of this Final Rule and related guidance materials that explain the rule's application to such employees. The Department further notes that upper-tier contractors can, and the Department understands often do, indemnify themselves against violations committed by lower-tier contractors. With respect to Vigilant's comment, both the SCA and DBA, to which the Order directs the Department to look in adopting remedies and enforcement processes, have long permitted the Department to hold a prime contractor responsible for compliance by any lower-tier contractor, *see* 29 CFR 4.114(b) (SCA); 29 CFR 5.5(a)(6) (DBA), and the Minimum Wage Executive Order's implementing regulations make the prime and upper-tier contractors responsible for compliance by any lower-tier contractor, *see* 29 CFR 10.21(b). Removal of this obligation, as AGC has requested, could diminish the level of care contractors exercise in selecting subcontractors on covered contracts and reduce contractors' monitoring of the performance of subcontractors—two "vital functions" served by the flow-down responsibility. *In the Matter of Bongiovanni,* WAB Case No. 91–08, 1991 WL 494751 (WAB April 19, 1991). Removal of this obligation could additionally hamper the Department's enforcement efforts under section 4(a) of the Order because a contractor's responsibility for the compliance of its lower-tier subcontractors enhances the Department's ability to obtain compliance with the Executive Order. For all these reasons, the Department declines to grant the request to remove the flow-down liability obligation.

Section 13.22 Paid Sick Leave

Proposed § 13.22 required contractors to allow all employees performing work on or in connection with a covered contract to accrue and use paid sick leave as required by the Executive Order and part 13. The Department received many comments related to contractors' paid sick leave obligations, which are addressed in subpart A of the preamble, but no comments specifically addressing § 13.22. This provision is therefore adopted as proposed.

Section 13.23 Deductions

Proposed § 13.23 stated that contractors may only make deductions from the pay and benefits of an employee who is using paid sick leave under the limited circumstances set forth in the proposed provision. The reference to "pay and benefits" in proposed § 13.23 had the same meaning as the reference to pay and benefits in § 13.5(c)(3), discussed above.

Proposed § 13.23 permitted deductions required by Federal, State, or local law, including Federal or State withholding of income taxes. *See* 29 CFR 531.38 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA); 29 CFR 10.23(a) (Executive Order 13658). This proposed provision also permitted deductions for payments made to third parties pursuant to court orders. *See* 29 CFR 531.39 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA); 29 CFR 10.23(b) (Executive Order 13658). Permissible deductions made pursuant to a court order could include such deductions as those made for child support. The proposed section also permitted deductions directed by a voluntary assignment of the employee or his or her authorized representative. *See* 29 CFR 531.40 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA); 29 CFR 10.23(c) (Executive Order 13658). Deductions directed by a voluntary assignment included, but were not limited to, deductions for the purchase of U.S. savings bonds, donations to charitable organizations, and the payment of union dues. Deductions made for voluntary assignments were required to be made for the employee's account and benefit pursuant to the request of the employee or his or her authorized representative. *See* 29 CFR 531.40 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA). Finally, the Department proposed to permit deductions made for the reasonable cost or fair value of board, lodging, and other facilities. *See* 29 CFR part 531 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA); 29 CFR 10.23(d) (Executive Order 13658). Deductions made for the reasonable cost or fair value of board, lodging and other facilities were required to comply with the regulations in 29 CFR part 531. In the proposal, the Department noted that a contractor could take credit for the reasonable cost or fair value of board, lodging, or other facilities against an employee's wages, rather than taking a deduction for the reasonable cost or fair value of these items. *See* 29 CFR part 531. The Department did not receive comments asking for modifications to proposed § 13.23. The Department is therefore adopting the language proposed, but it is also adding as § 13.23(e) that deductions are also permissible, to the extent permitted by law, for the purpose of recouping pay and benefits provided for paid sick leave as to which the contractor retroactively denied the employee's request pursuant to § 13.5(e)(3)(iii) or because the contractor approved the use of the paid sick leave based on a fraudulent request. This addition is consistent with the discussion of § 13.5(e)(3)(iii) and of comments regarding employee abuse of paid sick leave benefits.

Section 13.24 Anti-Kickback

Proposed § 13.24 required that all paid sick leave used by employees performing work on or in connection with covered contracts be paid free and clear and without subsequent deduction (unless as set forth in § 13.23), rebate, or kickback on any account. It further prohibited kickbacks directly or indirectly to the contractor or to another person for the benefit of the contractor for the whole or part of the paid sick leave. The proposal was derived from the Executive Order 13658 Final Rule at 29 CFR 10.27; it reflected the Department's intent to ensure that employees actually receive the full pay and benefits to which they are entitled under the Executive Order and part 13. The Department received no comments on this provision and adopts it as proposed.

Section 13.25 Records To Be Kept by Contractors

Proposed § 13.25 explained the recordkeeping and related requirements for contractors. The obligations set forth in proposed § 13.25 were derived from the FLSA, SCA, DBA, FMLA and Executive Order 13658. *See* 29 CFR part 516 (FLSA); 29 CFR 4.6(g) (SCA); 29 CFR 5.5(a)(3) (DBA); 29 CFR 825.500(c) (FMLA); 29 CFR 10.26 (Executive Order 13658). Proposed § 13.25(a) required contractors and subcontractors to make and maintain during the course of the covered contract, and preserve for no less than 3 years thereafter, records containing the information enumerated in proposed § 13.25(a)(1)–(15). It also required contractors to make such records available to the WHD for inspection, copying, and transcription.

Proposed § 13.25(a)(1)–(6) required contractors to make and maintain for each employee: Name, address, and Social Security number; the employee's occupation(s) or classification(s); the rate or rates of wages paid; the number of daily and weekly hours worked; any deductions made; and the total wages paid each pay period. Contractor obligations to maintain the categories of records set forth in proposed § 13.25(a)(1)–(6) were derived from and are consistent across the FLSA, SCA, and DBA (with the exception of the requirement to preserve records for no less than 3 years after the contract expires, which applies under the DBA and SCA but not the FLSA). An exception to the requirement in proposed § 13.25(a)(4) to keep records of an employee's hours worked was provided in proposed § 13.25(c), as described below. Therefore, in conjunction with § 13.25(c), these recordkeeping requirements imposed almost no new burdens on contractors.

Proposed § 13.25(a)(7) required contractors to make and maintain copies of notifications to employees of the amount of paid sick leave the employees accrued as required under § 13.5(a)(2). Proposed § 13.25(a)(8) required contractors to maintain copies of employees' requests to use paid sick leave, if in writing, or, if not in writing, any other records of employees' requests.

Proposed § 13.25(a)(9) required contractors to make and maintain records of the dates and amounts of paid sick leave used by employees and further specified that unless a contractor's paid time off policy satisfies the requirements of Executive Order 13706 and part 13 as described in § 13.5(f)(5), contractors must designate the leave in their records as paid sick leave pursuant to Executive Order 13706. Proposed § 13.25(a)(10) required contractors to make and maintain copies of any written denials of employees' requests to use paid sick leave, including explanations for such denials, as required under § 13.5(d)(3). Proposed § 13.25(a)(11) required contractors to make and maintain records relating to the certification and documentation a contractor could require an employee to provide under § 13.5(e), including copies of any certification or documentation provided by an employee. Proposed § 13.25(a)(12) required contractors to make and maintain any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave.

Proposed § 13.25(a)(13) required contractors to make and maintain copies of any certified list of employees' accrued, unused paid sick leave provided to a contracting officer in compliance with proposed § 13.26. Proposed § 13.25(a)(14) required contractors to maintain any certified list of employees' accrued, unused paid sick leave received from the contracting agency in compliance with proposed § 13.11(f). Finally, proposed § 13.25(a)(15) required contractors to maintain a copy of the relevant covered contract. The Department explained that each of the recordkeeping obligations set forth in proposed § 13.25(a)(1)–(15) were necessary and appropriate for the enforcement of Executive Order 13706 and part 13 because they require the maintenance and preservation of records necessary to investigate potential violations of and obtain compliance with the Order, consistent with sections 3(a) and 4(a) of the Order.

The Chamber/IFA, the American Benefits Council, and Seyfarth Shaw asserted that the requirement to preserve records for 3 years after contract completion was unduly burdensome. The Department has carefully reviewed the commenters' concerns; however, the Department declines to reduce the time period required for preserving records in this Final Rule. Section 3(a) of the Executive Order specifically authorizes the Secretary to issue regulations requiring contractors to make, keep, and preserve such employee records as the Secretary deems necessary and appropriate for the enforcement of either the Order's provisions or the regulations issued by the Department. Section 4(a) of the Executive Order further authorizes the Secretary to investigate possible violations of and obtain compliance with the Order, and instructs the Department, to the extent practicable, to adopt procedures and enforcement processes consistent with the FLSA, SCA, DBA, FMLA, VAWA, and Minimum Wage Executive Order. The obligation to preserve records for 3 years after contract completion mirrors the recordkeeping requirements under the SCA and DBA, *see* 29 CFR 4.6(g) (SCA); 29 CFR 5.5(a)(3) (DBA), that the Department has previously determined would assist in investigating possible violations of and obtaining compliance with those statutes' provisions. Thus, the requirements in proposed § 13.25(a) are not undue; rather, consistent with sections 3(a) and 4(a) of the Order, the Secretary has determined that maintenance and preservation of the records set forth in proposed § 13.25(a) for 3 years after contract completion is necessary and appropriate to ensure the Department can effectively investigate potential violations of and obtain compliance with the Order.

PSC requested that the Department "streamline" the recordkeeping requirements contained in § 13.25(a)(7)–(12) because, although those provisions reflect FMLA requirements, they are more burdensome here because the instances of paid sick leave will outnumber those under the FMLA. The ERISA Industry Committee similarly requested that the Department remove or otherwise decrease a contractor's recordkeeping requirements related to required notifications of the amount of paid sick leave employees have accrued. Consistent with these requests and as explained in the discussion of § 13.5(a)(2), the Department has reduced the frequency with which a contractor must notify employees of the leave they have accrued under the Order, which will reduce the required recordkeeping under § 13.25(a)(7). In addition, the Department has clarified elsewhere in this Final Rule that contractors may create and preserve documents electronically. With respect to the other recordkeeping requirements contained in § 13.25(a)(7)–(12), the Department understands that these requirements might result in a greater volume of recordkeeping than under the FMLA because there are likely to be more instances of leave under the Order than contractors experience under the FMLA. However, as mentioned above, the records the Department is requiring covered contractors to maintain under § 13.25(a)(7)–(12) are necessary to ensure the Department can fulfill its enforcement mandate under the Order.

The HR Policy Association requested that covered contractors be permitted to preserve the required records electronically. Similarly, the Chamber/IFA suggested that contractors be permitted to send required notifications to employees electronically to avoid the accumulation of paper. The ERISA Industry Committee contended that the voluminous records covered contractors would need to create to comply with the recordkeeping requirements would cause an administrative burden. In response to these comments, the Department clarifies that, as proposed, § 13.25(a) allowed a covered contractor to make and maintain the required records electronically provided that the reproductions of the electronic records were clear, identifiable, otherwise satisfy the specific requirements of § 13.25(a)(1)–(15), and were made available upon request. The Department additionally notes, however, that regardless of how a contractor maintains the required records, a contractor may only send information required by the Order and part 13 to employees electronically if the contractor customarily corresponds with or makes information available to its employees by electronic means. The Department expects that the right of contractors to make and maintain records electronically in the manner described above, which is generally consistent with FLSA and FMLA recordkeeping requirements under 29 CFR 516.1(a) and 825.500(b), respectively, should significantly reduce contractors' asserted recordkeeping burdens under the Order and implementing regulations.

The Chamber/IFA, the ERISA Industry Committee, and the HR Policy Association also asserted that the requirement in proposed § 13.25(a)(9) to designate leave used in records as paid sick leave pursuant to the Order will cause confusion because the leave might also satisfy overlapping Federal, State, or local leave requirements. The Department agrees that there may be circumstances when leave taken by an employee under the Order also satisfies a contractor's obligations under another Federal, State, or local law. However, the Department does not agree that requiring such leave to be designated consistent with proposed § 13.25(a)(9) will cause undue confusion. First, the language in the proposed rule does not preclude covered contractors from also designating the leave in its records as compliant with another legal or regulatory obligation; therefore, contractors may additionally designate the leave as compliant with the overlapping legal requirements. Second, although the Department is not requiring contractors to disclose records made under proposed § 13.25(a)(9) to employees, it is possible that employees will receive documents, such as pay stubs, that identify leave used by employees as paid sick leave pursuant to the Order. Rather than causing confusion, however, the Department believes that such disclosures, to the extent they occur, will help employees stay apprised of how much paid sick leave they have used.

ABC contended that the proposed rule does not address the new recordkeeping requirements it is imposing with respect to exempt employees, apparently referring to the Order's coverage of employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions. Under § 13.25(c) (adopted as proposed, as explained below), however, a contractor is excused from maintaining records of employees' number of daily and weekly hours worked as otherwise required under § 13.25(a)(4) if the SCA, DBA, or FLSA do not require the contractor to keep records of the employees' hours worked and the contractor elected to use the assumption, permitted by § 13.5(a)(1)(iii), that the employee works 40 hours on or in connection with covered contracts in each workweek. Thus, the Department has not only addressed the new recordkeeping requirement with respect to exempt employees, it has also provided contractors an opportunity to significantly reduce any new recordkeeping requirement with respect to such employees.

For all of these reasons, the Department is adopting § 13.25(a) essentially as proposed, although it has made certain modifications to ensure that certain provisions expressly refer to all relevant records and removed two entries from the list that are no longer necessary. Specifically, the Department has clarified that the reference to "wages paid" under § 13.25(a)(3) and § 13.25(a)(6) includes all "pay and benefits" as those terms are used in § 13.5(c)(3), which requires covered contractors to provide to an employee using paid sick leave the same pay and benefits (that is, both wages and any other benefits, such as but not limited to contributions toward a fringe benefit plan) the employee would have received had the employee not been absent from work. The addition of new language to § 13.25(a)(3) and § 13.25(a)(6) clarifies that contractors must make and maintain records of benefits, such as any contributions they make to a fringe benefit plan on an employee's behalf. Because the clarification compels covered contractors to maintain documentation to demonstrate that they have complied with § 13.5(c)(3), it will facilitate the Department's efforts to enforce the Order and its implementing regulations. The additional language is also generally consistent with the DBA and SCA recordkeeping requirements under 29 CFR 5.5(a)(3)(i) and 4.6(g)(1)(ii), respectively. Additionally, the Department has modified § 13.25(a)(10) to reflect that contractors must maintain records of not just written denials of requests to use paid sick leave, but all written responses, including approvals of such requests if in writing as well as denials, including explanations for such denials as required under § 13.5(d)(3). Although under § 13.5(d)(3)(i), contractors are not required to grant employees' requests to use paid sick leave in writing, if they do, maintaining such records will facilitate any investigation by the WHD that might occur. The Department removed § 13.5(a)(13) and § 13.5(a)(14) because the certified list requirement, which was necessary only to implement the requirement that successor contractors reinstate paid sick leave of employees who worked for the predecessor contractor, no longer appears. The entries that follow have been renumbered accordingly. The Department has also inserted as § 13.25(a)(14) the requirement that contractors make and maintain records of the regular pay and benefits provided to an employee for each use of paid sick leave. This provision makes explicit that records of such payments are required regardless of whether they are technically included in wages as referred to in § 13.25(a)(6). Finally, the Department inserted as § 13.25(a)(15) a requirement that a contractor make and maintain records of any financial payment made for unused paid sick leave upon a separation from employment that, pursuant to § 13.5(b)(5), relieves a contractor from the obligation to reinstate such paid sick leave as otherwise required by § 13.5(b)(4). This provision follows from the change to § 13.5(b)(5) described above; because financial payments can under the Final Rule affect a contractor's reinstatement obligation, it would be important in any investigation that a contractor have records showing that such payments were made.

Proposed § 13.25(b) related to the segregation of employees' covered and non-covered work for a single contractor. It provided that in order for a contractor to distinguish between an employee's covered and non-covered work (such as time spent performing work on or in connection with a covered contract versus time spent performing work on or in connection with non-covered contracts or time spent performing work on or in connection with a covered contract in the United States versus time spent performing work outside the United States, or to establish that time spent performing solely in connection with covered contracts constituted less than 20 percent of an employee's hours worked during a particular workweek), the contractor would be required to keep records or other proof reflecting such distinctions. It further provided that only if the contractor adequately segregated the employee's time would time spent on non-covered work be excluded from hours worked counted toward the accrual of paid sick leave, and that similarly, only if that contractor adequately segregated the employee's time could a contractor properly deny an employee's request to take leave under § 13.5(d) on the ground that the employee was scheduled to perform non-covered work during the time he asked to use paid sick leave.

The HR Policy Association and the ERISA Industry Committee commented that it would be difficult for covered contractors to implement § 13.25(b) with respect to those employees that might be spending less than 20 percent of hours worked in a workweek in connection with covered contracts and sought a 1-year grace period for contractors to make necessary modifications to their human resource systems to enable compliance with the requirements of § 13.25(b). EEAC and Seyfarth Shaw similarly expressed that tracking the hours of individuals working in connection with a covered contract would be challenging. The language in proposed § 13.25(b) is consistent with the treatment of hours worked on SCA- and non-SCA-covered contracts, *see* 29 CFR 4.178, 4.179, as well as the treatment of covered versus non-covered time under the Minimum Wage Executive Order rulemaking, *see* 79 FR 60659, 60660–61, 60672. Thus, many, if not most, covered contractors will have experience in segregating hours worked in the manner required by proposed § 13.25(b). In addition, requiring contractors that wish to distinguish between covered and non-covered time to keep adequate records reflecting that distinction would implement section 4(a) of the Order because it would facilitate the Department's investigation of potential violations of, and assist in obtaining compliance with, the Order. For these reasons, the Department declines to provide the grace period requested by HR Policy Association and the ERISA Industry Committee and adopts § 13.25(b) in the Final Rule as proposed. However, the Department has re-designated proposed § 13.25(b) as subparagraph (1) in the Final Rule because of the insertion of subparagraph (2), described below.

As explained above in the discussion of § 13.5(a)(i) and (iii), the Department has amended those provisions in response to comments to allow contractors to estimate an employee's covered hours worked in connection with covered contracts provided that the estimate is reasonable and based on verifiable information. New § 13.25(b)(2) reflects this change by providing that if a contractor estimates covered hours worked by an employee who performs work in connection with covered contracts pursuant to § 13.5(a)(i) or (iii), the contractor must keep records or other proof of the verifiable information on which such estimates are reasonably based. It further provides that only if the contractor relies on an estimate that is reasonable and based on verifiable information will an employee's time spent in connection with non-covered contracts be excluded from hours worked counted toward the accrual of paid sick leave. Finally, the new regulatory text notes, as explained in the discussion of § 13.5(c)(1) above, that if a contractor estimates the amount of time an employee spends performing work in connection with covered contracts, the contractor must permit the employee to use her paid sick leave during any work time for the contractor.

Proposed § 13.25(c) excused a contractor from maintaining records of the employee's number of daily and weekly hours worked as otherwise required under § 13.25(a)(4) if the SCA, DBA, or FLSA do not require the contractor to keep records of the employee's hours worked, such as because the employee is employed in a bona fide executive, administrative, or professional capacity as those terms are defined in 29 CFR part 541, and the contractor elected to use the assumption permitted by § 13.5(a)(1)(iii). The Department received no specific comments on proposed § 13.25(c) and implements the provision without modification.

Proposed § 13.25(d) addressed requirements related to the confidentiality of records. Proposed § 13.25(d)(1) required a contractor to maintain as confidential in separate files/records from the usual personnel files any records relating to medical histories or domestic violence, sexual assault, or stalking created by or provided to a contractor for purposes of Executive Order 13706, whether of an employee or an employee's child, parent, spouse, domestic partner, or other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship. Proposed § 13.25(d)(2) required records or documents created to comply with the recordkeeping requirements in proposed part 13 that are subject to the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA), Public Law 110–233, 122 Stat. 881 (2008), and/or the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, to be maintained in compliance with the confidentiality requirements of those statutes as described in 29 CFR 1635.9 and 1630.14(c)(1), respectively. Proposed § 13.25(d)(3) prohibited the disclosure of any documentation used to verify the need to use 3 or more consecutive days of paid sick leave for the purposes listed in § 13.5(c)(1)(iv), and required the contractor to maintain confidentiality about any domestic violence, sexual assault, or stalking, unless the employee consents or the disclosure is required by law.

The Department has modified proposed § 13.25(d)(2) to clarify that the confidentiality requirements of the GINA and the ADA apply to medical information contained in records or documents that a contractor creates or receives in connection with compliance with part 13. This modification aims to more clearly fulfill the intent of proposed § 13.25(d)(2), which was to ensure that to the extent compliance with the Order and its implementing regulations resulted in a contractor possessing documents to which the GINA and/or the ADA confidentiality requirements apply, the contractor must maintain those documents consistent with the GINA's and/or the ADA's confidentiality requirements. The Department received no specific comments related to proposed § 13.25(d), and with the exception of this modification, the Department adopts § 13.25(d) as proposed.

Proposed § 13.25(e) required contractors to permit authorized representatives of the WHD to conduct interviews with employees at the worksite during normal working hours. This provision was derived from similar provisions under the SCA and DBA, 29 CFR 4.6(g)(4) (SCA); 29 CFR 5.5(a)(3)(iii) (DBA), and would facilitate the WHD's ability to enforce the Order and part 13. The Department received no comments related to proposed § 13.25(e) and retains the provision as proposed.

Proposed § 13.25(f) stated that nothing in part 13 limits or otherwise modifies the contractor's recordkeeping obligations, if any, under the DBA, SCA, FLSA, FMLA, Executive Order 13658, their implementing regulations, or other applicable law. The Department received no comments regarding this provision and adopts it without change.

Certified List of Employees' Accrued Paid Sick Leave

Proposed § 13.26 required a predecessor prime contractor to provide to the contracting officer, upon completion of a covered contract, a certified list of the names of all employees entitled to paid sick leave under Executive Order 13706 and part 13 who worked on or in connection with the covered contract or any covered subcontract(s) at any point during the 12 months preceding the date of completion of the contract; the date each such employee separated from the contract or any covered subcontract(s) if prior to the date of the completion of the contract; and the amount of paid sick leave each such employee had available for use as of the date of completion of the contract or the date each such employee separated from the contract or subcontract. This requirement was intended to facilitate compliance by successor contractors with the requirement set forth in § 13.5(b)(4) that paid sick leave be reinstated for employees rehired by a successor contractor within 12 months of the job separation from the predecessor contractor. Because (for reasons explained above) that provision does not appear in the Final Rule, proposed § 13.26 is no longer necessary and also does not appear in the Final Rule.

Section 13.26 Notice

Proposed § 13.27 addressed the obligations of contractors with respect to notice to employees of their rights under Executive Order 13706 and part 13. Proposed § 13.27(a) required that contractors notify all employees performing work on or in connection with a covered contract of the paid sick leave requirements of Executive Order 13706 and part 13 by posting a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it would be readily seen by employees. The Department derived this proposal from the Executive Order 13658 Final Rule at 29 CFR 10.29(b). 79 FR 60670. This proposal differed from the Minimum Wage Executive Order regulations, however, in that it required all covered contractors, including those whose contracts are DBA- or SCA-covered, to display the poster rather than allowing DBA and SCA contractors to provide notice solely on wage determinations. This difference was based on the Department's belief that, because the Order's paid sick leave requirements require lengthier explanation than the minimum wage requirements of Executive Order 13658, and because those requirements are sufficiently detailed such that the Department did not propose to describe them in full on wage determinations, employees working on or in connection with DBA- and SCA-covered contracts would be more adequately informed about the paid sick leave requirements by a poster. The Department stated in the NPRM that it would make a poster, modeled on the Minimum Wage Executive Order poster, available on the WHD Web site.

Numerous commenters, including Voices for Vermont's Children, USAction, the NYC Department of Consumer Affairs, and NETWORK, supported the requirement that contractors prominently post notices regarding paid sick leave for employees to see. The National Partnership suggested that the Department additionally require contractors to provide employees with individual written notice of the paid sick leave requirements, either when they begin employment with the contractor or as soon as practicable if they are already employed. The Department declines to adopt this suggestion because it believes the notice poster and notification of paid sick leave accrual requirements in § 13.5(a)(2) will suffice to inform employees that they are entitled to paid sick leave. The Department therefore adopts § 13.27(a) as proposed, except that it appears in the Final Rule as § 13.26(a) because of the removal of proposed § 13.26 as explained above.

Proposed § 13.27(b), derived from the Executive Order 13658 Final Rule at 29 CFR 10.29(c), permitted contractors that customarily post notices to employees electronically to post the notice electronically, provided such electronic posting is displayed prominently on any Web site maintained by the contractor, whether external or internal, and is customarily used for notices to employees about terms and conditions of employment. The Department received no specific comments on proposed § 13.27(b) and retains the section in its proposed form, except that it appears in the Final Rule as § 13.26(b).

Section 13.27 Timing of Pay

Proposed § 13.28 described the time by which a contractor must compensate employees for hours during which they used paid sick leave. Under the proposed provision, a contractor was required to provide such compensation no later than one pay period following the end of the regular pay period in which the paid sick leave was used. The proposed timing of the payment obligation imposed was consistent with both the SCA's and Executive Order 13658's implementing regulations. *See* 29 CFR 4.165(a) (SCA); 29 CFR 10.25 (Executive Order 13658). The Department received no specific comments on proposed § 13.28 and accordingly adopts the provision without change, except that it appears in the Final Rule as § 13.27 because of the removal of proposed § 13.26.

Subpart D—Enforcement

Subpart D implements section 4 of Executive Order 13706, which grants the Secretary "authority for investigating potential violations of and obtaining compliance with the order," 80 FR 54699, by setting forth remedies, procedures, and enforcement processes. Subpart D is largely based on subpart D of the Minimum Wage Executive Order regulations in 29 CFR part 10, which incorporated relevant regulatory provisions under the FLSA, SCA, and DBA, as well as certain enforcement procedures set forth in the Department's regulations implementing the Nondisplacement Executive Order. Subpart D differs in some respects from the analogous provisions in the Minimum Wage Executive Order regulations because of the differences between minimum wage and paid sick leave requirements and because Executive Order 13706 contemplates that the Department would also incorporate FMLA provisions to the extent practicable.

Subpart D establishes a procedure for filing complaints with the WHD, creates an informal complaint resolution process between the WHD and parties alleged to be in violation of the Order, details the WHD's investigation procedures under the Order, and provides remedies and sanctions for violations of the Order, including monetary relief, liquidated damages, and debarment, as well as processes for collection of underpayments. As noted in the NPRM, the Department believes subpart D will facilitate investigations of potential violations of the Order, allow for violations of the Order to be addressed and remedied, and promote compliance with the Order. The Department received numerous comments generally supporting the proposed enforcement provisions as reasonable, strong, and critical to protecting workers' rights and discouraging violation of the law; as explained in more detail below, the Department is adopting subpart D as proposed.

Section 13.41 Complaints

The Department proposed a procedure for filing complaints in § 13.41 identical to that which appears in 29 CFR 10.41, the analogous section of the Minimum Wage Executive Order Final Rule. Proposed § 13.41(a) provided that any employee, contractor, labor organization, trade organization, contracting agency, or other person or entity that believes a violation of the Executive Order or part 13 has occurred could file a complaint with any office of the WHD. It also provided that no particular form of complaint is required; a complaint could be filed orally or in writing, and WHD would accept a complaint in any language if the complainant was unable to file it in English. Proposed § 13.41(b) stated the well-established policy of the Department with respect to confidential sources. *See* 29 CFR 4.191(a); 29 CFR 5.6(a)(5). Specifically, it provided that it is the Department's policy to protect the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy. Accordingly, the provision stated that the identity of any individual who makes a written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal the individual's identity, would not be disclosed in any manner to anyone other than Federal officials without the prior consent of the individual. The proposed provision further provided that disclosure of such statements would be governed by the provisions of the Freedom of Information Act, 5 U.S.C. 552, 29 CFR part 70, and the Privacy Act of 1974, 5 U.S.C. 552. Many commenters, including Jobs With Justice, Demos, Women Employed, the National Hispanic Council on Aging, and the National Employment Lawyers Association (NELA), generally supported allowing employees to file complaints with the WHD. No commenter suggested any change to this provision, and the Department adopts it as proposed.

Section 13.42 Wage and Hour Division Conciliation

Proposed § 13.42, which was identical to 29 CFR 10.42, established an informal complaint resolution process for complaints filed with the WHD. The provision allowed the WHD, after obtaining the necessary information from the complainant regarding the alleged violations, to contact the party against whom the complaint was lodged and attempt to reach an acceptable resolution through conciliation. The Department received no comments regarding this provision and adopts § 13.42 without modification.

Section 13.43 Wage and Hour Division Investigation

Proposed § 13.43, which outlined the WHD's investigative authority, was identical to 29 CFR 10.43. That section of the Minimum Wage Executive Order Final Rule was derived primarily from regulations implementing the SCA and DBA. *See* 79 FR 60679 (citing 29 CFR 4.6(g)(4), 29 CFR 5.6(b)). Proposed § 13.43 permitted the Administrator to initiate an investigation either as the result of a complaint or at any time on his or her own initiative. Under the proposal, as part of the investigation, the Administrator was entitled to conduct interviews with the contractor, as well as the contractor's employees at the worksite during normal work hours; inspect the relevant contractor's records (including contract documents and payrolls, if applicable); make copies and transcriptions of such records; and require the production of any documentary or other evidence the Administrator deems necessary to determine whether a violation, including conduct warranting imposition of debarment, has occurred. The proposed section also required Federal agencies and contractors to cooperate with authorized representatives of the Department in the inspection of records, in interviews with employees, and in all aspects of investigations. The Department received no comments requesting any change to this provision and therefore implements it as proposed.

Section 13.44 Remedies and Sanctions

In proposed § 13.44, the Department set forth remedies and sanctions for violations of the Order and part 13. Proposed § 13.44(a) provided for remedies for violations of the prohibition on interference with the accrual or use of paid sick leave described in § 13.6(a). Proposed § 13.44(a) provided that when the Administrator determines that a contractor has interfered with an employee's accrual or use of the paid sick leave in violation of § 13.6(a), the Administrator would notify the contractor and the relevant contracting agency of the interference and request the contractor to remedy the violation. It additionally proposed that if the contractor does not remedy the violation, the Administrator would direct the contractor to provide any appropriate relief to the affected employee(s) in the Administrator's investigation findings letter issued pursuant to § 13.51. The Department further proposed that such relief may include any pay and/or benefits denied or lost by reason of the violation; other actual monetary losses sustained as a direct result of the violation; or appropriate equitable or other relief. Proposed relief also included an amount equaling any monetary relief as liquidated damages unless such amount was reduced by the Administrator because the violation was in good faith and the contractor had reasonable grounds for believing it had not violated the Order or part 13. The types of relief available under proposed § 13.44(a) were derived from the FMLA, 29 U.S.C. 2617(a)(1), 2617(b)(2), and its implementing regulations, 29 CFR 825.400(c). Important aspects of these FMLA remedies, such as the inclusion of liquidated damages, are also part of the FLSA scheme. *See* 29 U.S.C. 216(b), 260. As noted in the NPRM, under the FLSA and FMLA—and by extension, under Executive Order 13706 and part 13—liquidated damages serve the purpose of compensating employees for the delay in receiving wages owed rather than punishing the employer who violated the statute. *See, e.g., Herman* v. *RSR Sec. Servs. Ltd.,* 172 F.3d 132, 142 (2d Cir. 1999) (FLSA); *Jordan* v. *U.S. Postal Serv.,* 379 F.3d 1196, 1202 (10th Cir. 2004) (FMLA).

As the Department explained in the NPRM, under the regulatory text, an example of a possible remedy includes payment for time for which a contractor improperly denied a request to use paid sick leave such that the employee took unpaid leave that should have been treated as paid sick leave. In that case, the damages would be the pay and benefits the employee would have received for that time pursuant to § 13.5(c)(3), and the award would include an equal amount of liquidated damages unless the violation was made in good faith and the contractor had reasonable grounds for believing it had not violated the Order or part 13. As another example, if a contractor improperly denied a request to use paid sick leave such that an employee came to work and hired a babysitter to care for a sick child with whom the employee wished to stay home, the remedy would be the amount the employee spent on the child care, and the award would include an equal amount of liquidated damages unless the violation was made in good faith and the contractor had reasonable grounds for believing it had not violated the Order or part 13. In this example, relief would not include lost pay or benefits because the employee did not lose pay or benefits due to the violation. The Department stated in the NPRM that equitable relief could include, but was not limited to, requiring the contractor to allow for accrual and use of paid sick leave by an employee it erroneously treated as not covered by the Executive Order or requiring the contractor to restore paid sick leave it improperly deducted from an employee's accrued paid sick leave.

Many commenters, including the NYC Department of Consumer Affairs, the Seattle Office of Labor Standards, NELP, the Coalition on Human Needs, and CLASP, supported including liquidated damages as a remedy for violations of the Order. EEAC, however, opposed the Department's proposal to allow for liquidated damages, noting that the Order directs that its implementing regulations should incorporate remedies from the Minimum Wage Executive Order rulemaking, which does not provide for liquidated damages.

After careful consideration, the Department will not follow EEAC's suggestion to remove liquidated damages as an available remedy for violations of the Order and part 13. The Executive Order requires the Department to incorporate procedures and remedies not solely from the Minimum Wage Executive Order rulemaking, but also the FLSA and, notably, the FMLA, and as explained above, those statutes provide for liquidated damages. Furthermore, monetary relief for violations of the Order and part 13 will often be limited because the monetary value of paid sick leave is limited. Liquidated damages in the amount of any monetary relief is therefore an important mechanism for ensuring that employees who suffer violations are adequately compensated.

Proposed § 13.44(a) also provided that the Administrator could direct that payments due on the contract or any other contract between the contractor and the Federal Government be withheld as may be necessary to provide any appropriate monetary relief, and that, upon the final order of the Secretary that monetary relief is due, the Administrator could direct the relevant contracting agency to transfer the withheld funds to the Department for disbursement. These portions of the proposed provision were identical to language in the Minimum Wage Executive Order Final Rule. *See* 29 CFR 10.44(a). The Department received no comments regarding this portion of the proposed provision. For the reasons explained, the Department adopts § 13.44(a) as proposed.

Proposed § 13.44(b) set out remedies for violations of the prohibition on discrimination in § 13.6(b). It provided that when the Administrator determines that a contractor has discriminated against an employee in violation of § 13.6(b), the Administrator would notify the contractor and the relevant contracting agency of the discrimination and request that the contractor remedy the violation. It further provided that if the contractor does not remedy the violation, the Administrator would direct the contractor to provide any appropriate relief, including but not limited to employment, reinstatement, promotion, restoration of leave, or lost pay and/or benefits, in the Administrator's investigation findings letter issued pursuant to § 13.51. As proposed, § 13.44(b) also provided that an amount equaling any monetary relief could be awarded as liquidated damages unless such amount is reduced by the Administrator because the violation was in good faith and the contractor had reasonable grounds for believing the contractor had not violated the Order or part 13. This language was derived from the FMLA remedies set forth in 29 U.S.C. 2617(a)(1) and 29 CFR 825.400(c); *see also* 29 U.S.C. 2617(b)(2). It was similar to the analogous provision in the Minimum Wage Executive Order rulemaking, 79 FR 60728 (codified at 29 CFR 10.44(b)), which was derived from the remedies provided for under the FLSA's anti-retaliation provision, *see* 29 U.S.C. 216(b), except that the proposed provision allowed for liquidated damages, a remedy available under the FMLA, 29 U.S.C. 2617(a)(1), and the FLSA, 29 U.S.C. 216(b), 260. Proposed § 13.44(b) further noted that the Administrator could additionally direct that payments due on the contract or any other contract between the contractor and the Federal Government be withheld as may be necessary to provide any appropriate monetary relief and that upon the final order of the Secretary that monetary relief is due, the Administrator could direct the relevant contracting agency to transfer the withheld funds to the Department of Labor for disbursement. Comments supporting and opposing the inclusion of liquidated damages in § 13.44(a) also apply to § 13.44(b), and for the reasons described above, the Department is continuing to allow for that remedy. Accordingly, this provision is implemented as proposed.

Proposed § 13.44(c) addressed the remedies for violations of the recordkeeping requirements in subpart C. It provided that when a contractor fails to comply with the requirements of § 13.25 in violation of § 13.6(c), the Administrator would request that the contractor remedy the violation. Proposed § 13.44(c) further provided that if a contractor fails to produce required records upon request, the contracting officer, upon direction of an authorized representative of the Department of Labor, or under its own action, would take such action as necessary to cause suspension of any further payment or advance of funds on the contract until such time as the violations are discontinued. PSC asserted that it would be unreasonable to suspend contract payments simply because a contractor failed to produce records upon request. The Department declines to modify proposed § 13.44(c) because any such suspension would end when the recordkeeping violations are discontinued, and because the section is consistent with and was derived from paragraph (g)(3) of the Minimum Wage Executive Order contract clause, 79 FR 60731, the analogous provision of the SCA regulations, 29 CFR 4.6(g)(3), and the analogous provision of the DBA regulations, 29 CFR 5.5(a)(3)(iii). The Department therefore adopts this provision without change other than the insertion of a reference to a guarantee of funds for the reasons explained in the discussion of § 13.11(c).

Proposed § 13.44(d), which was effectively identical to the corresponding provision in the Minimum Wage Executive Order rulemaking, 29 CFR 10.44(c), allowed for the remedy of debarment. Specifically, it provided that whenever a contractor is found by the Secretary to have disregarded its obligations under Executive Order 13706 or part 13, such contractor and its responsible officers, and any firm, corporation, partnership, or association in which the contractor or responsible officers have an interest, would be ineligible to be awarded any contract or subcontract subject to the Executive Order for a period of up to 3 years from the date of publication of the name of the contractor or responsible officer on the excluded parties list currently maintained on the System for Award Management Web site, *http://www.SAM.gov.* The "disregarded its obligations" standard, which is also used in the Minimum Wage Executive Order rulemaking, was derived from the DBA implementing regulations at 29 CFR 5.12(a)(2). *See* 79 FR 60680. Proposed § 10.44(d) further provided that neither an order of debarment of any contractor or its responsible officers from further Government contracts nor the inclusion of a contractor or its responsible officers on a published list of noncomplying contractors under this section would be carried out without affording the contractor or responsible officers an opportunity for a hearing before an Administrative Law Judge (ALJ).

Debarment is a long-established remedy for a contractor's failure to fulfill its labor standards obligations under the SCA and the DBA, *see* 41 U.S.C. 6706(b); 40 U.S.C. 3144(b); 29 CFR 4.188(a); 29 CFR 5.5(a)(7); 29 CFR 5.12(a)(2), and one that, as noted, was adopted in the Minimum Wage Executive Order rulemaking, *see* 79 FR 60728 (codified at 29 CFR 10.44(c)). In the NPRM, the Department explained that the possibility that a contractor will be unable to obtain Government contracts for a fixed period of time due to debarment promotes contractor compliance with the SCA, DBA, and Minimum Wage Executive Order, and the Department intended inclusion of the remedy in the NPRM to incentivize compliance with Executive Order 13706 as well.

A Better Balance, Innovation Ohio, the National Partnership, Equal Rights Advocates, CPD, and numerous other commenters endorsed the debarment of contractors found to have violated the Order and part 13 as an appropriate remedy. The Department therefore implements § 13.44(d) as proposed.

Proposed § 13.44(e) allowed for initiation of an action, following a final order of the Secretary, against a contractor in any court of competent jurisdiction to collect underpayments when the amounts withheld under § 13.11(c) are insufficient to reimburse all monetary relief due. Proposed § 13.44(e) also authorized initiation of an action, following the final order of the Secretary, in any court of competent jurisdiction when there are no payments available to withhold. Such circumstances could arise, for example, if at the time the Administrator discovers a contractor owes monetary relief to employees, no payments remain owing under the contract or another contract between the same contractor and the Federal Government, or if the covered contract is a concessions contract under which the contractor does not receive payments from the Federal Government. Proposed § 13.44(e) additionally provided that any sums the Department recovers would be paid to affected employees to the extent possible, but that sums not paid to employees because of an inability to do so within 3 years would be transferred into the Treasury of the United States. Proposed § 13.44(e) was derived from the analogous provision of the Minimum Wage Executive Order rulemaking, 29 CFR 10.44(d), which in turn was derived from the SCA, 41 U.S.C. 6705(b)(2). No comments addressed this provision specifically and the Department adopts it as proposed.

In proposed § 13.44(f), the Department addressed what remedy would be available when a contracting agency fails to include the contract clause in a contract subject to the Executive Order. It provided that the contracting agency, on its own initiative or within 15 calendar days of notification by the Department, would incorporate the clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination). This provision was identical to 29 CFR 10.44(e); in promulgating that provision during the Minimum Wage Executive Order rulemaking, the Department explained that this clause would provide the Administrator authority to collect underpayments on behalf of affected employees on the applicable contract retroactive to commencement of performance under the contract. 79 FR 60681. The Department also noted in that rulemaking that the Administrator possesses comparable authority under the DBA. *Id.* (citing 29 CFR 1.6(f)). The Department explained in the NPRM that a mechanism for addressing a failure to include the contract clause in a contract subject to Executive Order 13706 would further the interest in both remedying violations and obtaining compliance with the Order, as it did with respect to the Minimum Wage Executive Order. Furthermore, as also noted in the Minimum Wage Executive Order rulemaking, the proposed provision included language reflecting the Department's belief that a contractor is entitled to an adjustment where necessary to pay any necessary additional costs when a contracting agency initially omits and then subsequently includes the contract clause in a covered contract. *Id.* (citing 29 CFR 4.5(c), the SCA regulation with which this position is consistent). As noted above, PSC requested that the Department expressly require a price or cost adjustment when a contracting agency fails to include the contract clause in a covered contract. For the reasons explained in the discussion of § 13.11(b), § 13.44(f) is implemented without change.

Subpart E—Administrative Proceedings

Pursuant to section 4 of Executive Order 13706, subpart E establishes and describes the administrative proceedings to be conducted under the Order. In compliance with section 3(c) of the Order, proposed subpart E incorporates, to the extent practicable, the DBA, SCA, and Executive Order 13658 administrative procedures the Department believes are necessary to remedy potential violations and ensure compliance with the Executive Order. Indeed, the Department substantially modeled subpart E on subpart E of the Minimum Wage Executive Order Final Rule, which was primarily derived from the rules governing administrative proceedings conducted under the DBA and SCA. 79 FR 60682. The administrative procedures included in subpart E also closely adhere to existing procedures of the Department's Office of Administrative Law Judges and Administrative Review Board (ARB).

Section 13.51 Disputes Concerning Contractor Compliance

Proposed § 13.51, which the Department derived primarily from the DBA's implementing regulations at 29 CFR 5.11, addressed how the Administrator would process disputes regarding a contractor's compliance with part 13. Specifically, proposed § 13.51(a) provided that the Administrator or a contractor could initiate a proceeding. The Department received no comments regarding this provision, and it is adopted as proposed.

Proposed § 13.51(b)(1) provided that when it appears that relevant facts are at issue in a dispute covered by § 13.51(a), the Administrator would notify the affected contractor(s) and the prime contractor, if different, of the investigative findings by certified mail to the last known address. The preamble to the proposal further stated that if the Administrator determines that there are reasonable grounds to believe the contractor(s) should be subject to debarment, the investigative findings letter would so indicate. Proposed § 13.51(b)(2) required a contractor desiring a hearing concerning the investigative findings letter to request a hearing by letter postmarked within 30 calendar days of the date of the Administrator's letter. It further required the request to set forth those findings in dispute with respect to the violation(s) and/or debarment, as appropriate, and to explain how such findings are in dispute, including by reference to any applicable affirmative defenses.

Proposed § 13.51(b)(3) required the Administrator, upon receipt of a timely request for hearing, to refer the matter to the Chief Administrative Law Judge by Order of Reference for designation of an ALJ to conduct such hearings as may be necessary to resolve the disputed matter in accordance with the procedures set forth in 29 CFR part 6. It also required the Administrator to attach a copy of the Administrator's letter, and the response thereto, to the Order of Reference that the Administrator sent to the Chief Administrative Law Judge.

The Department did not receive any requests to alter § 13.51(b) and implements it as proposed.

Proposed § 13.51(c)(1) applied in circumstances when it appears there are no relevant facts at issue and there is not at that time reasonable cause to institute debarment proceedings. It required the Administrator to notify the contractor, by certified mail to the contractor's last known address, of the investigative findings and to issue a ruling on any issues of law known to be in dispute.

Proposed § 13.51(c)(2)(i) applied when a contractor disagrees with the Administrator's factual findings or believes there are relevant facts in dispute. It required the contractor to advise the Administrator of such disagreement by letter postmarked within 30 calendar days of the date of the Administrator's letter. Under the NPRM, the contractor was also required to explain in detail the facts alleged to be in dispute and attach any supporting documentation with its response.

Proposed § 13.51(c)(2)(ii) required that the information submitted in the response alleging the existence of a factual dispute must be timely in order for the Administrator to examine such information. Under the NPRM, where the Administrator determined there was a relevant issue of fact, the Administrator would refer the case to the Chief Administrative Law Judge. If the Administrator determined there was no relevant issue of fact, the Administrator would so rule and advise the contractor accordingly.

Proposed § 13.51(c)(3) applied where a contractor desires review of a ruling issued by the Administrator under proposed § 13.51(c)(1) or the final sentence of proposed § 13.51(c)(2)(ii). It required a contractor to file any petition for review with the ARB postmarked within 30 calendar days of the Administrator's ruling, with a copy thereof to the Administrator. It further required the petitioner to file its petition in accordance with the procedures set forth in 29 CFR part 7.

The Department received no comments addressing § 13.51(c) and adopts it without modification.

Proposed § 13.51(d) provided that the Administrator's investigative findings letter would become the final order of the Secretary if a timely response to the letter is not made or a timely petition for review is not filed. It additionally provided that if a timely response or a timely petition for review is filed, the investigative findings letter would be inoperative unless and until the decision is upheld by an ALJ or the ARB, or the letter otherwise becomes a final order of the Secretary. No comments addressed § 13.51(d), and the Department implements it as proposed.

Section 13.52 Debarment Proceedings

Proposed § 13.52 addressed debarment proceedings and was identical to the analogous provision in the Minimum Wage Executive Order regulations, 29 CFR 10.52, which the Department primarily derived from the DBA implementing regulations at 29 CFR 5.12. 79 FR 60683. Proposed § 13.52(a) provided that whenever any contractor is found by the Secretary of Labor to have disregarded its obligations to employees or subcontractors under Executive Order or part 13, such contractor and its responsible officers, and any firm, corporation, partnership, or association in which such contractor or responsible officers have an interest, would be ineligible for a period of up to 3 years to receive any contracts or subcontracts subject to the Executive Order from the date of publication of the name or names of the contractor or persons on the excluded parties list currently maintained on the System for Award Management Web site, *http://www.SAM.gov.* The Department received no comments addressing this provision and adopts it as proposed.

Proposed § 13.52(b)(1) provided that where the Administrator finds reasonable cause to believe a contractor has committed a violation of the Executive Order or part 13 that constitutes a disregard of its obligations to its employees or subcontractors, the Administrator would notify, by certified mail to the last known address, the contractor and its responsible officers (and any firms, corporations, partnerships, or associations in which the contractor or responsible officers are known to have an interest) of the finding. Under proposed § 13.52(b)(1), the Administrator would additionally furnish those notified a summary of the investigative findings and afford them an opportunity for a hearing regarding the debarment issue. Those notified would have to request a hearing on the debarment issue, if desired, by letter to the Administrator postmarked within 30 calendar days of the date of the letter from the Administrator. The letter requesting a hearing would need to set forth any findings that were in dispute and the reasons therefore, including any affirmative defenses to be raised.

Proposed § 13.52(b)(1) also required the Administrator, upon receipt of a timely request for hearing, to refer the matter to the Chief Administrative Law Judge by Order of Reference, to which would be attached a copy of the Administrator's investigative findings letter and the response thereto, for designation to an ALJ to conduct such hearings as may be necessary to determine the matters in dispute. Proposed § 13.52(b)(2) provided that hearings under § 13.52 would be conducted in accordance with 29 CFR part 6. Under the proposal, if no timely request for hearing was received, the Administrator's findings would become the final order of the Secretary.

The Department did not receive any comments regarding § 13.52(b) and implements the provision as proposed.

Section 13.53 Referral to Chief Administrative Law Judge; Amendment of Pleadings

Proposed § 13.53, as well as proposed §§ 13.54–13.57, were largely identical to the corresponding provisions in the Minimum Wage Executive Order rulemaking, 29 CFR 10.53–10.57, and were derived from the SCA and DBA rules of practice for administrative proceedings contained in 29 CFR part 6. Proposed § 13.53(a) provided that upon receipt of a timely request for a hearing under proposed § 13.51 (where the Administrator has determined that relevant facts are in dispute) or proposed § 13.52 (debarment), the Administrator would refer the case to the Chief Administrative Law Judge by Order of Reference, to which would be attached a copy of the investigative findings letter from the Administrator and the response thereto, for designation of an ALJ to conduct such hearings as may be necessary to decide the disputed matters. It further provided that a copy of the Order of Reference and attachments thereto would be served upon the respondent and that the investigative findings letter and the response thereto would be given the effect of a complaint and answer, respectively, for purposes of the administrative proceeding.

Proposed § 13.53(b) stated that at any time prior to the closing of the hearing record, the complaint or answer could be amended with permission of the ALJ upon such terms as the ALJ approves, and that for proceedings initiated pursuant to proposed § 13.51, such an amendment could include a statement that debarment action is warranted under proposed § 13.52. It further provided that such amendments would be allowed when justice and the presentation of the merits are served thereby, provided no prejudice to the objecting party's presentation on the merits would result. It additionally stated that when issues not raised by the pleadings were reasonably within the scope of the original complaint and were tried by express or implied consent of the parties, they would be treated as if they had been raised in the pleadings, and such amendments could be made as necessary to make them conform to the evidence. Proposed § 13.53(b) further provided that the presiding ALJ could, upon reasonable notice and upon such terms as are just, permit supplemental pleadings setting forth transactions, occurrences, or events that have happened since the date of the pleadings and that are relevant to any of the issues involved. It also authorized the ALJ to grant a continuance in the hearing, or leave the record open, to enable the new allegations to be addressed. The Department received no comments addressing this provision and implements it as proposed.

Section 13.54 Consent Findings and Order

Proposed § 13.54(a) provided that parties could at any time prior to the ALJ's receipt of evidence or, at the ALJ's discretion, at any time prior to issuance of a decision, agree to dispose of the matter, or any part thereof, by entering into consent findings and an order disposing of the proceeding. Proposed § 13.54(b) provided that any agreement containing consent findings and an order disposing of a proceeding in whole or in part would also provide: (1) That the order would have the same force and effect as an order made after full hearing; (2) that the entire record on which any order may be based must consist solely of the Administrator's findings letter and the agreement; (3) a waiver of any further procedural steps before the ALJ and the ARB regarding those matters which are the subject of the agreement; and (4) a waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement. Proposed § 13.54(c) provided that within 30 calendar days of receipt of any proposed consent findings and order, the ALJ would accept the agreement by issuing a decision based on the agreed findings and order, provided the ALJ is satisfied with the proposed agreement's form and substance. It further provided that if the agreement disposes of only a part of the disputed matter, a hearing would be conducted on the matters remaining in dispute. The Department received no comments addressing this provision, and it adopts § 13.54 as proposed.

Section 13.55 Proceedings of the Administrative Law Judge

Proposed § 13.55 addressed the ALJ's proceedings and decision. Proposed § 13.55(a) provided that the Office of Administrative Law Judges has jurisdiction to hear and decide appeals concerning questions of law and fact from the Administrator's investigative findings letters issued under § 13.51 and/or § 13.52. The Department received no comments related to proposed § 13.55(a) and accordingly adopts the section in its proposed form.

Proposed § 13.55(b) provided that each party could file with the ALJ proposed findings of fact, conclusions of law, and a proposed order, together with a supporting brief expressing the reasons for such proposals, within 20 calendar days of filing of the transcript (or a longer period if the ALJ permits). It also provided that each party would serve such documents on all other parties. No comments addressed § 13.55(b), and the Department adopts it as proposed.

Proposed § 13.55(c)(1) required an ALJ to issue a decision within a reasonable period of time after receipt of the proposed findings of fact, conclusions of law, and order, or within

30 calendar days after receipt of an agreement containing consent findings and an order disposing of the matter in whole. It further provided that the decision would contain appropriate findings, conclusions of law, and an order and be served upon all parties to the proceeding. Proposed § 13.55(c)(2) provided that if the Administrator requests debarment, and the ALJ concludes the contractor has violated the Executive Order or part 13, the ALJ would issue an order regarding whether the contractor is subject to the excluded parties list that would include any findings related to the contractor's disregard of its obligations to employees or subcontractors under the Executive Order or part 13. The Department received no comments related to proposed § 13.55(c) and adopts it without modification.

Proposed § 13.55(d) provided that the Equal Access to Justice Act (EAJA), as amended, 5 U.S.C. 504, does not apply to proceedings under part 13 because such proceedings were not required by an underlying statute to be determined on the record after an opportunity for an agency hearing. Therefore, the Department reasoned that an ALJ had no authority to award attorney's fees and/or other litigation expenses pursuant to the provisions of the EAJA for any proceeding under part 13.

NELA commented that the rule would be strengthened by adding language to allow prevailing employees represented by private counsel to recover attorney's fees and costs in administrative proceedings brought to enforce and remedy violations of the Order. NELA expressed the view that the financial loss to a full-time employee who has not been permitted to accrue or use up to 56 hours per year of paid sick leave as required under the Order is likely to be minimal, and that without the ability to recover attorney's fees and costs, it would not be financially feasible for an employee to retain private counsel, or economically viable for a private attorney to represent an employee in this type of complaint.

After careful consideration of this comment, the Department has decided to retain § 13.55(d) as proposed. Although the Department agrees that promoting legal representation for employees is a worthy objective, the Department declines to adopt the recommendation to add language to permit the recovery of attorney's fees and costs by prevailing employees in administrative proceedings brought pursuant to these regulations. The American Rule governing the recovery of attorney's fees ordinarily requires litigants in court to bear their own fees and costs, regardless whether they win or lose. *See Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001). A prevailing party may be entitled to collect fees from the losing party only pursuant to explicit statutory authority. *See Key Tronic Corp.* v. *United States*, 511 U.S. 809, 819 (1994); *In the Matter of Ann P. Harris* v. *Tennessee Valley Authority*, ARB Case No. 99–004, 2000 WL 2804643, at *3–7 (DOL Adm. Rev. Bd. Nov. 29, 2000) (same, in administrative proceedings before Department of Labor ALJs or the ARB). Not only does the Order not contain any such explicit authority, it also specifies that it does not create, and is not intended to create, any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the government or any other person. 80 FR 54699. Rather, pursuant to subpart E, where the Administrator finds that a violation of the Order or part 13 has occurred, the WHD shall initiate an enforcement proceeding, and an employee may participate in, but cannot be a party to, such a proceeding under the Order, and therefore would not be a "prevailing party" for purposes of fee-shifting even if monetary or other relief were awarded.

Lastly, § 13.44 sets forth remedies and sanctions for violations of the Order. Relief may include any pay and/or benefits denied or lost by reason of the violation, other monetary losses sustained as a direct result of the violation, or appropriate equitable or other relief, as well as, in certain circumstances, payment of liquidated damages in an amount equaling any monetary relief. The Department believes these remedies provide adequate restitution to employees for violations of the Order, and that the inability of affected employees to recover attorney's fees and costs does not represent an impediment to enforcement of Executive Order 13706.

Proposed § 13.55(e) provided that if an ALJ concludes that a violation of the Executive Order or part 13 occurred, the final order would mandate action to remedy the violation, including any monetary or equitable relief described in § 13.44. It also required an ALJ to determine whether an order imposing debarment is appropriate, if the Administrator has sought debarment. The Department received no comments related to proposed § 13.55(e) and accordingly retains the section as proposed.

Proposed § 13.55(f) provided that the ALJ's decision would become the final order of the Secretary, provided a party does not timely appeal the matter to the ARB. The Department received no comments regarding this provision and adopts it as proposed.

Section 13.56 Petition for Review

The Department proposed § 13.56 as the process to apply to petitions for review to the ARB from ALJ decisions. Proposed § 13.56(a) provided that within 30 calendar days after the date of the decision of the ALJ, or such additional time as the ARB grants, any party aggrieved thereby who desires review must file a petition for review with supporting reasons in writing to the ARB with a copy thereof to the Chief Administrative Law Judge. It further required the petition to refer to the specific findings of fact, conclusions of law, and order at issue and that a petition concerning a debarment decision state the disregard of obligations to employees and subcontractors, or lack thereof, as appropriate. It additionally required a party to serve the petition for review, and all supporting briefs, on all parties and on the Chief Administrative Law Judge. It also stated that a party must timely serve copies of the petition and all supporting briefs on the Administrator and the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor. The Department received no comments related to proposed § 13.56(a) and accordingly retains the section in its proposed form.

Proposed § 13.56(b) provided that if a party files a timely petition for review, the ALJ's decision would be inoperative unless and until the ARB issues an order affirming the decision, or the decision otherwise becomes a final order of the Secretary. It further provided that if a petition for review concerns only the imposition of debarment, the remainder of the ALJ's decision would be effective immediately. It additionally stated that judicial review would not be available unless a timely petition for review to the ARB is first filed. Failure of the aggrieved party to file a petition for review with the ARB within 30 calendar days of the ALJ decision would render the decision final, without further opportunity for appeal. No commenter addressed proposed § 13.56(b), and the Department implements it without change.

Section 13.57 Administrative Review Board Proceedings

Proposed § 13.57 outlined the ARB proceedings under the Executive Order. Proposed § 13.57(a)(1) stated the ARB has jurisdiction to hear and decide in its discretion appeals from the

Administrator's investigative findings letters issued under § 13.51(c)(1) or the final sentence of § 13.51(c)(2)(ii), Administrator's rulings issued under § 13.58, and from ALJ decisions issued under § 13.55. It further provided that in considering the matters within its jurisdiction, the ARB would be the Secretary's authorized representative and would act fully and finally on behalf of the Secretary. Proposed § 13.57(a)(2)(i) identified the limitations on the ARB's scope of review, including a restriction on passing on the validity of any provision of part 13 and a general prohibition on receiving new evidence in the record, because the ARB is an appellate body and must decide cases before it based on substantial evidence in the existing record. Proposed § 13.57(a)(2)(ii) prohibited the ARB from granting attorney's fees or other litigation expenses under the EAJA.

With respect to attorney's fees and costs under the EAJA, the Department explained in the discussion of § 13.55(d) above why it is declining to adopt NELA's recommendation to add language to permit the recovery of attorney's fees and costs by prevailing employees in administrative proceedings brought pursuant to these regulations. The Department received no other comments related to proposed § 13.57(a) and is adopting it as proposed.

Proposed § 13.57(b) required the ARB to issue a final decision within a reasonable period of time following receipt of the petition for review and to serve the decision by mail on all parties at their last known address, and on the Chief ALJ, if the case involved an appeal from an ALJ's decision. Proposed § 13.57(c) directed the ARB's order to mandate action to remedy a violation, including any monetary or equitable relief described in § 13.44, if the ARB concludes a violation occurred. Under the proposed rule, if the Administrator sought debarment, the ARB would determine whether a debarment remedy is appropriate.

Finally, proposed § 13.57(d) provided that the ARB's decision would become the Secretary's final order in the matter. The Department received no comments related to proposed § 13.57 (b), (c), and (d) and accordingly adopts them as proposed.

Section 13.58 Administrator Ruling

Proposed § 13.58 set forth a procedure for addressing questions regarding the application and interpretation of the rules contained in part 13. Proposed § 13.58(a), which the Department derived primarily from the DBA's implementing regulations at 29 CFR 5.13, provided that such questions could be referred to the Administrator. It further provided that the Administrator would issue an appropriate ruling or interpretation related to the question. Additionally, under proposed § 13.58(a), requests for rulings under this section must be addressed to the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210.

Any interested party could, pursuant to proposed § 13.58(b), appeal a final ruling of the Administrator issued pursuant to proposed § 13.58(a) to the ARB within 30 calendar days of the date of the ruling.

The Department received no comments related to proposed § 13.58 and accordingly retains the section as proposed.

Appendix A (Contract Clause)

Because Executive Order 13706 requires inclusion of a contract clause in covered contracts, the Department proposed the text of a contract clause in appendix A to part 13. The Department is finalizing the contract clause as appendix A to part 13 essentially as proposed. Certain provisions of the proposed contract clause have been modified, however, to reflect changes to relevant portions of part 13 as promulgated by the Final Rule; these modifications are explained below. As required by the Order, the contract clause specifies employees must earn not less than 1 hour of paid sick leave for every 30 hours worked. Consistent with the Secretary's authority to obtain compliance with the Order, as well as the Secretary's responsibility to issue regulations implementing the requirements of the Order that incorporate, to the extent practicable, existing procedures, remedies, and enforcement processes under the FLSA, SCA, DBA, FMLA, VAWA and Executive Order 13658, the additional provisions of the contract clause are based on the statutory text or implementing regulations of these five statutes and Executive Order 13658 and are intended to obtain compliance with the Order.

The introduction to the contract clause provides that the clause must be included by the contracting agency in all contracts, contract-like instruments, and solicitations to which Executive Order 13706 applies, except for procurement contracts subject to the Federal Acquisition Regulation (FAR). For procurement contracts subject to the FAR, contracting agencies shall use the clause set forth in the FAR developed to implement part 13. Such clause shall accomplish the same purposes as the clause set forth in appendix A and shall be consistent with the requirements set forth in the Secretary's regulations.

Paragraph (a) of the contract clause set forth in appendix A provides that the contract in which the clause is included is subject to Executive Order 13706, the regulations issued in part 13 to implement the Order's requirements, and all the provisions of the contract clause.

Paragraph (b) identifies the contractor's general paid sick leave obligations. Paragraph (b)(1) stipulates that contractors must permit each employee engaged in the performance of the contract by the prime contractor or any subcontractor, regardless of any contractual relationship that may be alleged to exist between the contractor and the employee, to earn not less than 1 hour of paid sick leave for every 30 hours worked. It further provides that the contractor must allow accrual and use of paid sick leave as required by the Executive Order and part 13, particularly the accrual, use, and other requirements set forth in §§ 13.5 and 13.6, which are incorporated by reference in the contract.

The first sentence of paragraph (b)(2), which reflects requirements in proposed §§ 13.23 and 13.24 and was derived from the contract clauses applicable to contracts subject to the SCA, DBA and Executive Order 13658, *see* 29 CFR 4.6(h) (SCA); 29 CFR 5.5(a)(1) (DBA); 79 CFR 60731 (Executive Order 13658), aims to ensure that employees actually receive the full pay and benefits to which they are entitled under the Executive Order and part 13 when they use paid sick leave. It requires a contractor to provide paid sick leave to all employees when due free and clear and without subsequent deduction (except as otherwise provided by § 13.24), rebate, or kickback on any account. Paragraph (b)(2)'s second sentence clarifies that employees who have used paid sick leave must receive the full pay and benefits to which they are entitled for the period of leave used no later than one pay period following the end of the regular pay period in which the employee used the sick leave. This requirement appears in § 13.27.

Paragraph (b)(3) provides that the prime contractor and any upper-tier subcontractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the requirements of Executive Order 13706, part 13, and the contract clause. This responsibility on the part of prime and upper-tier contractors for subcontractor compliance parallels that of the SCA, DBA and Executive Order 13658. *See* 29 CFR 4.114(b) (SCA); 29 CFR 5.5(a)(6)

(DBA); 29 CFR 10.21(b) (Executive Order 13658). It also appears in § 13.21(b).

Paragraphs (c) and (d) of the contract clause are derived primarily from the contract clauses applicable to contracts subject to the SCA, DBA, and Executive Order 13658. *See* 29 CFR 4.6(i) (SCA); 29 CFR 5.5(a)(2), (7) (DBA); 79 FR 60731 (Executive Order 13658). Paragraph (c) provides that the contracting officer shall, upon its own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the prime contractor under the contract or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay employees the full amount owed to compensate for any violation of the requirements of Executive Order 13706, part 13, or the contract clause, including any pay and/or benefits denied or lost by reason of its violation; other actual monetary losses sustained as a direct result of the violation; and liquidated damages. Consistent with withholding procedures under the SCA, DBA, and Executive Order 13658, paragraph (c) allows the contracting agency and the Department to effect withholding of funds from the prime contractor on not only the contract covered by the Executive Order but also on any other contract that the prime contractor has entered into with the Federal Government.

Paragraph (d) states the circumstances under which the contracting agency and/or the Department may suspend or terminate a contract, or debar a contractor, for violations of the Executive Order. It provides that in the event of a failure to comply with any term or condition of the Executive Order, part 13, or the contract clause in appendix A, the contracting agency may on its own action, or after authorization or by direction of the Department and written notification to the contractor, take action to cause suspension of any further payment, advance, or guarantee of funds until such violations have ceased. Paragraph (d) additionally provides that any failure to comply with the contract clause may constitute grounds for termination of the right to proceed with the contract work and, in such event, for the Federal Government to enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost; this requirement operates as provided in § 13.11(c). Paragraph (d) also provides that a breach of the contract clauses may be grounds to debar the contractor as provided in § 13.52.

Paragraph (e), which implements section 2(f) of the Executive Order, provides that the paid sick leave required by the Executive Order, part 13, and the contract clause is in addition to a contractor's obligations under the SCA and DBA, and that a contractor may not receive credit toward its prevailing wage or fringe benefit obligations under those Acts for any paid sick leave provided in satisfaction of the requirements of the Executive Order and part 13.

Paragraph (f), which implements section 2(l) of the Executive Order, provides that nothing in Executive Order 13706 or part 13 shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a CBA requiring greater paid sick leave or leave rights than those established under Executive Order 13706 and part 13. Sections 13.5(f)(2)(i) and § 13.5(f)(1) also implement sections 2(f) and 2(l) of the Executive Order, respectively, and the preamble discussions related to §§ 13.5(f)(2)(i) and 13.5(f)(1) accordingly describe the operation of paragraphs (e) and (f) in greater detail.

Paragraph (g) sets forth recordkeeping and related obligations that are consistent with the Secretary's authority under section 4 of the Order to obtain compliance with the Order, and that the Department views as essential to determining whether the contractor has satisfied its obligations under the Executive Order. The Department derived the obligations set forth in paragraph (g) from the FLSA, SCA, DBA, FMLA and Executive Order 13658. The recordkeeping obligations in paragraph (g) duplicate those in § 13.25, and paragraph (g) has accordingly been modified to reflect any changes to § 13.25. Specifically, paragraphs (xvi) and (xvii) have been added to section (1) to reflect the addition of § 13.25(16) and (17); paragraph (ii) has been added to section (2) to reflect the addition of § 13.25(b)(2); and paragraphs (iii), (vi), (vii), and (x) have been edited to reflect minor revisions made to the corresponding paragraphs of § 13.25. A full description of those obligations and changes appears in the preamble related to § 13.25.

Paragraph (h) requires the contractor to both insert the contract clause in all its covered subcontracts and to require its subcontractors to include the clause in any covered lower-tier subcontracts.

Paragraph (i), which is derived from the SCA contract clause, 29 CFR 4.6(n), and the Executive Order 13658 contract clause, 79 FR 60731, sets forth the certifications of eligibility the contractor makes by entering into the contract. Paragraph (i)(1) stipulates that by entering into the contract, the contractor and its officials certify that neither the contractor nor any person or firm with an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of the sanctions imposed pursuant to section 5 of the SCA, section 3(a) of the DBA, or 29 CFR 5.12(a)(1). Paragraph (i)(2) constitutes a certification that no part of the contract shall be subcontracted to any person or firm on the list of persons or firms ineligible to receive Federal contracts currently maintained on the System for Award Management Web site, *http://www.SAM.gov.* Paragraph (i)(3) contains an acknowledgement by the contractor that the penalty for making false statements is prescribed in the U.S. Criminal Code at 18 U.S.C. 1001.

Paragraph (j) implements section 2(k) of the Executive Order. The text of paragraph (j) mirrors the regulatory text at §§ 13.6(a) and 13.6(b); accordingly, paragraph (j) has been modified to reflect an additional example of interference included in the regulatory text. A full description of the operation of the proposed contractor obligations not to interfere with or discriminate against employees with respect to the accrual or use of paid sick leave accordingly appears in the preamble related to §§ 13.6(a) and 13.6(b).

Paragraph (k) provides that employees cannot waive, nor may contractors induce employees to waive, their rights under Executive Order 13706, part 13, or the contract clause. As discussed in greater detail in the preamble related to § 13.7, the Department included a provision prohibiting the waiver of rights in the regulations implementing the Minimum Wage Executive Order and believes it is appropriate to adopt the same policy here.

Paragraph (l) requires that contractors notify all employees performing work on or in connection with a covered contract of the paid sick leave requirements of Executive Order 13706, part 13, and the contract clause by posting a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by employees. It additionally permits contractors that customarily post notices to employees electronically to post the notice electronically, provided such electronic posting is displayed prominently on any Web site that is maintained by the contractor, whether external or internal, and is customarily used for notices to employees about terms and conditions of employment. The notice obligations contained in paragraph (l) mirror those contained in § 13.26(a)–(b), which the Department derived from the Minimum Wage Executive Order Final Rule at 29 CFR 10.29(b)–(c). The preamble related to those sections contains a discussion of the Department's rationale for including the particular notice obligation it has adopted.

Paragraph (m) is based on section 5(b) of the Executive Order and provides that disputes related to the application of the Executive Order to the contract shall not be subject to the contract's general disputes clause. Instead, such disputes shall be resolved in accordance with the dispute resolution process set forth in part 13. Paragraph (m) also provides that disputes within the meaning of the contract clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

III. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, and its attendant regulations, 5 CFR part 1320, requires that the Department consider the impact of paperwork and other information collections burdens imposed on the public. Under the PRA, an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. *See* 5 CFR 1320.8(b)(3)(vi). The OMB has assigned control number 1235–0018 to the general recordkeeping provisions of various labor standards that the WHD administers and enforces and control number 1235–0021 to the information collection which gathers information from complainants alleging violations of such labor standards. The OMB has assigned control number 1235–0029 to the new information collection request (ICR) that the Department has created to address any recordkeeping requirements related to paid sick leave that may be new.

In accordance with the PRA, the Department solicited public comments on the proposed changes to the existing information collections and the new information collection in the NPRM, as discussed below. *See* 81 FR 9592. The Department also submitted a contemporaneous request for OMB review of the proposed revisions to the information collections in accordance with 44 U.S.C. 3507(d). The Department extended the period for filing comments on the PRA and information collections only, to provide interested parties additional time to submit comments. *See* 81 FR 19997. On April 28, 2016, the OMB issued a notice that continued the previous approval of the information collections under the existing terms of clearance and asked the Department to resubmit the information collection requests upon promulgation of the Final Rule and after consideration of public comments received.

Circumstances Necessitating Collection: The Final Rule contains provisions that are considered collections of information under the PRA. Pursuant to § 13.21, the contractor and any subcontractors shall include in any covered subcontracts the applicable Executive Order paid sick leave contract clause referred to in § 13.11(a) and shall require, as a condition of payment, that the subcontractor include the contract clause in any lower-tier subcontracts. Pursuant to § 13.25, contractors and each subcontractor performing work subject to Executive Order 13706 and these regulations shall make and maintain during the course of the covered contract, and preserve for no less than three years thereafter, records containing the information specified in paragraphs (a)(1) through (17) of § 13.25 for each employee and shall make them available for inspection, copying, and transcription by authorized representatives of the Wage and Hour Division. These include: (1) Name, address, and Social Security number of each employee; (2) The employee's occupation(s) or classification(s); (3) The rate or rates of wages paid (including all pay and benefits provided); (4) The number of daily and weekly hours worked; (5) Any deductions made; (6) The total wages paid (including all pay and benefits provided) each pay period; (7) A copy of notifications to employees of the amount of paid sick leave the employees have accrued as required under § 13.5(a)(2); (8) A copy of employees' requests to use paid sick leave, if in writing, or, if not in writing, any other records reflecting such employee requests; (9) Dates and amounts of paid sick leave used by employees; (10) A copy of any written denials of employees' requests to use paid sick leave, including explanations for such denials, as required under § 13.5(d)(3); (11) Any records reflecting the certification and documentation a contractor may require an employee to provide under § 13.5(e), including copies of any certification or documentation provided by an employee; (12) Any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave; (13) The relevant covered contract; (14) The regular pay and benefits provided to an employee for each use of paid sick leave; and (15) Any financial payment made for unused paid sick leave upon a separation from employment intended, pursuant to § 13.5(b)(5), to relieve a contractor from the obligation to reinstate such paid sick leave as otherwise required by § 13.5(b)(4).

Additionally, under § 13.25, if a contractor wishes to distinguish between an employee's covered and non-covered work, the contractor must keep records reflecting such distinctions.

The Department notes that some of the recordkeeping requirements related to paid sick leave may be new requirements for some contractors. As a result, the Department created a new information collection, 1235–0NEW, titled "Government Contractor Paid Sick Leave" and submitted it to OMB for approval. On April 28, 2016, the OMB filed a notice of action, assigning OMB control number 1235–0029 to the new package, and asked that prior to publication of the Final Rule, the Department provide OMB a summary of all comments received and identify any changes made in the Final Rule in response to those comments. A new information collection request (ICR) was submitted to the OMB that would provide PRA authorization for control number 1235–0029 to incorporate the recordkeeping provisions in this Final Rule and to incorporate burdens associated with the new recordkeeping requirements.

Additionally, on, April 28, 2016, the OMB filed a notice of action instructing the Department to continue the information collections under the existing terms of clearance for ICR 1235–0018 and ICR 1235–0021, and asked the Department to resubmit the information collection requests upon promulgation of the Final Rule and after consideration of public comments received. The Department will submit to OMB for approval a revision to ICR 1235–0018 incorporating certain recordkeeping provisions in this rule even though the Final Rule does not increase a paperwork burden on the regulated community of the information collection provisions contained in ICR 1235–0018. The ICR under OMB control number 1235–0018 contains the general FLSA recordkeeping requirements and burdens. The Final Rule does restate recordkeeping requirements that are already required for other purposes. The restated recordkeeping requirements are located in § 13.25(a)(1)–(6) (including an exemption located in § 13.25(c)). Such burden is already captured in the ICR for all employers; however, the Department believes restating the requirements in one place will help employers, particularly small entities, comply with this Final Rule by removing the need to cross check other regulations.

The WHD obtains PRA clearance under control number 1235–0021 for an information collection covering complaints alleging violations of various labor standards that the agency administers and enforces. An ICR has been submitted to revise the approval to incorporate the provisions in the Final Rule applicable to complaints and adjust burden estimates to reflect any increase in the number of complaints filed against contractors who fail to comply with the paid sick leave requirements of Executive Order 13706 and 29 CFR part 13.

Subpart E establishes administrative proceedings to resolve investigation findings and imposes information collection requirements, particularly with respect to hearings. However, the PRA's requirements do not apply to a civil action in which a U.S. agency is a party, or to an administrative action or investigation involving a U.S. agency. *See* 44 U.S.C. 3518(c)(1)(B); 5 CFR 1320.4(a)(2). Therefore, the Department determined the collections of information required by subpart E of this Final Rule are exempt from the PRA's requirements.

Information and technology: There is no particular order or form of records prescribed by the Final Rule. A contractor may meet the requirements of this Final Rule using paper or electronic means. The WHD, in order to reduce burden caused by the filing of complaints that are not actionable by the agency, uses a complaint filing process that has complainants discuss their concerns with WHD professional staff. This process allows agency staff to refer complainants raising concerns that are not actionable under wage and hour laws and regulations to an agency that may be able to offer assistance.

Public comments: The Department sought public comments on its analysis that the NPRM created a slight paperwork burden associated with ICR 1235–0021 but did not add to the paperwork burden on the regulated community for the information collection provisions otherwise previously approved in ICR 1235–0018. Additionally, the Department sought comments on its analysis that the proposed rule created a new paperwork burden on the regulated community as described in the new information collection provisions contained in ICR 1235–0029. The Department received some comments with respect to the paperwork. The SEIU submitted a comment, with approximately 4,000 employee signatures, voicing general support for the new reporting requirements established by the NPRM and stating that Section 13.21 (which requires federal contractors to include the Executive Order contract clause in all of their federal contracts) "guarantees that federal contractors and subcontractors are familiar with the paid sick leave requirements and that they will comply with these requirements 'as a condition of payment'," and that Section 13.25's recordkeeping requirements "assist the agency with both preventing and detecting possible instances of contractor fraud and inaccuracies."

The Chamber commented that the Department's Paperwork Reduction Act burden estimates provided in the NPRM were too low. They contended that the Department's assertion that 322,067 workers will gain paid sick leave rights during the first three years of implementation of the proposed rule was an underestimate for the number of affected employees. They suggested that a more reasonable estimate of the number of affected workers would include the number of workers working for concessionaires and lessees of space on Federal property, independent contractors who are covered under the EO, subcontractor employees, and employees who spend time working on non-Federal projects. As described in more detail in the relevant sections, to address commenters' concerns with respect to the number of affected employees, the Department reviewed its methodology and revised its estimates by adding concessioners and other contractors on Federal lands, lessees of space on Federal property, and firms with operations on Federal bases to the analysis of this Final Rule, which contributed to an increase in the estimated number of affected employees. Also, using more recent data to estimate the number of subcontractors led to the inclusion of 3,763 more subcontractors than in the NPRM. The Department notes that the OES includes incorporated independent contractors, and thus those workers are included in the analysis. Unincorporated independent contractors continue to be excluded in this Final Rule as they are unlikely to be covered by this Rule because, assuming they are bona fide independent contractors, they are not covered by the FLSA and are unlikely to be performing work on or in connection with SCA-covered, or DBA-covered contracts. As further described below, the methodology represents workers who are working exclusively and year-round on covered Federal contracts, thus the number of workers who will gain benefits will likely exceed this number. However, data are not available to estimate the number of workers gaining benefits. Implications of this for costs and transfers are discussed in the relevant sections.

The Chamber also expressed the view that the new recordkeeping burden should be higher because the Department underestimated its estimates of patterns of leave use; time values associated with recordkeeping, creating a certified list, and providing leave balances; and failed to account for the burden created for employers as a part of regulatory familiarization. The Department agrees that the Executive Order and the regulations will usually require employers subject to the Order to track accrued leave and leave usage and to provide notice to employees of the amount of accrued paid leave, and will allow employers subject to the Order to obtain a certification under certain circumstances. The Department has accordingly created a new information collection requirement for employers subject to these new requirements. The Department's estimates of time values related to these requirements are based on its enforcement experience. The Department has added a new section on regulatory familiarization to this ICR to address the Chamber's concern.

An agency may not conduct an information collection unless it has a currently valid OMB approval, and the Department submitted the identified information collections contained in the proposed rule to OMB for review in accordance with the PRA under Control numbers 1235–0018, and 1235–0021. The Department submitted a new information collection request in the proposed rule as 1235–0NEW, to which OMB subsequently assigned control number 1235–0029. *See* 44 U.S.C. 3507(d); 5 CFR 1320.11. The Department has resubmitted the revised information collections to OMB for approval, and the Department intends to publish a notice announcing OMB's decision regarding this information collection request. A copy of the information collection request can be obtained at *http://www.Reginfo.gov* or by contacting the Wage and Hour Division as shown in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

Total burden for the recordkeeping and complaint process information collections, including the burdens that will be unaffected by this Final Rule and any changes are summarized as follows:

Type of Review: Revision to currently approved information collections.
Agency: Wage and Hour Division, Department of Labor.
Title: Records to be Kept by Employers—Fair Labor Standards Act.
OMB Control Number: 1235–0018.
Affected Public: Private sector businesses or other for-profits, farms, not-for-profit institutions, state, local and tribal governments, and individuals or households.
Estimated Number of Respondents: 5,511,960 (unaffected by this rulemaking).
Estimated Number of Responses: 46,057,855 (unaffected by this rulemaking).
Estimated Burden Hours: 3,489,585 (unaffected by this rulemaking).
Estimated Time per Response: Various (unaffected by this rulemaking).
Frequency: Various (unaffected by this rulemaking).
Other Burden Cost: 0.

Title: Employment Information Form.
OMB Control Number: 1235–0021.
Affected Public: Businesses or other for-profit, not-for-profit institutions, state and local governments, and individuals or households.
Total Respondents: 37,594 (227 from this rulemaking).
Estimated Number of Responses: 37,594 (227 from this rulemaking).
Estimated Burden Hours: 12,532 (76 from this rulemaking).
Estimated Time per Response: 20 minutes (unaffected by this rulemaking).
Frequency: once.
Other Burden Cost: 0.

Type of Review: Approval of New Information Collection.
Agency: Wage and Hour Division, Department of Labor.
Title: Government Contractor Paid Sick Leave.
OMB Control Number: 1235–0029.
Affected Public: Businesses or other for-profit, farms, not-for-profit institutions, state, local and tribal governments, and individuals or households.
Total Respondents: 617,200.
Estimated Number of Responses: 13,577,407.
Estimated Burden Hours: 590,478.
Estimated Time per Response: various.
Frequency: on occasion.
Other Burden Cost: $347,784 (maintenance and operations).

IV. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of an intended regulation and to propose or adopt a regulation only upon a reasoned determination that the intended regulation's net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity) justify its costs. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits where possible, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, it must be identified whether a regulatory action is significant and therefore subject to the requirements of the Executive Order and to review by OMB. 58 FR 51735. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. *Id.*

The Office of Management and Budget has determined that this Final Rule is a "significant regulatory action" under section 3(f) of Executive Order 12866 because it is economically significant based on the analysis set forth below. As a result, the Department has prepared a Final Regulatory Impact Analysis (FRIA) as required under section 6(a)(3) of Executive Order 12866, and OMB has reviewed the Final Rule.

A. Introduction

i. Background and Need for Rulemaking

Executive Order 13706 (EO) provides that employees can earn up to seven days of paid sick leave annually on specified categories of contracts with the Federal Government where either the solicitation has been issued, or the contract has been awarded outside the solicitation process, on or after January 1, 2017. The Executive Order states that the Federal Government's procurement interests in economy and efficiency are promoted when the Federal Government contracts with sources that allow their employees to earn paid sick leave.[2] This rulemaking implements the Executive Order, consistent with the authorization in section 3 of the Order.

ii. Summary of Affected Employees, Costs, Benefits, and Transfers

The Department estimated the number of employees who would, as a result of the Executive Order and this Final Rule, receive some additional amount of paid sick leave, *i.e.,* "affected employees." There are two categories of affected employees: Those covered employees who currently receive no paid sick leave, and those covered employees who currently receive paid sick leave in an amount less than they would be entitled to receive under the Executive Order (up to 7 days annually). As discussed in detail below, because the Final Rule only applies to "new contracts," and the Department has assumed it will take five years for the universe of possibly covered contracts to become "new," the full impact of the rulemaking will not likely occur before Year 5. In Year 5, the Department estimates there will be 1.2 million affected employees (Table 1).[3] [4] This includes approximately 593,800 employees who currently receive no paid sick leave and 556,800 employees who receive some paid sick leave but would be entitled to receive additional paid sick leave under the Final Rule (Table 8).

The Department also estimated costs and transfer payments associated with this rulemaking. During the first 10 years the rule is in effect, average annualized direct employer costs are estimated to be $27.3 million (Table 1). (This estimation assumes a 7 percent real discount rate; hereafter, unless otherwise specified, average annualized values will be presented using a 7 percent real discount rate.) This estimated annualized cost includes $10.7 million for regulatory familiarization, $4.9 million for initial implementation costs, $3.7 million for recurring implementation costs, and $8.0 million for administrative costs. For a discussion of how the Department estimated these numbers, please *see* section V.C.ii.

---

[2] The phrase "economy and efficiency" is used here only in the sense implied by the Federal Property and Administrative Services Act.

[3] This includes projected net job growth and so is somewhat larger than five times the number of affected employees in Year 1. Net job growth takes into account both workers entering and leaving Federal government contracting.

[4] The estimates of affected employees represent the number of full-year employees working exclusively on covered contracts.

Transfer payments are transfers of income from employers to employees. Estimated average annualized transfer payments are $349.6 million per year over 10 years. Some of these payments may be in terms of increased time away from work rather than increased income if workers take more days of sick leave after the Rulemaking. We refer to all such gains as transfers.

Lastly, the Department estimated deadweight loss (DWL). DWL occurs when a market operates at less than optimal equilibrium output, which happens anytime the conditions for a perfectly competitive market are not met, including but not limited to a labor market intervention. The Department estimated that average annualized DWL will be $734,000 per year during the first ten years of the rule. This will be primarily due to a possible small decrease in employment that may be a consequence of the Final Rule. This DWL analysis assumes the market is currently in equilibrium.

There will be many benefits associated with this rule. However, due to data limitations, these benefits are not monetized. The following benefits are a subset of those discussed qualitatively: Improved employee health, improved health of dependents, increased productivity, reduced hiring costs, decreased healthcare expenditures, and job growth.

TABLE 1—SUMMARY OF AFFECTED EMPLOYEES, REGULATORY COSTS, AND TRANSFERS

	Year 1 (1,000s)	Future years (1,000s)			Average annualized value (1,000s)	
		Year 2	Year 5	Year 10	3% Real rate	7% Real rate
Affected employees	222.1	454.0	1,150.6	1,203.7		
Direct employer costs (2015$)	$125,044	$10,541	$16,936	$11,034	$25,027	$27,255
Regulatory familiarization	80,427	0	0	0	9,154	10,702
Initial implementation	36,475	0	0	0	4,151	4,853
Recurring implementation	6,107	6,379	6,389	0	3,396	3,690
Administrative	2,036	4,162	10,548	11,034	8,326	8,010
Transfers (2015$)	85,508	176,226	456,686	496,765	364,112	349,629
DWL (2015$)	183	376	963	1,028	764	734

iii. Terminology and Abbreviations

The following terminology and abbreviations will be used throughout this Regulatory Impact Analysis (RIA).

ATUS: American Time Use Survey.

BLM: Bureau of Land Management.

BLS: Bureau of Labor Statistics.

CPI–U: Consumer Price Index for all urban consumers.

CPS: Current Population Survey.

CUA: Commercial Use Authorization.

DBA: Davis-Bacon Act.

DWL: Deadweight loss. This is the loss of economic efficiency that can occur when the market equilibrium for a good or service is not achieved.

ECEC: Employer Costs for Employee Compensation.

FPDS–NG: Federal Procurement Data System–Next Generation.

FS: U.S. Forest Service.

FY: Fiscal year. The Federal fiscal year, used in this analysis, is from October 1 through September 30.

GSA: General Services Administration.

NCS: National Compensation Survey.

NHIS: National Health Interview Survey.

NPS: National Park Service.

OES: Occupational Employment Statistics.

PTO: Paid time-off.

Price elasticity of labor demand (with respect to wage): The percentage change in labor hours demanded in response to a one percent increase in wages.

Price elasticity of labor supply (with respect to wage): The percentage change in labor hours supplied in response to a one percent increase in wages.

Real dollars (2015$): Dollars adjusted using the CPI–U to reflect their purchasing power in 2015.

RIA: Regulatory Impact Analysis. This will be used to reference the analysis conducted to assess the impact of this regulation.

SAM: System for Award Management.

SBA Advocacy: Office of Advocacy of the U.S. Small Business Administration.

SUSB: Survey of United States Businesses.

Walsh-Healey PCA: The Walsh-Healey Public Contracts Act.

B. Methodology to Determine the Number of Affected Employees and Firms

i. Overview and Data

This section explains the Department's methodology to estimate the number of affected employees and firms. The number of firms is estimated primarily from the General Services Administration's (GSA) System for Award Management (SAM). This is supplemented with a variety of other sources including data from the NPS, the BLM, the FS and SBA Advocacy. There are no data on the number of employees working on Federal contracts ("Federal contract employees"); therefore, to estimate the number of Federal contract employees, the Department employed the approach used in the Minimum Wage Executive Order Final Rule.[5] This approach uses data from USASpending.gov, a database of government contracts from the Federal Procurement Data System–Next Generation (FPDS–NG).

After determining the total number of Federal contract employees, the Department estimated the share who will receive additional days of paid sick leave due to the rulemaking. The 2015 National Compensation Survey (NCS) provides data on the percentage of employees with paid sick leave and categorical ranges of the annual number of days of leave that employees receive. This distribution allowed the Department to estimate the number of employees who receive less than the amount of paid sick leave required under the Final Rule. The 2015 NCS does not provide data for the agriculture industry. Therefore, the Department supplemented the 2015 NCS data on paid sick leave with data from the 2011 ATUS Leave Module.

ii. Number of Affected Firms

Commenters asserted that the Department underestimated the number of firms affected by the rulemaking for several reasons. In response to these comments, the Department reviewed its methodology for estimating the number of affected firms and revised its estimates by excluding firms that are only applying for grants, and adding entities likely operating under covered nonprocurement contracts, specifically nonprocurement contracts on Federal lands, firms with leases in Federally owned properties, and firms with operations on Federal bases to the analysis. These revisions are described below with a discussion of commenters' concerns.

---

[5] *See* 79 FR 60634, 60692–60720.

The main data source used to estimate the number of affected firms is SAM. SAM reports all entities registered in the database, which is a requirement to bid for Federal procurement contracts or grants. Firms report a 6-digit primary NAICS code as part of their SAM registration. NAICS codes were not reported by 20 companies; for these firms NAICS codes are assigned based on the proportion of firms in each industry.

In the NPRM we used SAM data to estimate that 543,851 firms might be affected by the rulemaking. *See* 81 FR 9641. However, this estimate included firms whose sole contractual arrangement with the Federal Government was that they were applying for grants. These firms will not be affected by the rulemaking, and therefore, we have eliminated them from the analysis. The Department updated its estimate by downloading August 2015 SAM data and removing from the analysis firms only receiving grants. After this adjustment we found 415,310 registered firms.[6] [7] This is a reduction of 128,541 firms relative to the NPRM.

SAM includes all prime contractors and some subcontractors (those who are also prime contractors or who have otherwise registered in SAM). However, we are unable to determine the number of subcontractors who are not in the SAM database. Therefore, for the NPRM the Department examined five years of USASpending data[8] and found 20,589 subcontractors who did not hold contracts as primes (and thus may not be included in SAM), and added these firms to the total from SAM. The Department used the number of unique subcontractors over five years to adjust for USASpending not including lower tiers of subcontractors. No commenters provided data or suggestions for methodological improvements, so we continue to use this methodology in this Final Rule. Applying this method to the most recent five years of data, FY2011 through FY2015, the Department found 24,352 subcontractors who do not hold contracts as primes and added these firms to the 415,310 firms not registered in SAM solely for the purpose of receiving grants in this Final Rule (Table 2).

Commenters such as the Chamber/IFA and the SBA Advocacy noted the Department did not account for nonprocurement concessions contracts and nonprocurement contracts entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public. In response to these comments, the Department has included 49,757 additional firms in the Final Rule. Estimating the number of entities operating under covered nonprocurement contracts on Federal property or lands involved many data sources and assumptions as described below.[9]

First, the Department estimated the number of contractors with National Park Service (NPS) concessions contracts. The NPS Web site contains a list of entities operating under concessions contracts on NPS lands.[10] The Department downloaded all 473 records contained on the Web site, identified unique firms by name, and assigned them to industries based on the first service provided listed. This results in 418 entities operating under concessions contracts on NPS lands. Second, the Department estimated the number of NPS Commercial Use Authorizations (CUAs). The Department informally consulted with the NPS and learned that the NPS has approximately 5,900 FY2015 CUAs. The Department understands that a NPS CUA is a written authorization to provide services to park area visitors. *See* 36 CFR 18.2(c). Because this definition may render NPS CUAs contracts with the Federal Government in connection with Federal property or lands and related to offering services to the general public and/or SCA-covered contracts, the Department has assumed, solely for purposes of the economic analysis, that all NPS CUAs are contracts covered by the Executive Order. Because the number of CUAs does not take into account that one firm may hold multiple authorizations, we multiplied the total number of CUAs by the ratio of unique firms holding NPS concessions contracts to total NPS concessions contracts to estimate the number of contractors with CUAs (418 divided by 473 = 88 percent) for an estimated 5,190 unique firms with CUAs from NPS. We also used the industry distribution from NPS concessions contracts to assign CUA permit holders to industries because industry information was not directly available.

Next, we estimated the number of U.S. Forest Service special use authorizations. The Department informally consulted the FS, which informed the Department that 77,353 special use authorizations (SUAs) were in effect in fiscal year 2015. Based on further informal consultations with the FS, the Department estimates that approximately 36 percent of these SUAs may be covered contracts. No data are available to determine whether a contractor holds more than one permit; therefore, we used the NPS ratio of unique concessions contract holders to total concessions contract holders to estimate the number of unique contractors with FS permits (88 percent). This leaves 24,370 unique firms that may be affected. The Department combined its own assumptions with information from the U.S. Census Bureau on the NAICS classification when determining the relevant industry for each type of permit because data were not available.

We also estimated the number of affected NPS special use permits. During informal discussions with DOL, NPS officials estimated it issued 33,700 special use permits in FY 2015.[11] It is likely that many, if not most, of these permits will not be covered by the rulemaking, but the Department has no method for directly determining the number of such permits that might be covered. Therefore the Department assumed, solely for purposes of the economic analysis, that the EO would cover 36 percent of NPS special use permits using the FS data for SUAs, and that 88 percent of the permits are held by unique contract holders based on NPS data for CUAs. Therefore, the Department estimates that 10,600 entities holding special use permits will be covered by the rule. We assigned these permit holders to the "arts, entertainment, and recreation" industry.

---

[6] Data released in monthly files. Available at: *https://www.sam.gov/portal/SAM/#1.*

[7] Entities registering in SAM are asked if they wish to bid on contracts. If a non-Federal entity answers "Yes" to this question, SAM marks the registration as being "All Awards." This is the "Purpose of Registration" column in the SAM data. The Department included only firms with a value of "Z2," which denotes "All Awards." See Section 3.2: Determining your Purpose of Registration in the System for Award Management User Guide available at: *https://test.sam.gov/sam/SAM_Guide/SAM_User_Gude.htm#_Toc330768975.*

[8] The Department identified subawardees from the *USASpending.gov* data who did not perform work as a prime during those years. The Department included subcontractors from five years of data to compensate for lower-tier subcontractors that may not be included in *USASpending.gov.* The Department believes this is a reasonable approximation of the number of subcontractors, and received no comments providing a better method. The USASpending data are discussed in more detail in the section on "Number of Potentially Affected Employees."

[9] Those estimates primarily capture those covered contracts for concessions and contracts in connection with Federal property or lands and relating to services for Federal employees, their dependents, or the general public that are nonprocurement in nature, such that the contracting entities are not necessarily listed in SAM. However, the estimates will additionally capture some SCA-covered contracts because SCA-covered contracts, contracts for concessions and contracts in connection with Federal property or lands are to some degree overlapping categories of contracts (*e.g.,* at least some concessions contracts and contracts in connection with Federal property or lands are covered by the SCA, *see, e.g., Cradle of Forestry in America Interpretive Association,* ARB Case No. 99–035, 2001 WL 328132 (ARB March 30, 2001)).

[10] Available at: *http://www.concessions.nps.gov/authorized_concessions.htm.* The Department has assumed all NPS concessions contracts are covered by the EO, solely for purposes of this economic analysis, primarily because the EO itself specifically covers concessions contracts.

[11] According to the NPS, activities that may require a special use permit "include (but are not limited to) weddings, [F]irst [A]mendment demonstration activities, a bike race, fishing tournament, group activities (groups of 20 or more participants). *See https://www.nps.gov/ever/learn/management/specialuse.htm.*

Next, we estimated the number of U.S. Bureau of Land Management (BLM) special recreation permits. BLM reports 4,004 of these permits in FY2014.[12] The Department again relied on the FS data to assume that 36 percent of these permits will be covered, and that 88 percent will be held by unique contractors.[13] This results in 1,261 entities holding BLM special recreation permits. We assumed that these are in the "arts, entertainment, and recreation" industry. These estimates for the NPS, FS, and BLM do not account for the possibility that the same firms may hold concessions contracts with more than one group.

SBA Advocacy provided estimates of retail and concession leases in federally-owned buildings. SBA Advocacy cites the GSA as the source for 732 retail leases and "hundreds of other businesses that have concessions contracts" in Federally-owned buildings. We were unable to confirm these numbers. We interpreted "hundreds" to be 500 and thus included a total of 1,232 entities. SBA also suggested that the NPRM's estimate of affected firms did not include visually-impaired contractors that lease space at federal building to operate vending facilities under the Randolph-Sheppard Act. The Department understands that approximately 2,108 such leases may have existed in fiscal year 2014.[14] The Department has accordingly added 2,108 firms to its estimate, but notes that some of these firms may already be counted in the GSA estimate. We assume these entities are in the "retail trade" and "accommodation and food services" industries.

SBA Advocacy also provided estimates of operations and concessions on military bases. SBA Advocacy cites a phone call between Advocacy and the Army and Air Force Exchange Service to report 1,200 direct operations and 462 concessions operating on federal bases. The Department was unable to independently confirm these numbers.[15] The Navy, the Marine Corps, and the Coast Guard also have bases with retail and concessions contracts. The Department determined there are 523 Navy Exchanges,[16] 2,250 Marine Corps Exchanges,[17] and 114 [18] Coast Guard Exchanges. Based on general information about services on bases, we assume these entities are in the "retail trade" and "accommodation and food services" industries. We further assume that these entities, which appear to be providing nonprocurement services, are not listed in SAM.

In conclusion, the Department added some firms to the pool of affected business entities, but eliminated others. The Department added 49,757 firms operating under contracts on federal lands or with leases in federal buildings or bases, based on our assumption that these were nonprocurement contractors not registered in SAM that might be covered by the Executive Order. Using more recent data to estimate the number of subcontractors led to the inclusion of 3,763 more subcontractors than in the NPRM. We also eliminated 128,541 firms that only receive federal grants mentioned above. In total, these revisions and updates reduced the number of firms by 75,021 (49,757 + 3,763 − 128,541). This Final Rule accordingly estimates 489,419 potentially affected firms. Table 2 summarizes the estimated number of affected contractors by contract nexus and industry used in this rulemaking.

TABLE 2—NUMBER OF POTENTIALLY AFFECTED CONTRACTORS

Industry	Total potentially affected firms	Firms from SAM [a]	Subcontractors [b]	NPS concessions	NPS CUAs [c]	NPS special use permits [d]	Forest service SUAs [e]	BLM special recreation permits	Public buildings [f]	Federal bases [g]
Agriculture, forestry, fishing ..	8,525	8,428	13	0	0	0	84	0	0	0
Mining	1,668	1,594	11	0	0	0	63	0	0	0
Utilities	5,641	3,171	61	0	0	0	2,409	0	0	0
Construction	61,399	52,410	8,770	0	0	0	219	0	0	0
Manufacturing	69,513	65,119	4,364	0	0	0	30	0	0	0
Wholesale trade	28,626	28,157	469	0	0	0	0	0	0	0
Retail trade	17,682	12,446	52	73	906	0	34	0	1,670	2,501
Transportation and warehousing	17,780	11,881	93	153	1,900	0	3,754	0	0	0
Information	19,511	13,583	235	0	0	0	5,693	0	0	0
Finance and insurance	2,712	2,682	30	0	0	0	0	0	0	0
Real estate and rental and leasing	20,705	20,699	6	0	0	0	0	0	0	0
Professional, scientific, and ..	101,538	93,481	7,562	0	0	0	496	0	0	0
Management of companies ...	264	264	0	0	0	0	0	0	0	0
Administrative and waste services	33,374	30,375	2,086	50	621	0	241	0	0	0
Educational services	13,645	13,130	446	0	0	0	69	0	0	0
Health care and social assistance	27,314	27,246	39	2	25	0	2	0	0	0
Arts, entertainment, and recreation	26,922	4,063	1	78	968	10,628	9,922	1,261	0	0

---

[12] U.S. Department of the Interior, Bureau of Land Management. (2015). Public Land Statistics 2014. Available at: *http://www.blm.gov/public_land_statistics/pls14/pls2014.pdf.*

[13] The Department believes it is reasonable to apply the 36% coverage estimates to NPS special use permits and BLM special recreation permits because it understands that these permits are likely for sufficiently similar purposes and entered into with sufficiently similar individuals and entities as the FS SUAs.

[14] *http://www2.ed.gov/programs/rsarsp/index.html.*

[15] The Department did identify one source of data. Available at: *http://www.aafes.com/Images/AboutExchange/factsheet.pdf.*

[16] Navy Exchange data from Navy Exchange's Annual Report 2014. Available at: *https://www.mynavyexchange.com/assets/Static/NEXCOMEnterpriseInfo/AR14.pdf.*

[17] Marine Corps Exchanges Community Services. Available at: *http://www.usmcmccs.org/about/.*

[18] Coast Guard's Community Services Command. Available at: *http://www.uscg.mil/csc/.*

TABLE 2—NUMBER OF POTENTIALLY AFFECTED CONTRACTORS—Continued

Industry	Total potentially affected firms	Firms from SAM [a]	Subcontractors [b]	NPS concessions	NPS CUAs [c]	NPS special use permits [d]	Forest service SUAs [e]	BLM special recreation permits	Public buildings [f]	Federal bases [g]
Accommodation and food services	14,524	8,902	1	58	720	0	1,124	0	1,670	2,048
Other services	18,077	17,679	113	4	50	0	232	0	0	0
Total private	489,419	415,310	24,352	418	5,190	10,628	24,370	1,261	3,340	4,549

[a] GSA's System for Award Management (SAM) for August 2015.
[b] USASpending.gov FY2011–FY2015.
[c] Total CUAs from NPS, adjusted for firms holding more than one permit using the ratio from NPS concessions.
[d] Total SUAs from NPS. Assumed same proportion as the FS SUAs are covered and the same proportion as NPS concessions are unique.
[e] Forest Service provided a count of permits at the end of FY2015. Use ratio of unique firms to all firms from NPS concessions.
[f] Retail and concession leases in public buildings. Provided by SBA Advocacy and U.S. Department of Education.
[g] Direct operations and concessions on federal bases. Army and Air Force Exchange Service (AAFES) firms provided by SBA Advocacy. Navy Exchange data from Navy Exchange's Annual Report 2014. Marine Corps Exchange data from Marine Corp Community Services. Coast Guard Exchange data from Coast Guard's Community Services Command.

The Chamber/IFA also argued that the Department's analysis in the NPRM is internally inconsistent because we estimated 1.2 million potentially affected employees and 543,900 potentially affected contractors, which results in an average of 2.1 potentially affected employees per contracting firm. The Department believes this perceived inconsistency is the result of inappropriately dividing the number of potentially affected employees by 543,900. There are three primary reasons why the 543,900 figure is not the appropriate denominator when calculating the average number of employees per contracting firm.

First, as explained in the NPRM, 81 FR 9641, the estimated number of potentially affected contractors includes those that only work on Walsh-Healey Public Contracts Act (PCA) contracts, which will not be affected by the rulemaking, and whose employees thus have been excluded from the estimate of affected employees. These contractors remain in the estimate of affected contractors in the Final Rule because the Department believes they may accrue some limited regulatory familiarization costs to determine that they are not impacted by the Final Rule. However, these contractors will not have affected employees.

Second, as also explained in the NPRM, 81 FR 9641, some firms listed in the SAM database may not currently hold government contracts but are enrolled in SAM because they have held government contracts in the past or are interested in applying for contracts. These firms were kept in the analysis because some may bid on and be awarded future contracts. However, since others will not, affected workers should not be distributed to those firms (*i.e.*, some of these firms will not have affected employees). Third, the NPRM analysis included firms listed in the SAM database that only hold, or wish to hold, government grants. Firms applying only for grants were eliminated from the estimated number of affected firms in this Final Rule because they will not accrue any costs.

When preparing the analysis of the proposed rule, the Department had not identified an appropriate method to eliminate contracting firms with contracts only on Walsh-Healey PCA contracts or without Federal contracts to estimate the number of contracting firms with affected employees. For this Final Rule, the Department has identified a methodology to estimate the number of contractors with potentially affected employees.[19] This methodology counts only contractors with service (including construction) contracts in USASpending in FY2015 because these are the procurement contractors with potentially affected employees, and adds entities operating under covered nonprocurement contracts on Federal property or lands. We estimate there are 165,987 such contractors (91,878 prime contractors in USASpending, 24,352 subcontractors, and 49,757 entities with contracts on Federal property or lands). If this is used as the denominator, which we think would be reasonable, then we estimate an average of 10.4 full-year employees working exclusively on covered contracts per contracting firm. It is important to note, however, that this is not an estimate of the average number of total employees at these potentially affected contracting firms since only a segment of a contracting firm's workforce may work on covered Federal contracts.

iii. Number of Potentially Affected Employees

There are no data on the number of employees working on Federal contracts; therefore, to estimate the number of Federal contract employees, the Department employed the approach used in the Minimum Wage Executive Order Final Rule.[20] The Department estimated the number of employees who work on federal contracts that will be covered by the Executive Order, representing the number of "potentially affected employees." Additionally, the Department estimated the share of potentially affected employees who will receive new or additional paid sick leave as a result of the Executive Order. These employees are referred to as "affected."[21]

The Department estimated the number of potentially affected employees in two parts. First, we estimated employees working on SCA and DBA procurement contracts. Second, we estimated the number of potentially affected employees on nonprocurement concessions contracts and contracts on Federal property or lands (some of which would also be SCA-covered). SCA and DBA contract employees on covered procurement contracts were estimated by taking the ratio of Federal contracting expenditures ("Exp") to total output (Y), by industry. Total output is the market value of the goods and services produced by an industry. This ratio is then applied to total private employment in that industry ("Emp")

---

[19] This methodology plus one additional step is used in the FRFA to estimate the number of small contractors with affected employees because these contractors are a subset of the contractors with potentially affected employees.

[20] *See* 79 FR 60634, 60692–60720.

[21] Some workers with seven days of paid sick leave may still be affected if the Executive Order entitles them to use paid sick leave for additional purposes. However, data are not available to estimate these workers.

(Table 3). This analysis was conducted at the 2-digit NAICS level.[22]

$$Potentially\ Affected\ Emp_i = \frac{Exp_i}{Y_i}\ x\ Emp_i$$

Where i= 2-digit NAICS

The Department used total Federal contracting expenditures from *USASpending.gov* data, which tabulates data on Federal contracting through the Federal Procurement Data System—Next Generation (FPDS–NG). The Congressional Budget Office (CBO) has stated that this is the "only comprehensive source of information about federal spending on contracts."[23] According to data from *USASpending.gov,* the government spent $555 billion on procurement contracts in FY2015. The Department excluded expenditures to state and local governments because government employees generally receive at least seven days of paid sick leave and because the DBA does not apply to construction performed by state or local government employees. The Department also excluded contracts performed outside the U.S. because the Final Rule only covers contracts to the extent they are performed in the U.S. These two adjustments reduce the relevant Federal government's expenditures to $508 billion. Next, the Department excluded expenditures on goods purchased by the Federal government because the Final Rule does not apply to contracts subject to the Walsh-Healey PCA and hence would not apply to contracts for the manufacturing and furnishing of materials and supplies.[24] Contracts for goods were identified in the *USASpending.gov* data if the product or service code begins with a number (services begin with a letter). Subtracting Federal expenditures on goods purchased, the Department found that the Federal government spent $286.4 billion on services (including construction) provided by government contractors in FY2015.

To determine the share of all output associated with government contracts the Department divided industry-level contracting expenditures by that industry's gross output.[25] For example, in the information industry, $8.1 billion in contracting expenditures was divided by $1.6 trillion in total output, resulting in an estimate that covered government contracts comprise 0.52 percent of every dollar of total output in the information industry. The Department then multiplied the ratio of covered-to-gross output by private sector employment to estimate the share of employees working on covered contracts for each 2-digit NAICS industry. Private sector employment is from the 2015 Occupational Employment Statistics (OES).[26] To demonstrate, in the information industry, there were approximately 2.7 million private sector employees in May 2015 and covered government contracts comprise 0.52 percent of every dollar of total output. The Department multiplied 2.7 million by 0.52 percent to estimate that 14,000 employees on covered procurement contracts in the information industry will be potentially affected by the Executive Order.[27]

Commenters claimed that independent contractors are not represented in these data. For example, the Chamber/IFA wrote "the Department's analysis fails to account for independent contractors who will be treated as equivalent employees under the proposal." The Department notes that the OES includes incorporated independent contractors, and thus such independent contractors are included in the analysis. Unincorporated independent contractors are unlikely to be covered by this rule because, assuming they are bona fide independent contractors, they are not covered by the FLSA, and are unlikely to be performing work on or in connection with SCA- or DBA-covered contracts. Thus, they continue to be excluded in the Final Rule.

This Final Rule makes clear that contract workers with the U.S. Postal Service are covered by this rulemaking. These workers are included in the OES employment data for the transportation and warehousing industry and these contracts are included in USASpending.gov data.[28] Therefore, workers covered by these contracts are captured in the methodology above.

This methodology represents the number of year-round potentially affected employees who work exclusively on covered Federal contracts. Thus, when we refer to potentially affected employees in this analysis we are referring to this illustrative number of year-round potentially affected employees who work exclusively on covered government contracts. The number of employees who will gain benefits will likely exceed this number since all workers may not work exclusively on Federal contracts. However, data are not available to estimate the number of employees gaining benefits. Implications of this for costs and transfers are discussed in the relevant sections.

---

[22] The North American Industry Classification System is a method by which Federal statistical agencies classify business establishments in order to collect, analyze, and publish data about certain industries. Each industry is categorized by a sequence of codes ranging from 2 digits (most aggregated level) to 6 digits (most granular level). United States Census Bureau. "North American Industry Classification System: Introduction to NAICS." U.S. Department of Commerce. Available at: *http://www.census.gov/eos/www/naics/.*

[23] Congressional Budget Office. (2015). Federal Contracts and the Contracted Workforce. p. 3. Available at: *https://www.cbo.gov/publication/49931.*

[24] For example, the government purchases pencils; however, a contract solely to purchase pencils (whether covered by the Walsh-Healey PCA or not) would not be covered by the Executive Order.

[25] Bureau of Economic Analysis, National Income and Product Accounts (NIPA) Tables, Gross Output. 2015. "Gross output of an industry is the market value of the goods and services produced by an industry, including commodity taxes. The components of gross output include sales or receipts and other operating income, commodity taxes, plus inventory change. Gross output differs from value added, which measures the contribution of the industry's labor and capital to its gross output."

[26] Bureau of Labor Statistics. Occupational Employment Statistics. May 2015. Available at: *http://www.bls.gov/oes/.*

[27] Note that number of employees aggregated across industry analysis does not match the total number of employees derived using totals due to the order of multiplying and summing.

[28] The Department excludes from the OES data the 615,100 workers in NAICS 491110 who are Federal postal service employees but includes workers in NAICS 492000: Couriers and Messengers.

TABLE 3—NUMBER OF POTENTIALLY AFFECTED EMPLOYEES

Industry	NAICS	Private employees (1,000s) [a]	Total output (billions) [b]	Covered contracting output (millions) [c]	Share output from covered contracting	Employees on direct contracts (1,000s) [d]	Employees on Federal lands and concessions (1,000s)	Total contract employees (1,000s)
Agriculture, forestry	11	412	$454	$339	0.07%	0	0	0
Mining	21	811	426	105	0.02	0	0	0
Utilities	22	554	391	3,043	0.78	4	7	12
Construction	23	6,393	1,320	24,194	1.83	117	1	119
Manufacturing	31–33	12,303	5,940	20,703	0.35	43	0	43
Wholesale trade	42	5,838	1,574	254	0.02	1	0	1
Retail trade	44–45	15,751	1,610	1,263	0.08	12	107	120
Transportation & warehousing	48–49	4,789	1,071	11,005	1.03	49	98	147
Information	51	2,749	1,571	8,146	0.52	14	19	34
Finance and insurance	52	5,666	2,275	18,734	0.82	47	0	47
Real estate and rental and	53	2,066	3,264	1,174	0.04	1	0	1
Professional, scientific, and	54	8,483	1,979	136,870	6.92	587	9	596
Management of companies	55	2,260	629	0	0.00	0	0	0
Administrative and waste	56	8,882	891	29,781	3.34	297	18	315
Educational services	61	2,814	332	4,290	1.29	36	1	37
Health care and social assist	62	17,754	2,234	22,845	1.02	182	1	182
Arts, entertainment, and rec.	71	2,243	311	103	0.03	1	14	15
Accommodation and food	72	12,923	961	1,161	0.12	16	28	44
Other services	81	4,010	672	2,387	0.36	14	1	15
Total private	....	116,702	27,907	286,396	1.03	1,421	306	1,727

[a] OES May 2015.

[b] Bureau of Economic Analysis, NIPA Tables, Gross output. 2015.

[c] USASpending.gov. Contracting expenditures for covered contracts in FY2015.

[d] Assume share of expenditures on contracting is same as share of employment. Assumes all employees work exclusively on Federal contracts. Thus this may be an underestimate if some employees are not working entirely on Federal contracts.

The above analysis, which largely follows the NPRM, found 1.4 million potentially affected employees associated with contracting expenditures by the Federal government. However, as pointed out by SBA Advocacy and the Chamber/IFA, the rulemaking also covers entities operating under covered nonprocurement contracts on Federal property or lands and these workers may not be represented above. To account for these employees the Department used a variety of sources. First, the Department estimated the number of entities operating under covered nonprocurement contracts on Federal property or lands (section V.B.ii.). Then the Department multiplied the number of contracting firms by the number of potentially affected employees per contracting firm by industry. Conceptually, this ratio was calculated by dividing the potentially affected employees on direct contracts identified above (1.4 million across all industries) by the 116,200 estimated number of prime contractors and subcontractors with potentially affected employees from USASpending (91,900 prime contractors in and 24,400 subcontractors) (V.B.ii.). However, this calculation was conducted at the industry level and summed over industries. For example, in retail trade, we estimate 12,000 potentially affected workers in 597 entities (545 prime plus 52 subcontractors), for an average of 20.7 potentially affected workers per firm. This estimate of potentially affected workers per firm is multiplied by the estimated 5,184 entities operating under covered nonprocurement contracts on Federal property or lands in the retail trade industry, resulting in 107,000 potentially affected employees in these firms. Summing these calculations over all industries results in an additional 306,000 covered employees for a total of 1.7 million potentially affected employees.

Because the Executive Order only applies to "new contracts," coverage of the estimated total number of potentially affected employees (1.7 million) will occur on a staggered year-by-year basis. The Department accordingly needed to devise a method to estimate at what rate the staggered coverage would occur. The Executive Order defines a new contract to be either one for which a solicitation has been issued, or for which the contract has been awarded outside the solicitation process, on or after January 1, 2017. Consistent with the Department's approach in the rulemaking implementing Executive Order 13658, *see* 79 FR 34568, 34596, 60693, the Department estimated that twenty percent of contracts will qualify as "new" in Year 1. If approximately twenty percent of contracts are new each year, then almost all contracts should qualify as new for purposes of the Executive Order by Year 5.[29] The Department assumed employee coverage would also occur on a uniform twenty percent year-by-year basis. The Department accordingly multiplied the 1.7 million total potentially affected employees by 0.2 to estimate that 345,000 employees may be impacted in Year 1. In Years 2 through 5 a slightly larger number of workers will be impacted due to projected employment growth.[30]

The Chamber/IFA questioned the Department's estimate of affected employees in the NPRM on multiple grounds. As discussed below, the Department disagrees with the commenters. First, the Chamber/IFA believes the Department may have underestimated the number of affected employees because the "estimate is based only on consideration of numbers of employees who may currently lack access to 7 days of paid leave, and it ignores the impact on thousands more employees and their employers because current programs offering 7 or more days of leave fail to match other prescriptive details of the proposed rule.'' Employers that offer seven days of paid sick leave but with more restrictive usage will be required to broaden the use of their paid sick leave policies in response to the rulemaking. For instance, to the extent the employer's policy does not allow employees to use paid sick leave for absences related to domestic violence, the policy would need to be revised to comply with the Order and part 13. Therefore, the Department agrees these workers may be beneficiaries of this Final Rule. Although, as discussed below, the Department was able to calculate imprecise estimates of the number of additional affected employees, it has not included the costs or transfers associated with these employees for two main reasons. First, the Department found no applicable evidence to estimate the number of employees with paid sick leave that have a more restrictive scope of use than required in this Final Rule. Second, no strong evidence is available to estimate the impact on the number of days of paid sick leave taken for these employees who currently have a more restrictive scope of use in their current paid sick leave access. Therefore, they are not included in the analysis.

---

[29] If some contracts last longer than 5 years, then not all contracts will be covered by Year 5. For example, U.S. Forest Service contracts for ski resorts can last 20 years or more.

[30] The Department applied the geometric annual growth rate based on the ten-year employment projection for 2014 to 2024 from BLS' Employment Projections program by industry. Available at *http://www.bls.gov/news.release/ecopro.t02.htm.*

However, the Department identified some data appropriate for illustrative estimates. According to the 2010 National Paid Sick Days Study (NPSDS), 64 percent of workers have paid sick days but only 47 percent have paid sick days they are allowed to use to care for sick family members.[31] If we assume workers with paid sick leave that can only be used for their own health are uniformly distributed across days of paid leave then we can estimate the number of affected employees due to expanded usage eligibility. We estimate 123,300 workers (115,700 full-time + 7,600 part-time) receive 7 days or more of paid sick leave and thus will not receive additional days of paid leave.[32] If 27 percent ((64 percent − 47 percent)/ 64 percent) of these employees have greater access to their paid sick leave due to expanded eligibility, then an additional 32,800 employees may be considered ''affected'' in Year 1 (an increase of 15 percent in Year 1). However, according to the data from the American Time Use Survey, analyzed by the Council of Economic Advisors,[33] 53 percent of workers have paid sick days that can be used for their own illness and 48 percent have paid sick days that can be used to care for family members. As noted above, the Department estimated that 123,300 potentially affected employees receive 7 days or more of paid sick leave. If 9.4 percent ((53 percent − 48 percent)/53 percent) of these employees have usage extended then an additional 11,600 employees may be considered ''affected'' in Year 1, (a 5.2 percent increase in the number of affected employees).[34] Therefore, depending on the source, the estimate of the incremental number of affected employees due to expanded usage varies between 11,600 and 32,800 employees.[35]

The second Chamber/IFA concern is that the Department is underestimating affected employees because ''if government contract work is more labor intensive per dollar expended than non-governmental activity, then the number of affected employees will be . . . commensurately greater than the numbers estimated by the Department in its analysis.'' The Department calculated the number of employees based on the share of government expenditures to all expenditures by industry. Overall, the Department believes that services provided for the government will not be any more or less labor intensive than services provided for the private sector However, within industries, government contract work could be more or less labor intensive than private contract work. For example, because federal contracts for construction services are more likely to be heavy or highway construction, government contract work could involve different levels of labor intensity than private contract work in the construction industry. The Department believes that the differences in labor intensity between contracted and non-contracted sectors across 2-digit NAICS tend to balance each other out.

Third, the Chamber/IFA believes affected employees may be underestimated because the Department assumed that employees were working exclusively on Federal contracts. To the extent that employees spend only a portion of their time working on federal contracts, the number of affected employees will be higher than the number of year-round exclusively federal contract employees estimated above. As discussed above, data are not available on the share of an employee's time that is spent on Federal contracting. The impact of this on transfers was discussed in the NPRM and in this Final Rule in the section on transfers (V.C.iii.). For this Final Rule we have added a discussion regarding the impact on costs (V.C.ii.).

Fourth, the Chamber/IFA repeatedly stated that the Department should have conducted a baseline survey of contracting firms to obtain information about the prevalence of the ''15 plus specific elements'' required by the Rule. The commenters claim that the Department could have conducted a survey ''following the issuance of Executive Order 13706 in September 2015'' and ''still be on schedule to complete the contemplated rulemaking by September 30, 2016.'' The Department believes that conducting such a survey is unnecessary because existing data provides the information necessary to calculate reasonable estimates of the total costs and transfers of this Final Rule.

iv. Number of Affected Employees

The Department used the 2015 National Compensation Survey (NCS) to determine the proportion of potentially affected employees who already receive paid sick leave. The NCS estimates that nationally 61 percent of all private sector employees currently receive some paid sick leave.[36] [37] However, this average can vary substantially by industry and hours worked. To account for these differences the Department performed its analysis by industry and full-time/part-time status.[38] The BLS reports the share of employees who receive paid leave disaggregated by industry and separately by full-time status (Table 4). However, the NCS does not publish data cross-tabulated by industry and full-time status. For this Final Rule the BLS provided this breakdown using the NCS microdata for categories with sufficient observations to meet their publication criteria. For industries not available from the NCS by part-time status, the Department estimated the rates.[39] The NCS does not include employees in the agriculture, forestry, fishing and hunting industries; therefore, the Department estimated the share of employees with access to paid sick leave in those industries based on the 2011 ATUS Leave Module.[40]

---

[31] Smith, T.W. and Kim, J. (2010). Paid Sick Days: Attitude and Experiences. Public Welfare Foundation.

[32] Based on estimates from 2015 NCS, 2011 ATUS, and 2015 CPS. See section V.B.iv. for details.

[33] The Council of Economic Advisers. (2014). The Economics of Paid and Unpaid Leave.

[34] This assumes all workers who have paid leave to care for family members can use this leave to care for themselves.

[35] This is potentially an underestimate since it does not include any impacts due to additional uses allowed under this Final Rule, such as domestic violence. The Department found no data on current coverage for any additional uses to include in the estimate of additional ''affected'' employees.

[36] National Compensation Survey, March 2015, Table 32. Leave benefits: Access, private industry employees.

[37] Data on paid sick leave are not available specifically for Federal contractors. The Department assumes rates of paid sick leave for Federal contractors are similar to all private sector workers.

[38] The Department's analysis categorizes as full-time those individuals who work 32 hours or more per workweek (rounded to the nearest integer). 32 hours represents the line of demarcation between workers who would and would not accrue 56 hours of paid sick leave a year if they work a full year. The Department's designation herein of certain individuals as ''full-time'' and other individuals as ''part-time'' based on their usual hours worked is solely for purposes of facilitating the economic analysis in this rulemaking.

TABLE 4—SHARE OF EMPLOYEES WITH PAID SICK LEAVE BY INDUSTRY AND FULL-TIME STATUS

Industry	NAICS	% With some paid sick leave		
		Total[a] (%)	Full-Time[b] (%)	Part-Time[b] (%)
Agriculture, forestry, fishing and hunting[c]	11	18	21	7
Mining	21	64	65	[d]27
Utilities	22	89	89	[d]89
Construction	23	41	42	25
Manufacturing	31–33	65	67	[d]18
Wholesale trade	42	77	80	[d]41
Retail trade	44–45	50	73	27
Transportation and warehousing	48–49	74	75	73
Information	51	92	95	51
Finance and insurance	52	90	93	57
Real estate and rental and leasing	53	72	80	[d]36
Professional, scientific, and technical services	54	78	85	[d]26
Management of companies and enterprises	55	90	91	[d]81
Administrative and waste services	56	44	53	15
Educational services	61	73	90	24
Health care and social assistance	62	72	85	36
Arts, entertainment, and recreation	71	48	71	29
Accommodation and food services	72	25	46	11
Other services	81	57	73	24
Total private		61	73	25

[a] National Compensation Survey, March 2015, Table 32. Leave benefits: Access, private industry workers (unless otherwise noted). Assumes distribution of paid leave is similar for Federal contractors and other private employees.

[b] The NCS does not publish data by industry and full-time status; however, for this Final Rule the BLS provided this breakdown using the NCS microdata for industries with sufficient observations to meet their publication criteria. Full-time is defined as 32 or more hours per week.

[c] NCS does not include information for this industry. Used 2011 ATUS Leave Module to estimate share of employees in this industry with paid sick leave. Assumes distribution of paid leave is similar for Federal contractors and other private sector employees.

[d] NCS does not include information for this industry and part-time status. The Department estimated these rates.

The Department estimated that of the 345,000 employees potentially impacted in Year 1, approximately 294,000 are full-time employees and 51,400 are part-time employees.[41] For full-time employees, across all industries, 73 percent receive some paid sick leave and 27 percent currently receive no paid sick leave. For part-time employees, 25 percent receive some paid sick leave and 75 percent receive no paid leave. All employees with no paid sick leave will be affected regardless of how many hours per week they work (assuming they work a sufficient number of hours to accrue paid sick leave).

Additionally, some employees who currently receive paid sick leave will also be affected by the Final Rule if they receive fewer than the mandated number of days based on the required accrual rate. To determine how many of these employees are affected, the Department used NCS data on the distribution of days of leave. The 2015 NCS provides the share of employees with a range of days of paid sick leave (*e.g.,* 5 to 9 days per year).[42] The NCS publishes these data aggregated across all industries. However, since this analysis is conducted by industry, the BLS provided the Department with these ranges of days disaggregated by industry based on the NCS (*see* Appendix A). The Department then used the categorical distribution of days for all workers in an industry and full-time workers across industries to approximate these values for both full-time and part-time workers by industry.[43] This results in a distribution by categories of days of sick leave by industry and full-time status.

The Department distributed the share of employees within each NCS category (*e.g.,* 5 to 9 days per year) of paid sick leave days across the individual number of days in that category (*e.g.,* 5, 6, 7, 8,

---

[39] The Department used the share of employees with sick leave, for all employees and full-time employees, and the ratio of full-time to part-time employees in each industry to estimate the shares for part-time employees in those industries without part-time employees' shares. The Department used data from the CPS to calculate the ratio of full- to part-time employees. For example, the NCS does not provide an estimate of the percentage of part-time workers in the manufacturing industry with paid sick leave. NCS provides estimates of 65 percent and 67 percent of all and full-time workers, respectively, have some paid sick leave in the manufacturing industry. Based on the 2015 CPS data, the Department estimated that about 96% of workers in the manufacturing industry work full-time. Since the 65 percent total is a weighted average of full-time and part-time workers with paid sick leave, we estimated the percentage of part-time workers in the manufacturing industry with paid sick leave by solving for "PT%" in:

$0.65 = (0.67*0.959) + (PT\%*0.041)$.

[40] The 2011 ATUS Leave Module is a special supplement to the annual ATUS survey sponsored by the BLS and conducted by the U.S. Census Bureau. It surveys employees nationally on use of leave. The Department estimated the share of workers in the agriculture, forestry, fishing and hunting industries that receive paid sick leave. The ratio of leave benefits for full-time and part-time workers from the NCS was applied to this total to estimate separate rates for these two subgroups.

[41] Based on the share of workers who are full-time in the 2015 CPS data. This assumes the share of government contractors that are full-time is similar to private industry overall. As noted, full-time is defined for purposes of this analysis as 32 or more hours per week.

[42] Table 35. Paid sick leave: Number of annual days by service requirement, private industry workers, National Compensation Survey, March 2015. Available at: *http://www.bls.gov/ncs/ebs/benefits/2015/ownership/private/table35a.htm.*

[43] The distribution is available for all workers and full-time workers but not part-time workers. Combining these data with the share of workers who are full-time allowed the Department to approximate the distribution for part-time workers.

9) using a Poisson distribution that approximates the distribution of days of paid sick leave provided to workers with this benefit.[44] For example, using the NCS data the Department estimates that 53 percent of full-time employees with paid sick leave receive 5 to 9 days of leave. Applying the Poisson distribution, the Department estimated 10 percent of employees with paid sick leave currently receive 5 sick days, 13 percent currently receive 6 sick days, etc.[45] The percent distributions of days of paid sick leave are presented in Appendix A.

The Executive Order generally measures paid sick leave in hours, restricting a contractor from limiting total accrual of paid sick leave per year, or any point in time, at less than 56 hours. Because the NCS tabulates paid sick leave in days, the Department converted sick leave hours to days to use the NCS. The Department assumed a standard 8 hours worked per day, so the Executive Order provides a maximum accrual of 7 days of paid sick leave annually. Therefore, this analysis assumes employees receiving at least 7 days of paid sick leave are not affected.[46]

To estimate the number of affected employees in Year 1 the Department summed the number of potentially affected employees with less than 7 days of paid sick leave. The Department estimates 114,600 contract employees have no paid sick leave and will be affected. The Department also estimates 107,500 contract employees have access to paid sick leave but receive fewer than 7 days of paid sick leave (47 percent of workers with some paid sick leave) and are thus classified as affected employees. The Department accordingly estimates that there will be approximately 222,100 affected employees in Year 1 (Table 5).

v. Number of Additional Days of Paid Sick Leave Accrued by Affected Employees

The Department estimated the number of additional paid sick leave days the approximately 222,100 affected employees would need to receive for contractors to comply with the Executive Order. This was done somewhat differently for full-time and part-time employees. For full-time employees with no paid sick leave the Department estimated they will receive 7 additional days of paid sick leave. For full-time employees with between 1 and 6 days of leave the Department estimated the number of additional days they would need to receive to reach 7 days of paid sick leave (*e.g.*, if they currently receive 1 day then they will receive an additional 6 days).

To estimate the additional number of paid sick days per year that would accrue to part-time employees as a result of the rule, the Department first had to estimate hours of paid sick leave per year currently available to these workers. To estimate paid sick leave hours currently available to part-time employees required additional calculations because the NCS reports *days* of paid sick leave per year, not hours. Therefore, the Department adjusted part-time employees' days of paid sick leave by assuming that the hours of paid sick leave associated with "one day" of leave is equivalent to average hours worked in a day. For example, if a part-time worker averages 6 hours of work per work day, then one day of paid sick leave will also be equal to 6 hours. To do this, the Department divided part-time workers' average hours worked per week by 5 to calculate their average hours worked per day by industry. The Department then multiplied average work hours per day by NCS reported paid days of sick leave per year to estimate part-time employees' hours of paid sick leave currently available per year.

Next, the Department calculated the total hours of paid sick leave per year that might accrue to a part-time worker as a result of this E.O. Because paid sick leave is accrued at a rate of 1 hour per every 30 hours worked, the Department divided mean annual hours worked for part-time workers in an industry by 30 to estimate the number of hours of paid sick leave required under the Executive Order. The difference between hours of paid sick leave currently available per year and hours of paid sick leave per year required under the Executive Order is the additional hours that accrue to part-time workers. This was then divided by 8 to express the additional paid sick hours in terms of standardized 8-hour days. Table 7 presents the adjusted numbers for part-time employees.

As stated above, the Department is estimating a total of 222,100 affected employees in Year 1 (Table 5). The total number of additional days of paid sick leave is then calculated by multiplying the number of employees affected by the average number of additional days of paid sick leave provided by the Final Rule (Table 6 and Table 7). The Department estimated that the Final Rule will result in a total of 968,000 additional days of paid sick leave provided (792,000 days for full-time workers and 176,000 days for part-time workers).[47]

TABLE 5—NUMBER OF AFFECTED EMPLOYEES IN YEAR 1

Industry	Affected employees				
	Total	Full-Time [a]	Part-Time [a]	With no paid sick leave	With some paid sick leave
Agriculture, forestry, fishing and hunting	58	47	12	52	6
Mining	39	37	1	20	18
Utilities	294	287	8	256	39

---

[44] The Poisson distribution is frequently used for discrete count data. The data were consistent with a Poisson distribution. The distribution of days of sick leave is continuous but was approximated using integers to allow use of the Poisson distribution and to simplify the analysis. Aggregate findings would be highly comparable if a continuous distribution had been used instead.

[45] Some additional manipulations were made to the data in cases where the Poisson distribution resulted in numbers contradictory to the reported medians (*see* Appendix A).

[46] The number of days of leave for workers with paid time off policies is unknown. The NCS estimates the distribution of days of paid sick leave for workers with a set number of days of paid sick leave. We assume this distribution of days of leave is the same for workers with paid time off policies (and those with "as needed" paid sick leave provisions). This may result in an underestimate of the number of days currently received by workers with a paid-time off program because the SHRM (2008) estimates that workers with paid time off policies receive an average of 15 days the first year of service.

[47] This estimate is based on the marginal number of paid sick days employers would have to provide due to this regulation. To the extent employers that currently provide paid sick leave do not modify their existing paid sick leave policies in accordance with section 2(g) of the Executive Order and section 13.5(f), and to the extent there are SCA- or DBA-covered employers who provide paid sick leave as an SCA or DBA fringe benefit, this estimate may not entirely reflect the total marginal number of days employers would have to provide. However, the Department assumes firms will be able to and will choose to apply the currently provided days of paid sick leave toward the requirements of the Executive Order and this rule, and the Department similarly understands that contractors generally do not provide paid sick leave as an SCA or DBA fringe benefit.

TABLE 5—NUMBER OF AFFECTED EMPLOYEES IN YEAR 1—Continued

Industry	Affected employees				
	Total	Full-Time[a]	Part-Time[a]	With no paid sick leave	With some paid sick leave
Construction	20,280	18,504	1,776	14,086	6,195
Manufacturing	6,372	6,045	327	3,009	3,363
Wholesale trade	133	121	12	43	90
Retail trade	16,709	11,021	5,688	9,487	7,223
Transportation and warehousing	15,609	13,857	1,752	7,427	8,182
Information	2,587	2,042	545	701	1,886
Finance and insurance	2,484	2,194	290	842	1,642
Real estate and rental and leasing	95	73	22	42	54
Professional, scientific, and technical serv.	72,713	60,405	12,308	26,224	46,489
Management of companies and enterprises	0	0	0	0	0
Administrative and waste services	50,648	40,768	9,881	33,656	16,993
Educational services	2,456	1,275	1,181	1,716	739
Health care and social assistance	19,587	14,554	5,033	8,601	10,985
Arts, entertainment, and recreation	2,184	1,276	908	1,328	856
Accommodation and food services	7,718	4,451	3,267	5,895	1,823
Other services	2,092	1,365	727	1,208	884
Total private	222,059	178,320	43,739	114,593	107,465

[a] Part-time is defined as working less than 32 hours per week.

TABLE 6—CURRENT DISTRIBUTION OF DAYS OF PAID LEAVE, ADDITIONAL DAYS OF LEAVE, AND AFFECTED EMPLOYEES IN YEAR 1, FULL-TIME EMPLOYEES

Industry	Number of full-time potentially affected employees accruing annually the following number of days of sick leave								Affected employees	Days additional sick leave available
	0	1	2	3	4	5	6	7+		
Agriculture, forestry, fishing	41	0	0	1	2	1	1	5	47	302
Mining	19	0	0	0	0	3	15	18	37	157
Utilities	250	0	0	0	0	8	29	1,982	287	1,792
Construction	12,626	154	475	980	1,515	1,448	1,307	3,265	18,504	104,346
Manufacturing	2,721	55	228	626	1,291	562	562	2,200	6,045	28,580
Wholesale trade	35	1	5	15	30	18	16	53	121	480
Retail trade	4,686	115	356	734	1,135	1,967	2,028	6,335	11,021	47,574
Transportation and warehousing	6,567	77	358	1,107	2,568	1,249	1,931	12,411	13,857	64,780
Information	295	8	38	116	270	516	799	3,865	2,042	5,409
Finance and insurance	617	7	41	171	528	271	559	6,614	2,194	7,933
Real estate and rental and leasing	24	1	3	7	11	13	13	49	73	294
Professional, scientific, and	15,758	394	1,625	4,467	9,214	12,188	16,759	44,647	60,405	207,437
Management of companies	0	0	0	0	0	0	0	0	0	0
Administrative and waste services	24,702	301	1,241	3,414	7,042	1,930	2,138	11,789	40,768	221,703
Educational services	590	4	24	90	255	108	204	4,623	1,275	5,818
Health care and social assistance	4,505	152	628	1,726	3,561	1,676	2,305	15,482	14,554	58,835
Arts, entertainment, and recreation	574	19	58	119	185	158	163	702	1,276	5,929
Accommodation and food services	2,872	43	133	275	425	346	356	867	4,451	24,452
Other services	580	11	47	129	265	140	192	784	1,365	6,146
Total private	77,462	1,342	5,260	13,977	28,298	22,603	29,378	115,693	178,320	791,969

Note: Numbers do not always add to total due to rounding.

TABLE 7—CURRENT DISTRIBUTION OF DAYS OF PAID LEAVE, ADDITIONAL DAYS OF LEAVE, AND AFFECTED EMPLOYEES IN YEAR 1, PART-TIME EMPLOYEES

Industry	Number of full-time potentially affected employees accruing annually the following number of days of sick leave								Affected employees	Days additional sick leave available[a]
	0	1	2	3	4	5	6	7+		
Agriculture, forestry, fishing & hunting	11	0	0	0	0	0	0	0	12	46
Mining	1	0	0	0	0	0	0	0	1	5
Utilities	6	0	0	0	0	0	1	49	8	31
Construction	1,459	11	29	53	72	79	73	170	1,776	7,503
Manufacturing	288	1	3	7	13	7	7	24	327	1,381
Wholesale trade	9	0	0	1	1	1	1	2	12	45
Retail trade	4,801	22	59	107	145	292	264	888	5,688	23,165
Transportation and warehousing	860	13	51	140	285	171	232	1,433	1,752	5,730
Information	406	1	3	9	19	45	61	283	545	1,822
Finance and insurance	225	0	2	7	19	13	23	234	290	1,196
Real estate and rental and leasing	17	0	0	1	1	1	1	5	22	81
Professional, scientific, and technical	10,467	22	78	189	343	548	662	1,842	12,308	47,125
Management of companies and	0	0	0	0	0	0	0	0	0	0
Administrative and waste services	8,954	23	83	200	363	120	137	653	9,881	42,049

TABLE 7—CURRENT DISTRIBUTION OF DAYS OF PAID LEAVE, ADDITIONAL DAYS OF LEAVE, AND AFFECTED EMPLOYEES IN YEAR 1, PART-TIME EMPLOYEES—Continued

Industry	Number of full-time potentially affected employees accruing annually the following number of days of sick leave								Affected employees	Days additional sick leave available [a]
	0	1	2	3	4	5	6	7+		
Educational services	1,127	0	2	7	18	10	16	301	1,181	4,671
Health care and social assistance	4,096	19	69	167	302	172	208	1,367	5,033	20,469
Arts, entertainment, and recreation	754	5	15	27	37	37	33	154	908	3,302
Accommodation and food services	3,023	9	23	42	58	55	57	130	3,267	14,564
Other services	628	2	7	17	31	19	23	99	727	2,861
Total private	37,132	127	426	975	1,708	1,570	1,802	7,635	43,739	176,048

Note: Numbers do not always add to total due to rounding.

[a] This is expressed in terms of standardized 8-hour days, as described in the text.

To estimate the number of affected employees in later years, the Department calculated the average annual geometric growth rate in employment based on the ten-year employment projection for 2014 to 2024 from BLS' Employment Projections program. Table 8 shows the number of affected employees in Years 1 through 10, along with the number of employees with no paid sick leave currently, with some paid sick leave, and by full-time/part-time status. The share of employees working full-time in 2015 and the share of employees with no paid sick leave were applied to projected years.

TABLE 8—AFFECTED EMPLOYEES IN YEARS 1 THROUGH 10

Year	Affected employees (1,000s)				
	Total	Full-Time	Part-Time	With no paid sick leave	With some paid sick leave
Year 1	222.1	178.3	43.7	114.6	107.5
Year 2	454.0	364.6	89.4	234.3	219.7
Year 3	686.1	551.0	135.1	354.1	332.0
Year 4	918.3	737.4	180.9	473.9	444.4
Year 5	1,150.6	924.0	226.6	593.8	556.8
Year 6	1,161.0	932.3	228.7	599.1	561.9
Year 7	1,171.5	940.7	230.7	604.5	566.9
Year 8	1,182.1	949.3	232.8	610.0	572.1
Year 9	1,192.8	957.9	235.0	615.6	577.3
Year 10	1,203.7	966.6	237.1	621.2	582.5

The Department estimates that once all covered contracts have been renewed (in Year 5), the equivalent of 1.2 million year-round exclusively federal contract employees will be affected by this Final Rule. The Economic Policy Institute developed a range of estimates that are comparable; they found that "between 694,000 and 1,053,000 employees of Federal contractors may directly benefit with additional paid sick leave." Their estimates use data from the General Services Administration's (GSA's) Federal Procurement Data System, the BLS' Employment Requirements Matrix, and the BLS' NCS. EPI's estimated number is consistent with the Department's estimate in the NPRM because both estimates included only employees working on contracts in USASpending.gov. As noted previously, the Department added employees working on contracts on Federal property or lands in the analysis of this Final Rule, which increased the estimated number of affected employees.

C. Impacts of Final Rule

i. Overview

This section presents direct employer costs, transfer payments and DWL associated with the Final Rule. These impacts were projected for 10 years. The Department estimated average annualized direct employer costs of $27.3 million, transfer payments of $349.6 million and DWL of $734,000. As these numbers demonstrate, the largest quantified impact of the Final Rule will be the transfer of income from employers to employees. The Department also discusses the many benefits of this rule qualitatively.

ii. Costs

The Department quantified three direct employer costs: (1) Regulatory familiarization costs; (2) implementation costs; and (3) recurring administrative costs. Other employer costs are considered qualitatively. This section explains the methodology and responds to commenters. Some commenters believe our costs estimates are too low; where appropriate, estimates were adjusted. Other commenters provided evidence from state and municipal laws demonstrating that costs will be low. For instance, the Seattle Office of Labor Standards cited a study that found the costs of the Seattle paid leave law have been modest, stating: "[T]here is no evidence that the Ordinance caused employers to go out of business, and 70% of employers were either "somewhat" or "very" supportive of the Ordinance." [48] They also cite a study by the Main Street Alliance of Washington that found "no evidence of widespread negative economic impacts." [49] Similarly, many commenters submitted a form letter that cites the Vice

---

[48] Romich, J., Bignell, W., Brazg, T, Johnson, C., Mar, C., and et al. (2014). Implementation and Early Outcomes of the City of Seattle Paid Sick and Safe Time Ordinance. University of Washington. Available at: *http://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/PSSTOUWReportwAppendices.pdf.*

[49] Main Street Alliance of Washington. (2013). Paid Sick Days and the Seattle Economy: Job Growth and Business Formation at the 1-year Anniversary of Seattle's Paid Sick and Safe Leave Law. Available at: *http://www.seattle.gov/Documents/Departments/CivilRights/psst-report-main_street_alliance.pdf.*

President of the San Francisco Chamber of Commerce saying that the San Francisco law's impact on employers was "minimal" (due to responses by employers that allow them to lower costs, such as having current employees cover for others using paid sick leave instead of hiring replacement labor).[50] These commenters also cited research finding that the Connecticut paid sick leave "law had a minimal impact on costs" [51] for employers. The Leadership Conference on Civil and Human Rights cited research showing that "CEOs support paid sick time 73 percent to 16 percent, and support 'more time off to take care of sick children or other relatives' 83 percent to 5 percent." [52]

1. Regulatory Familiarization Costs

The Final Rule will impose direct costs on covered contractors by requiring them to review the regulation. The Department believes that all Federal contracting firms that have or expect to have covered contracts will incur regulatory familiarization costs because all establishments will need to determine whether they are in compliance. As explained above, in response to comments the Department revised the number of potentially affected contracting firms to include entities operating on Federal lands and property. See section V.B.ii. for a description of the number of these potentially affected contracting firms. The Department estimated in the NPRM, based on the GSA's SAM data in August 2015, that there were 543,900 Federal contracting firms.

In the NPRM the Department included contracting firms strictly providing materials and supplies to the government and other firms with no Federal contracts covered by the Executive Order because they may incur some regulatory familiarization costs.[53] However, the Department also noted that these firms may not incur regulatory familiarization costs, resulting in an overestimate of the number of potentially affected contractors. The Chamber/IFA wrote that the Department's estimate of regulatory familiarization costs is based on the assumption that "only successful contract bidders will incur familiarization cost." To clarify, our estimate includes firms that are registered in SAM but that do not have covered contracts. Thus, it includes most firms serious about bidding. The Chamber/IFA also wrote: "Even contractors exempt from the proposed rule for some reason will, first, have to review the regulation and their own book of contracts (and prospective bids) to make such a determination." The Department acknowledges these firms may still incur some minimal regulatory familiarization costs and has therefore included them in the estimate of potentially affected contactors.

In the NPRM the Department assumed one hour of a human resources manager's time will be spent reviewing the rulemaking. Some commenters believe this is an underestimate. The Chamber/IFA wrote "experience based on other recent regulations . . . shows that the initial familiarization process entails many hours of involvement by a variety of company executives, attorneys and consultants." TrueBlue, Inc. wrote: "We have already spent well more than [one hour] trying to decipher this rule." In response to these comments, the Department has increased this estimate to two hours per firm. The Department also notes that the time estimate is an average over all firms the Department has identified as potentially affected. As stated in the previous paragraph, the estimate includes firms expected to have very minimal or no regulatory familiarization costs such as contractors only holding or bidding on contracts for products. Thus, while some firms presumably will spend more than two hours on regulatory familiarization, the Department believes that the average amount of time potentially affected contractors will spend on regulatory familiarization is two hours.

The Chamber/IFA also wrote that "[t]here may be circumstances under which a familiarization effort may require repetition. For example, a large firm with decentralized contract teams, may find that multiple familiarization activities occur as different teams within the company make independent bid decisions on different contract opportunities." However, the commenters provided neither evidence of the prevalence of these circumstances nor an average number of teams per firm with these circumstances. The Department accordingly cannot confirm how commonly, if at all, this scenario will occur. Even assuming it does, the Department lacks the data to make an estimate related to additional familiarization costs.

The cost of this time is the mean wage for a human resource manager of $82.17 per hour.[54] In the NPRM, based on 2014 data, this wage rate was $79.96. The Chamber/IFA believes this is too low because it does not include the "full economic opportunity cost." It suggests that a "practical approximation may be provided by the indirect overhead and profit mark-ups relative to direct labor cost that government contracts permit." Thus, the Chamber/IFA believes direct wages should be multiplied by 3.25 instead of the 1.46 used in the proposed rule.

The Department disagrees with the mark-up rate suggested by the Chamber/IFA because it is not appropriate to apply a load factor used on direct labor costs to indirect labor. That is, the markup rate suggested by the commenters includes indirect overhead labor (*i.e.,* time for human resource workers), and it is inappropriate to mark-up that indirect cost (*i.e.,* HR workers' wages) for indirect costs (*e.g.,* additional HR time). The Department also disagrees with the mark-up rate suggested by the commenters because the relatively small costs of this rulemaking (relative to payroll or revenue, *see* section V.C.vii.) are likely to have little to no effect on the cost of overhead and support services in addition to the overhead costs estimated in this cost section. Most overhead costs are largely fixed and will be unaffected. For example, building rent, heat and electricity are unlikely to change. For these reasons, the Department has continued to use the NPRM mark-up rate in the Final Rule.[55]

---

[50] Swarns, R. (2014). Despite Business Fears, Sick-Day Laws Like New York's Work Well Elsewhere. New York Times. Available at: *http://www.nytimes.com/2014/01/27/nyregion/despite-business-fears-sick-day-laws-like-new-yorks-work-well-elsewhere.html.*

[51] Appelbaum, E., Milkman, R., Elliott, L., and Kroeger, T. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Available at: *http://cepr.net/documents/good-for-buisness-2014-02-21.pdf.*

[52] Bottari, M. (2016). Highlights of Luntz Poll of American CEOs Shows Broad Support for Progressive Policies, PRWatch, Center for Media and Democracy.

[53] In addition, at the time the NPRM was prepared, the Department had not developed a method to estimate and exclude firms strictly providing materials and supplies to the government and firms without Federal contracts. The Department has since devised a method to identify and exclude such firms which is done when estimating the number of contractors with affected employees.

[54] This includes the mean base wage of $56.29 from the Occupational Employment Statistics (OES) plus benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's Employer Costs for Employee Compensation (ECEC) data. OES data available at: *http://www.bls.gov/oes/current/oes113121.htm.*

[55] The Department acknowledges that there might be overhead costs and thus conducted a sensitivity analysis using an additional overhead rate of 17 percent. This rate is based on a Chemical Manufacturers Association Study and has been used in the Environmental Protection Agency's Final Rules (see for example, EPA Electronic Reporting under the Toxic Substances Control Act Final Rule, Supporting & Related Material).

Continued

Therefore, for this Final Rule, the Department has estimated regulatory familiarization costs to be $80.4 million ($82.17 per hour × 2 hours × 489,400 contractors) (Table 9). The Department has included all regulatory familiarization costs in Year 1. We believe firms will need to familiarize themselves with the rule in Year 1 in order to identify whether any contracts will be covered in Year 1. It is possible a contractor will postpone the familiarization effort until it is poised to have a covered contract (*i.e.,* a new contract within one of the 4 covered categories). However, since many contractors will have at least one new contract in Year 1, and the Department has no data on when contractors will first be affected, the Department has included all regulatory familiarization costs in Year 1.

TABLE 9—YEAR 1 COSTS

Variable	Regulatory familiarization costs	Initial implementation costs (no current policy)	Initial implementation costs (current policy)	Recurring implementation costs	Recurring administrative costs
Hours per potentially affected contractor	2	10	1	N/A	N/A
Hours per employee	N/A	N/A	N/A	1	0.33
Potentially affected contractors[a]	489,419	92,990	396,430	N/A	N/A
Newly affected employees	N/A	N/A	N/A	222,059	N/A
Total affected employees	N/A	N/A	N/A	N/A	222,059
Loaded wage rate	$82.17	$27.50	$27.50	$27.50	$27.50
Base wage[b]	*$56.29*	*$18.84*	*$18.84*	*$18.84*	*$18.84*
Benefits adj. factor[c]	*1.46*	*1.46*	*1.46*	*1.46*	*1.46*
Cost ($1,000s)	$80,427	$25,573	$10,902	$6,107	$2,036

[a] Total number of prime contractors from the GSA's SAM from August 2015 and subcontractors from USASpending.gov. Number of entities operating under covered contracts on Federal property from various sources. Total is split between firms with and without a sick leave policy based on results from a SHRM survey.

[b] Regulatory familiarization uses OES mean wage for human resource managers in 2015. Available at: *http://www.bls.gov/oes/current/oes113121.htm.* Other costs use OES mean wage for human resources assistants, except payroll and timekeeping in 2015. Available at: *http://www.bls.gov/oes/current/oes434161.htm.*

[c] Ratio of loaded wage to unloaded wage from the 2015 ECEC.

2. Implementation Costs

Firms will incur implementation costs. The Department believes some of these costs will be incurred in Year 1 and will occur regardless of the number of employees affected but other implementation costs will be incurred as employees become covered and be a function of the number of affected employees. Therefore, the Department modeled this in two parts. First, firms will incur upfront implementation costs (*e.g.,* fixed time costs associated with making baseline adjustments to accounting and payroll software that are not dependent on the size of the firm). Second, because we believe overall implementation costs will generally vary with the size of the firm, we have included a cost per affected employee. Because this Final Rule will only apply to employees on new contracts, the Department estimates it will take approximately five years to phase in the coverage over nearly all affected employees. Therefore, recurring implementation costs will generally be spread over the first five years that the regulation is in effect, with some fixed costs upfront. As each contract becomes affected, the covered contractors will need to spend some time updating the accounting systems used to track paid sick leave and training managers responsible for implementing the requirements of the Executive Order and this rule.

Fixed costs that do not vary by number of employees are assumed to be a small share of total implementation costs but they provide an opportunity to vary costs across firms with and without sick leave programs in place. The Department assumed firms that need to create a sick leave policy will each spend 10 hours of time developing this policy, regardless of the number of employees, and firms with a program in place will spend one hour, regardless of the number of employees.[56] According to a survey conducted by the Society for Human Resource Management (SHRM), 81 percent of companies provided some form of paid sick leave.[57] As noted above, the Department estimated there are 489,400 Federal contracting firms. Therefore, the Department estimated 93,000 firms will need to create a sick leave policy (19 percent of 489,400 firms). The remaining 396,400 firms would have lower implementation costs. The share of firms with a system in place is consistent with findings from one study of the San Francisco paid sick leave ordinance that found "only one-sixth needed to introduce an entirely new paid sick days policy because of the law."[58] This is 16.7 percent, which is comparable to the SHRM estimate (19 percent) the Department used above.

In addition to these fixed costs, all firms with affected employees will have additional implementation costs that vary based on the number of affected employees. The Department also assumed, as it did in the NPRM, that firms will spend one hour on implementation costs per newly affected employee. Total implementation costs are therefore a function of whether the firm has a system in place and the number of affected employees.

However, an overhead rate based on the chemical manufacturing industry may not be appropriate for all industries, and thus we present this estimate as an illustrative example. Adding an additional overhead rate of 17 percent would increase total costs (regulatory familiarization costs, implementation costs, and administrative costs) by $14.6 million in Year 1, an increase of 11.6 percent. As previously noted, the Department believes this overestimates the overhead costs attributable to this rulemaking, but recognizes that there is not a definitive approach to estimating the marginal cost of labor.

[56] When developing the NPRM the Department identified little applicable data from which to estimate the amount of time required to make these adjustments. One source, based on a small sample, finds the average one-time implementation costs ranged from zero to $125,000 with an average of 0.125 percent of revenue. *See* Romich, J., et al. (2014). Implementation and Early Outcomes of the City of Seattle Paid Sick and Safe Time Ordinance. However, the authors note: "These respondents are self-selected and too few to provide statistically representative data. However, their responses offer a qualitative sense of the range of possible costs."

[57] Society for Human Resource Management. (2008). Examining Paid Leave in the Workplace: Helping Your Organization Attract and Retain Talented Employees. SHRM reports are available based on more recent surveys, which indicate a greater proportion of firms have a paid sick leave program than the 81 percent figure used here. However, the newer estimates seem inconsistent with data from other sources concerning the prevalence of paid sick leave programs; because of this uncertainty, and to avoid a possible underestimate of implementation costs, the Department has relied here on the earlier SHRM report.

[58] Drago, R. and Lovell, V. (2011). San Francisco's Paid Sick Leave Ordinance: Outcomes for Employees and Employers. Institute for Women's Policy Research.

For this Final Rule, the Department has included a table demonstrating average implementation hours by contractor size. For a contractor with a current paid sick leave policy and 50 affected employees, we estimated they will spend 51 hours over five years implementing the program. We estimated that a contractor without a current paid sick leave policy and 50 affected employees will spend a total of 60 hours over five years implementing the program. Contractors with no affected employees are estimated to accrue just the fixed implementation costs. This includes covered contractors whose paid sick leave policies already provide for at least one hour of paid sick leave per 30 hours worked; contracting firms strictly providing materials and supplies to the government; and other firms registered in SAM with no Federal contracts covered by the Executive Order. This is an overestimate of the number of firms incurring fixed implementation costs; contracting firms only providing materials and supplies will incur no fixed implementation costs because they have no employees working on covered contracts and will not have to make any changes to their current systems. Thus, while some firms may spend more than one hour (or 10 hours depending on whether they currently have a system in place), other firms will spend less time; one hour (or 10 hours for a firm with no system) is used to approximate the average time spent for all of the potentially affected contracting firms.

TABLE 10—IMPLEMENTATION HOURS BY EMPLOYER SIZE OVER 5 YEARS

Number of affected employees	Per firm hours for implementation over 5 years	
	No current policy	Current policy
1–5	11–15	2–6
6–10	16–20	7–11
11–20	21–30	12–21
21–50	31–60	22–51
51–100	61–110	52–101
101–500	111–510	102–501
501–1,000	511–1,010	502–1,001
1,001–2,000	1,011–2,010	1,002–2,001

The Department values this time using human resources worker's mean wage of $27.50 per hour.[59] Initial implementation costs in Year 1 were estimated to be $36.5 million ($27.50 per hour × 10 hours × 93,000 contractors plus $27.50 per hour × 1 hour × 396,400 contractors) (Table 9). The Department assumes recurring implementation costs will use one hour of a human resource worker's time per newly affected employee. As stated above, the Department found that the average wage with benefits for a human resources worker is $27.50 per hour. The estimated number of newly affected employees in Year 1 is 222,100 (Table 9). Therefore, total Year 1 recurring implementation costs were estimated to equal $6.1 million ($27.50 × 1 hour × 222,100 employees). The Chamber/IFA asserted that implementation will require the time of multiple employees at various levels within a company and thus a blended wage rate should be used. However, the Department believes a human resources worker is capable of performing the tasks necessary for a contractor to implement the Order and this part, and the Chamber provided no specific basis for computing a blended wage rate.

The Chamber/IFA contended that affected employees were underestimated in the NPRM (as mentioned previously) and that this may cause costs to be underestimated. It expressed concern that the Department's "estimate is based only on consideration of numbers of employees who may currently lack access to 7 days of paid leave, and it ignores the impact on thousands more employees and their employers because current programs offering 7 or more days of leave fail to match other prescriptive details of the proposed rule." The Department's estimate of implementation costs in this Final Rule includes an hour of implementation time for contractors that currently offer 7 or more days of sick leave, *i.e.*, the initial implementation cost. The Department believes the costs associated with changing a paid sick leave policy solely to meet the prescriptive details of the Order and implementing regulations will be minimal, particularly because some contractors likely provide an opportunity to take 7 or more days of paid sick leave in programs for which leave is already permitted for any reason, and that its one-hour estimate is accordingly appropriate.

As noted earlier, the Chamber/IFA also believes affected employees may be underestimated because the analysis assumes workers are working only on Federal contracts. This modeling method was retained in the Final Rule because the number of truly affected employees is unknown. The number of employees sharing work on Federal contracts will impact recurring costs; therefore the Department tried to take into account that this work may be spread over several employees when it estimated the amount of time per affected employee—*i.e.* per affected full-year-on-federal-contract equivalents—necessary for implementation and administrative activities. If this has not been adequately reflected in the time cost estimates, and the costs used instead better represent costs per one worker working exclusively on Federal contracts, then the total costs may be underestimated. Unfortunately, data are not available to determine whether this is true and if so, how much higher costs may be.

Various commenters, including AGC, the Chamber/IFA, TrueBlue, Inc., the American Benefits Council, PSC and Integrated Facility Services, also expressed a general concern that the Department's time estimates were low. For example, TrueBlue, Inc. asserted the time estimates are inaccurate because "[m]aking the necessary procedural, IT infrastructure, and administrative changes needed to accommodate and comply with the proposed rules is complicated, daunting, time-consuming, and leaves any employer open to making potentially costly mistakes." Additionally, the Chamber/IFA expressed a concern that the Department's estimate of the time allotted for implementation is insufficient for the amount of training required in a company to implement this regulation. However, the Department believes that the total hours estimated for implementation by companies, as demonstrated in Table 10 above, adequately covers any training, IT, and administrative time that might be necessary to implement any changes. Indeed, other commenters provided evidence from state and municipality laws that supports the Department's assessment concerning the size of implementation costs. For example, many commenters submitted a form letter that cites research finding that 70 percent of employers in the city of Seattle had experienced no administrative difficulties with implementation.[60] Another report found that in Connecticut almost half of employers reported that the new state law had caused no change in their overall costs.[61] [62] Evidence from state and local laws is discussed in additional detail in the section on "Other Potential Costs."

---

[59] This includes the mean base wage of $18.84 from the OES plus benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's ECEC data. OES data available at: *http://www.bls.gov/oes/current/oes113121.htm.*

The Department has carefully reviewed the comments suggesting its implementation costs estimate in the NPRM was too low as well as the comments suggesting that the Department's estimate in the NPRM was appropriate. For the reasons described above, the Department has not adjusted the implementation time estimates for this Final Rule.

3. Recurring Administrative Costs

Contractors may incur recurring administrative costs associated with maintaining records of paid sick leave, approving leave, and adjusting scheduling. In the NPRM the Department assumed an HR worker will spend on average an additional fifteen minutes per affected employee annually on administrative costs. We believe these costs will be relatively small because employers already have systems in place and already incur many of these costs for employees who take sick leave. For example, managers may need to adjust scheduling when workers take time off due to illness regardless of whether that sick leave is paid or unpaid. These costs should therefore reflect only the costs associated with the marginal number of days of leave taken due to the implementation of this Final Rule. The additional number of days of leave taken is unknown but estimates tend to be in the 1-to-2 day range. For example, Ahn and Yelowitz (2016) found that paid sick leave results in workers staying home 1.2 more days a year.[63] [64]

Many commenters, including the Chamber/IFA, PSC, American Outdoors Association and the National Roofing Contractors Association asserted the rule would be administratively burdensome and/or that the proposed cost is too low. For example, the Chamber/IFA believes the 15-minute estimate is too low because it does not include time for workers to enter their hours, and the National Roofing Contractors Association asserts that its members are concerned the paid sick leave mandate will disrupt their daily operations.

Other commenters discussed the high cost of tracking hours worked on Federal contracts. For example, SBA Advocacy contended construction industry representatives have represented that segregating covered federal work from non-federal work for the accrual of paid sick leave will be challenging because their employees often work at multiple locations for multiple clients. However, the Department believes that for billing and/or other purposes most businesses already track hours spent on work for different clients on different contracts. For example, hours worked by laborers and mechanics on DBA contracts must already be monitored and reported. SBA Advocacy believes this may be a concern for seasonal recreation businesses which it asserts "often have large numbers of part time workers and operate in remote locations, shifting from covered and non-covered work for multiple days."

Conversely, some commenters provided evidence from state and municipality laws demonstrating that administrative costs will be low. For example, many commenters cited a study of Connecticut's paid sick leave law that found employers "typically found that the administrative burden was minimal." [65] [66] The study authors wrote: "In our fieldwork, some managers noted that it took time and effort to establish mechanisms to track employee hours for those receiving paid sick day coverage for the first time. However, once those mechanisms were in place, the staff required to administer the law was modest." Evidence from state and local laws is discussed in additional detail in the section on "Other Potential Costs." Additionally, some commenters drew upon their own experience as evidence that providing paid sick leave is not overly burdensome to implement. Hawthorne Auto Clinic has 33 years of experience providing sick leave to employees and wrote "[b]ased on our experience, I am confident that other businesses will find it simple to implement paid sick days policies."

The Department believes most employers already track employees' time and thus these costs would be negligible. The Department has also reduced both the frequency with which contractors must calculate covered employees' accrued paid sick leave, and the frequency with which contractors must inform covered employees of the paid sick leave they have accrued, as explained in the discussion of subpart A above. Therefore, the recurring administrative costs of this Final Rule will be lower than the proposed rule. However, despite that, the Department agrees with commenters that these administrative costs may be underestimated and has increased the time estimate from 15 minutes per affected employee to 20 minutes in order to be responsive to comments. The Department would like to emphasize this is the average amount of time per affected employee. Some employees may require more time; for example, employees whose requests are denied might require more administrative effort. However, many employees do not take any sick leave and their costs would be negligible. Based on tabulations of the 2014 National Health Interview Survey (NHIS) data, the Department estimated that 46.9 percent of workers with paid sick leave do not take any sick leave in a year.[67]

---

[60] Romich, Romich, J., Bignell, W., Brazg, T., Johnson, C., Mar, C., Morton, J., & Song, C. (2014). Implementation and Early Outcomes of the City of Seattle Paid Sick and Safe Time Ordinance. University of Washington Publication. Available at *http://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/PSSTOUWReportwAppendices.pdf*.

[61] Appelbaum, E., et al. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Available at: *http://cepr.net/documents/good-for-business-2014–02–21.pdf*.

[62] However, it should be noted that the Connecticut law may be easier to implement since it applies to all workers at a firm. Therefore, it does not necessitate tracking hours on different contracts.

[63] Ahn, T. and Yelowitz, A. (2016). Paid Sick Leave and Absenteeism: The First Evidence from the U.S. Available at: *http://ssrn.com/abstract=2740366*.

[64] Using the ATUS 2011 Leave Module, the Department estimated workers with paid sick leave take on average an additional 2.3 hours of sick leave compared to workers with no paid sick leave annually. Using the National Health Interview Survey (NHIS) the Department found workers with paid sick leave took on average 0.77 more days of sick leave than did workers without paid sick leave.

[65] Appelbaum, E., et al. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Available at: *http://cepr.net/documents/good-for-buisness-2014-02-21.pdf*.

[66] However, it should be noted that the Connecticut law may be easier to implement since it applies to all workers at a firm. Therefore, it does not necessitate tracking hours on different contracts.

The cost of this time is estimated as the mean wage for a human resource worker of $27.50 per hour.[68] The Department estimates in Year 1 there will be 222,100 affected employees. Under these assumptions, administrative costs in Year 1 will total $2.0 million ($27.50 × (20 minutes/60 minutes) × 222,100 employees). Although these costs are relatively small in Year 1, they will occur annually and thus be a significant share of costs in the long run.

Some commenters, including the Chamber/IFA, argued this wage is inappropriate. However, the Chamber did not provide any evidence for what a more appropriate wage rate would be. Additionally, as noted earlier, the Chamber/IFA believes affected employees may be underestimated because we assume employees are working exclusively on Federal contracts. As noted in the section on implementation costs, because the number of truly affected employees is unknown, the Department considered costs related to the equivalent of one employee working exclusively on Federal contracts.

4. Projected Costs

Table 11 shows estimated costs for each of the first 10 years as well as average annualized costs over the same period. Regulatory familiarization and initial implementation costs will only accrue in Year 1. Recurring implementation costs are incurred over the first 5 years since the Department has estimated it will take five years for the universe of covered contracts to become "new." Recurring administrative costs accrue in all years. The annual administrative cost increases until Year 5 because the number of affected employees increases during this period. After Year 5, recurring administrative costs level off, with only a small increase over time to reflect employment growth.

When estimating projected costs the Department employed the same method used for Year 1 but used projected numbers of affected employees. The employment growth rate was calculated as the geometric annual growth rate based on the ten-year employment projection for 2014 to 2024 from BLS' Employment Projections program. Real wages for human resource managers and human resources assistants (except payroll and timekeeping) were assumed to remain constant over this ten-year period.

TABLE 11—DIRECT EMPLOYER COSTS IN YEARS 1 THROUGH 10

[Millions of 2015$]

Year/discount rate	Regulatory famil. costs	Initial implementation costs	Recurring implementation costs [a]	Recurring administrative costs	Total
Years 1 through 10					
Year 1	$80.4	$36.5	$6.1	$2.0	$125.0
Year 2	0.0	0.0	6.4	4.2	10.5
Year 3	0.0	0.0	6.4	6.3	12.7
Year 4	0.0	0.0	6.4	8.4	14.8
Year 5	0.0	0.0	6.4	10.5	16.9
Year 6	0.0	0.0	0.0	10.6	10.6
Year 7	0.0	0.0	0.0	10.7	10.7
Year 8	0.0	0.0	0.0	10.8	10.8
Year 9	0.0	0.0	0.0	10.9	10.9
Year 10	0.0	0.0	0.0	11.0	11.0
Average Annualized Amounts					
3% discount rate	9.2	4.2	3.4	8.3	25.0
7% discount rate	10.7	4.9	3.7	8.0	27.3

[a] Recurring implementation costs are incurred for the first 5 years as since the Department has estimated it will take five years for the universe of possibly covered contracts to become "new."

5. Other Potential Costs

In addition to the costs discussed above, there may be additional costs that have not been quantified. These include the following potential costs included in the NPRM: Costs to consumers, reduced production, and replacement costs. Based on similar rules in states and municipalities, the Department expects these costs to be small.[69] After discussing these costs we then discuss additional costs mentioned by commenters, including: Costs to seasonal businesses, reduced profits, reduced benefits, bonuses, or wages, reduced employment, absenteeism, and competitive disadvantage.

Consumer Costs

The relevant consumer is the Federal government. If the rulemaking increases employers' costs, and contractors pass along part or all of the increased cost to the government, in the form of higher contract prices, then government expenditures may rise (though, as discussed later, benefits of the Executive Order are expected to accompany any such increase in expenditures). Because direct costs to employers and transfers are relatively small compared to Federal covered contract expenditures, the Department believes that any potential increase in contract prices will be negligible. In FY2015, Federal expenditures for covered contracting service firms were $286.4 billion (Table 3). Employer costs and transfers (estimated below) in Year 5 (the year when all employees are affected) are estimated to be $473.6 million. Therefore, employer costs are 0.17

---

[67] However, due to the additional uses allowed under this rulemaking and the provisions to prevent retaliation, use may be expanded due to this Final Rule.

[68] This includes the mean base wage of $18.84 from the 2015 OES plus benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's ECEC data. OES data available at: *http://www.bls.gov/oes/current/oes113121.htm.*

[69] *See: http://www.dol.gov/featured/PaidLeave/get-the-facts-sicktime.pdf.*

percent of contracting revenue (assuming no growth in contracting expenditures and without accounting for the benefits of the Final Rule).

Concerning prices, the National Roofing Contractors Association wrote that paid sick leave costs "must be factored into the bids submitted for any federal contract and will add further to the already high degree of uncertainty to the bidding process." MCAA believes firms will "have to add high price contingencies to their bids or proposals to cover these new contingent risks." However, a study of Connecticut's paid sick leave law, cited by many commenters, found only 15.5 percent of employers reported increased prices.[70] Similarly, in San Francisco 10.9 percent of firms raised prices in response to paid sick leave.[71] Therefore, there is some evidence that increased costs will be passed on to the government in higher contract prices. However, the Department expects this price increase to be low because evidence shows a minority of firms raised prices and the cost of the rulemaking is a very small share of these firms' revenues.

Some commenters believe this rulemaking will reduce the efficiency of government contracting by increasing government contract prices or stifling competition. Roffman Horvitz PLC wrote "[t]he proposed regulation creates additional overhead contract costs that new government contractors simply cannot bear to absorb, creating further barriers to entry in the market." The National Roofing Contractors Association spoke with members who reported "they would consider not bidding at all on federal contracts" due to this rulemaking. Conversely, the Washington Center for Equitable Growth cited research evaluating Washington, DC's Accrued Sick and Safe Leave Act of 2008 that found that "[i]n 2013, the Office of the District of Columbia Auditor looked at the effects of the requirement and found no evidence that businesses opted to leave Washington or that it prevented new business formation in the District." [72] [73] In order for competition to be stifled, costs would have to increase (and outweigh benefits) and not be passed along to the government. As noted above, we believe costs will be small on average and will be accompanied by benefits, and some costs will be passed along to the government, leaving little reason to restrain the vast majority of bidders.

Production Costs

If the number of days of sick leave taken remains unchanged by the Final Rule, then production should not be affected by the rule. However, employees may take more sick days if the number of compensated sick days available increases or the scope of eligible reasons to take sick leave broadens; it is via this path that the Final Rule might result in production costs to employers. There is evidence that workers may take additional days of leave under this rulemaking.[74]

If these additional hours are not covered by a replacement worker, then the employer incurs costs associated with this lost production and the employee receives benefits associated with the paid sick leave (expressed as a transfer from employer to employee in this rule). Payroll remains the same but the worker's production is lost. If a worker's productivity is equal to his or her wage, then the cost is equivalent to income paid to the worker in wages while on sick leave.

If employers bring in workers to cover these lost hours of production, then the additional cost (*i.e.,* the replacement worker's wages) is offset because the employer does not lose the production attributed to the sick worker. In both cases, the employer incurs net costs equivalent to one worker's wage or productivity; either the employer pays the sick worker, but loses the sick worker's productivity, or the employer pays both the sick worker and the replacement worker, but does not lose the sick worker's productivity. In both cases, costs and benefits should offset each other, to the extent that workers are paid according to their marginal productivity, and the productivity of the replacement worker matches that of the original worker. Although these assumptions are not likely to be exactly met, conceptually small deviations from the assumptions should result in only small deviations of net costs or benefits. In addition, there are no data available on which to estimate these net costs or benefits.

Replacement Costs

As demonstrated above, if the worker who takes sick leave is temporarily replaced by another worker, the marginal payroll cost of the additional worker is offset by the productivity of the replacement worker. Therefore, the Department estimates there will be very few additional costs associated with bringing in workers to cover work normally performed by workers on sick leave (in addition to the cost of paying the sick worker). However, there are four channels through which additional costs may be incurred if firms bring in replacement workers. These all stem from the assumption that workers take more leave when paid sick leave is provided. These costs will depend on whether firms hire new workers or reschedule current workers.

First, there are managerial costs associated with rescheduling; these are included in administrative costs. Second, if replacement workers are hired, then there may be associated hiring costs. The Department expects this cost to be small. A 2010 survey of employers providing paid sick days in San Francisco found 8.4 percent reported "always" or "frequently" hiring a replacement for a sick worker and 23.6 percent saying they "rarely" hire replacement workers.[75] Third, if other workers are scheduled at their overtime wage rate, then there may be some additional cost associated with the overtime premium. Once again, the Department expects this cost to be small. Many commenters cited a study of Connecticut's paid sick leave law that found 13.7 percent of employers had other workers work overtime to cover absences as the primary method of covering absences.[76] Fourth, if the replacement worker is paid the same amount as the absent worker but is less productive, then there may be some production costs.

Some commenters disagreed with the Department's analysis in the previous paragraph as it was depicted in the NPRM. For example, the National Roofing Contractors Association asserted that the Department's assumption means that a replacement worker would have to do the job of two people for this rationale to make sense. This was not an assumption made by the Department. The point of the discussion in the NPRM and above is that if an employer pays another worker to replace the sick worker, that employer does not incur any costs in addition to the transfers accounted for elsewhere in the Regulatory Impact Analysis section.

---

[70] Appelbaum, E., et al. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Available at: *http://cepr.net/documents/good-for-buisness-2014-02-21.pdf.*

[71] Drago, R. and Lovell, V. (2011). San Francisco's Paid Sick Leave Ordinance: Outcomes for Employers and Employees. Institute for Women's Policy Research.

[72] Branche, Y. (2013). Audit of the Accrued Sick and Safe Leave Act of 2008. Washington, DC: Office of the District of Colombia Auditor. Available at: *http://dcauditor.org/sites/default/files/DCA092013.pdf.*

[73] Impacts of this rule may differ from DC because this law may result in employers having to distinguish between covered and non-covered workers. Additionally, the DC law required less paid sick leave, one hour for every 37 to 87 hours, depending on the size of the firm.

[74] Data suggest that workers may take more sick leave when it is paid. Using the ATUS 2011 Leave Module, the Department estimated workers with paid sick leave take on average an additional 2.3 hours of sick leave annually. Using the NHIS the Department found workers with paid sick leave took on average 0.77 more days of sick leave. Workers who already have paid sick leave may also expand their usage because of the additional uses allowed under this rulemaking and the provisions to prevent retaliation.

[75] Drago, R. and Lovell, V. (2011). San Francisco's Paid Sick Leave Ordinance: Outcomes for Employers and Employees. Institute for Women's Policy Research.

[76] Appelbaum, E., et al. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Page 11. Available at: *http://cepr.net/documents/good-for-buisness-2014-02-21.pdf.*

Reduced Profits

Some commenters argued profits will be hurt. However, after the Seattle law took effect a majority of employers reported profitability was unchanged.[77] The Institute for Women's Policy Research cited the 2011 IWPR report on San Francisco's Paid Sick Leave Ordinance, which found that "Six of seven employers reported no negative effect on profitability after the law's implementation." [78] In part, this may be because costs were passed through to consumers or wages or other benefits to workers were reduced. However, the same survey found that only 10.9 percent of firms raised prices (as discussed above) and "[s]ix out of seven workers reported that their employer did not reduce raises, bonuses, or other benefits to implement" (benefits, bonuses, and wages are discussed below).[79] Therefore, it seems employers make adjustments through multiple channels to account for any increased costs.

Reduction in Benefits, Bonuses, and Wages

Some commenters believe this benefit would be offset by reductions in other benefits, bonuses, or pay. A commenter from New Jersey wrote that requiring paid sick leave will "force them to look at alternatives to reduce other costs—reduce vacation eligibility or other types of benefits OR reducing staff or hours worked." We believe these impacts will be negligible. A study of Connecticut's paid sick leave law found only one percent of establishments reduced wages within the time period of the analysis.[80] And as noted in the survey discussed above, according to workers, employers generally did not reduce benefits, raises, or bonuses as a result of the San Francisco Ordinance.

Reduction in Employment

Some commenters believe this benefit will hurt employment or hours. One small business owner believes this rule will cause lay-offs. A manager of a seasonal recreational business believes the increased costs will result in employment cuts, in particular for youth. The Department believes any impact on employment will be small due to case studies of paid sick leave and the small size of costs relative to these contractors' payroll and revenue. For example, a study of Connecticut's paid sick leave law found that approximately 90 percent of employers did not reduce employee hours.[81] Furthermore, in Seattle, job growth was stronger in 2013 after the Ordinance went into effect than it was in the first part of 2012. The Department does, however, account for some decreased hours in the model in the DWL calculation (section V.C.iv.).[82]

Work Absences

Some commenters expressed concern that the rulemaking will increase workers' absences. This is especially a concern to employers when the absences are considered abuse of the policy. AGC asserted its member contractors working in Massachusetts have noticed questionable uses of paid sick leave since the state adopted a paid leave mandate. They also cited research by Ahn and Yelowitz (2016) [83] showing that paid sick leave increases absenteeism by 1.2 days a year.[84] They also noted that absenteeism in the construction industry causes unique challenges because cost and schedule concerns are highly dependent on labor productivity. This issue is discussed in more detail in section V.C.vii.

The Department agrees the rulemaking will likely increase days away from the office because workers may stay home more often when sick or to care for sick family members. This is an intended result of the rulemaking, and the Department expects the benefits from increased access to paid sick leave to partially offset increased costs. Moreover, there is little evidence of employees abusing paid sick leave.

According to a study of Connecticut's paid sick leave law, managers commented that "the level of abuse was not only low, but [had] not changed at all after the state law's implementation." [85] The Department also believes abuse is uncommon because most workers with paid sick leave do not take all of their paid sick days and a significant portion of workers do not take any paid sick leave.[86]

Competitive Disadvantage

According to the American Benefits Council:

> Providing mandatory paid leave will increase costs of doing business, but the requirements—and increased costs—apply only to those businesses providing services to the federal government. A business operating in a federal building must provide the paid leave; its competitor down the street need not. This puts the business in the federal building at a financial disadvantage. It cannot simply request that the government pay for the increased costs. In these types of contracts, the contractor remits a portion of its proceeds to the government. The federal building business can increase its prices (although some contracts with the government limit the business's ability to do so) and hope that the price increase does not drive customers away. The federal building business can cut costs in other ways—decreasing staffing levels or reducing service options. Or, the federal building business can decide to cease operating in a federal building.

---

[77] Romich, J., et al. (2014). Implementation and Early Outcomes of the City of Seattle Paid Sick and Safe Time Ordinance. University of Washington. Available at: *http://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/PSSTOUWReportwAppendices.pdf.*

[78] Drago, R. and Lovell, V. (2011). San Francisco's Paid Sick Leave Ordinance: Outcomes for Employers and Employees. Institute for Women's Policy Research.

[79] Drago, R. and Lovell, V. (2011). San Francisco's Paid Sick Leave Ordinance: Outcomes for Employers and Employees. Institute for Women's Policy Research.

[80] Appelbaum, E., et al. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Page 13. Available at: *http://cepr.net/documents/good-for-buisness-2014-&-02-21.pdf.*

[81] Appelbaum, E., et al. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Page 13. Available at: *http://cepr.net/documents/good-for-buisness-2014-02-21.pdf.*

[82] Main Street Alliance of Washington. (2013). Paid Sick Days and the Seattle Economy: Job Growth and Business Formation at the 1-year Anniversary of Seattle's Paid Sick and Safe Leave Law. Available at: *http://www.seattle.gov/Documents/Departments/CivilRights/psst-report-main_street_alliance.pdf.*

[83] Ahn, T. and Yelowitz, A. (2016). Paid Sick Leave and Absenteeism: The First Evidence from the U.S. Available at: *http://ssrn.com/abstract=2740366.*

[84] The authors measure "absenteeism" as the amount of sick leave taken from one's job, regardless of the reason. The Department chose to not use this result to calculate quantitative estimates of impacts for various reasons, including that the estimate is based on administrative workers and thus may not be applicable to all workers.

[85] Appelbaum, E., et al. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Available at: *http://cepr.net/documents/good-for-buisness-2014-02-21.pdf.*

[86] Based on tabulations of the 2014 NHIS, the Department estimated that 46.9 percent of workers with paid sick leave do not take any sick leave in a year.

The Department reiterates that the costs of this Final Rule are expected to be small relative to payroll and revenue. Therefore, even if the contractor incurs additional costs they should be incorporated by small adjustments to prices, profits, wages, or hours (as discussed above). Additionally, because the Final Rule only applies to new contracts, the bidder can potentially restructure its contractual relationship in order to be able to incur the potentially higher costs without making these adjustments. The Department believes contractors will find the most efficient combination of adjustments.

The Chamber/IFA considered competitive disadvantage from a different angle: "The proposed rule may raise costs for contractors who need to create new or modify existing paid sick leave programs and put them at a contract bidding disadvantage compared to firms that already have such plans in place." However, it is the contractor who may presently avoid the costs of providing sick leave to employees that has a competitive advantage; requiring contractors to provide paid sick leave removes that advantage. Indeed, as the U.S. Women's Chamber of Commerce commented: "Requiring more businesses to provide paid sick leave will help level the playing field for those business owners who are doing the right thing for their workers."

DLA Piper asked whether the Department considered the impact of the proposed rule on commercial item contractors and barriers to participation. As an initial matter, the Department recognizes that some commercial items contracts may be covered by the Executive Order and part 13 because they cover contracts covered by the SCA, which may apply in certain circumstances to contracts for commercial services. *See, e.g.,* 48 CFR 52.212–5(c). However, a significant portion of commercial items contracts will not be covered by the Order and part 13. First, the paid sick leave requirements do not apply to commercial supply contracts subject to the Walsh-Healey Public Contracts Act. Second, unless covered under one of the other contract categories in the Order (such as concession contracts), the Final Rule will not apply to contracts for services that are specifically exempted from coverage under the SCA, including those commercial services listed in 29 CFR 4.123(e). For the reasons discussed above, the Department's conclusions regarding the benefits and costs associated with other contractors implementing the Order are similarly applicable to any commercial items contracts subject to the Order and this Final Rule.

iii. Transfer Payments

1. Calculating Transfer Payments

To calculate transfer payments, the Department has assumed solely for purposes of discussion and ease of presentation that no offsetting cost- and productivity-related benefits will be realized as a result of the Executive Order and this Final Rule. As discussed in section V.C.v., however, numerous benefits of providing paid sick leave under the Executive Order can be expected to accompany the transfer payments and other costs discussed above.

The most important factor in determining transfer payments is the number of additional days of paid sick leave for which employees will be compensated. In order to estimate transfer payments the Department needed to:

- Assign a monetary value to these days of paid sick leave taken; and
- Determine what share of the additional 968,000 days of paid sick leave accrued (calculated above in section V.B.iv.) will be taken.

The Final Rule requires contractors to provide an employee the same pay and benefits for hours of paid sick leave used that the employee would have received had he been working. Thus, the Department needed to estimate both a base hourly wage for affected employees and a base hourly benefit rate. The Department assumed an 8-hour work day to place a monetary value on the transfer payment associated with a day of paid sick leave used. The Department used data from the 2015 CPS to estimate base hourly wage rates by industry and full-time status. The SCA nationwide fringe benefit rate, which applies to most contracts covered by the SCA, currently is $4.27 per hour. Because many of the contracts covered by the Executive Order will be subject to the SCA, and many employees performing on or in connection with contracts covered by the Executive Order but not covered by the SCA will nonetheless be performing service-related work similar in character to work performed by SCA-covered service employees, the Department estimated that most affected employees will average a base hourly benefit rate of $4.27. The exception is the construction industry, for which the Department used the benefits to wage ratio from the ECEC for the construction industry (1.45) because employees in the construction industry will be performing on or in connection with DBA contracts rather than SCA contracts.[87]

Although the Executive Order will allow employees to accrue up to 56 hours of paid sick leave annually, many employees will not use all paid sick leave that they accrue (and many others will not work a sufficient number of hours on covered contracts to accrue 56 hours of paid sick leave in an accrual year). If employees take less than the full amount of paid sick leave accrued, then transfer payments should include only some of the additional days accrued. The Department expects employees on average to use fewer days than allocated. To estimate the share of accrued days employees will use, the Department used data from the 2015 NCS and ECEC by industry (provided by the BLS and reported in Table 12). While the numbers vary by industry, over all industries employees with paid sick leave take an average of 4 days of sick leave annually.[88] Employees with access to a fixed number of paid sick leave days per year accrued an average of 8 days annually. Dividing the average days of paid sick leave taken by the average days of paid sick leave accrued annually, the Department estimated that employees use on average 50 percent of days allotted. This may be an overestimate in Year 1 when employees may have fewer days available since they will not start to accrue paid sick leave until they commence work on a covered contract, nor will they carry over any days from the previous year.[89] This could also be an underestimate because the additional uses allowed under this rulemaking and the provisions to prevent retaliation, may result in expanded use for employees who already have paid sick leave.

Case studies demonstrate that not all paid sick days will be taken. In a comment by the Institute for Women's Policy Research, the organization cited the 2011 IWPR report on San Francisco's Paid Sick Leave Ordinance that found that the average worker used only three paid sick days per year and 25 percent used no paid sick days at all.[90]

---

[87] For full-time construction workers benefits are estimated to be $10.06 per hour (45 percent of $22.47). For part-time construction workers benefits are estimated to be $7.94 per hour (45 percent of $17.74).

[88] BLS calculated this using the ECEC data based on workers in paid sick leave plans where a cost was incurred by the employer in the reference period.

[89] This assumes employees with sick leave in the NCS are allowed to carry over sick days. The larger the share of these employees without carryover privileges, the more appropriate the number is for Year 1 and the less appropriate it is for future years.

[90] Drago, R. and Lovell, V. (2011). San Francisco's Paid Sick Leave Ordinance: Outcomes for

TABLE 12—RATIO OF DAYS OF SICK LEAVE AVAILABLE THAT ARE TAKEN

Industry	Average number of days [a]		Ratio of days available taken	Total additional days of paid sick leave	
	Available	Taken		Available	Taken
Agriculture, forestry, fishing [b]	....	....	0.50	349	174
Mining	27	2	0.07	162	12
Utilities	21	6	0.29	1,823	521
Construction	6	2	0.33	111,849	37,283
Manufacturing	8	3	0.38	29,961	11,235
Wholesale trade	8	3	0.38	526	197
Retail trade	6	2	0.33	70,740	23,580
Transportation and warehousing	9	4	0.44	70,509	31,337
Information	9	4	0.44	7,231	3,214
Finance and insurance	12	5	0.42	9,130	3,804
Real estate and rental and leasing	6	4	0.67	376	251
Professional, scientific, and	8	4	0.50	254,562	127,281
Management of companies and	12	4	0.33	0	0
Administrative and waste services	8	2	0.25	263,752	65,938
Educational services	11	5	0.45	10,488	4,767
Health care and social assistance	8	4	0.50	79,304	39,652
Arts, entertainment, and recreation	6	3	0.50	9,231	4,616
Accommodation and food services	6	2	0.33	39,016	13,005
Other services	8	3	0.38	9,007	3,378
Total private [c]	8	4	0.50	968,017	370,246

[a] For this Final Rule the BLS provided this breakdown using NCS and ECEC data for industries with sufficient observations to meet their publication criteria.

[b] NCS does not include information for this industry. Used average across all private employees.

[c] Total additional days of paid sick leave taken is not equal to the number of paid sick leave days available multiplied by the share of 50 percent. This is because the analysis was conducted at the industry level and days were aggregated to estimate the total. Due to rounding by the BLS of the number of days, the aggregated total number of days taken and the total using aggregated number of days available and taken differ.

Therefore, of the 968,000 days of additional paid sick leave accrued, 370,200 days are estimated to be taken and result in transfer payments (see Table 12). Using wage data by industry results in Year 1 transfer payments of $85.5 million (Table 13). This is 0.03 percent of revenue from Federal contracts for these contractors (since many covered contractors garner revenue from private work, the transfer payment estimate is almost certainly a lower percentage of their total revenues). If all days of paid sick leave were used, transfers would be $214.4 million in Year 1 or 0.07 percent of Federal contracting revenues.

TABLE 13—TRANSFER PAYMENTS IN YEAR 1

Industry	NAICS	Transfer ($1,000s)	Covered contracting revenue (millions) [a]	Transfer as share of contracting revenue (percent)
Agriculture, forestry, fishing and	11	$28	$339	0.01
Mining	21	3	105	0.00
Utilities	22	142	3,043	0.00
Construction	23	9,565	24,194	0.04
Manufacturing	31–33	2,558	20,703	0.01
Wholesale trade	42	44	254	0.02
Retail trade	44–45	3,869	1,263	0.31
Transportation and warehousing	48–49	6,501	11,005	0.06
Information	51	793	8,146	0.01
Finance and insurance	52	981	18,734	0.01
Real estate and rental and leasing	53	55	1,174	0.00
Professional, scientific, and	54	36,531	136,870	0.03
Management of companies and	55	0	0	0.01
Administrative and waste services	56	11,660	29,781	0.04
Educational services	61	1,040	4,290	0.02
Health care and social assistance	62	8,438	22,845	0.04
Arts, entertainment, and recreation	71	816	103	0.79
Accommodation and food services	72	1,870	1,161	0.16
Other services	81	615	2,387	0.03

Employers and Employees. Institute for Women's Policy Research.

TABLE 13—TRANSFER PAYMENTS IN YEAR 1—Continued

Industry	NAICS	Transfer ($1,000s)	Covered contracting revenue (millions) [a]	Transfer as share of contracting revenue (percent)
Total private		85,508	286,396	0.03

[a] Source: *USASpending.gov.* Contracting expenditures for covered contracts.

To estimate transfers beyond year 1, the Department projected employment and wage growth. The employment growth rate was calculated as the geometric annual growth rate based on the ten-year employment projection for 2014 to 2024 from BLS' (as discussed in section V.B.iv.). The Department calculated the average annual geometric growth rate in median nominal wages from CPS data between 2005 and 2015. The geometric growth rate is the constant annual growth rate that when compounded yields the last historical year's wage. The CPI–U was then used to convert this nominal growth rate to a real growth rate.

The real growth rate for benefit payments was calculated using the geometric growth rate in nominal SCA benefit rates between 2006 and 2015 and converted to a real rate using the CPI–U.[91] For projected transfers the Department employed the same method used for Year 1 but used the projected number of employees and wages. Table 14 shows projected transfers through Year 10. It also contains average annualized transfers using both 3 percent and 7 percent discount rates.

If some contracts last longer than 5 years, then not all contracts will be covered by Year 5 and transfers will accrue more slowly. In general, the Department believes most contracts will renew within five years but notes that some contracts, such as contracts for concessions and operations on federal lands may last longer than five years.

TABLE 14—TRANSFERS IN YEARS 1 THROUGH 10

Year/discount rate	Transfers (millions of 2015$)
Years 1 through 10	
Year 1	$85.5
Year 2	176.2
Year 3	268.3
Year 4	361.8
Year 5	456.7
Year 6	464.4
Year 7	472.2
Year 8	480.2
Year 9	488.4
Year 10	496.8
Average Annualized Amounts	
3% discount rate	364.1
7% discount rate	349.6

2. Additional Considerations

The Department based its method of calculating transfers on the number of employees working exclusively on Federal contracts. To the extent that Federal contract work is split between employees, these transfer estimates may be over- or underestimates. The current method attributes all hours worked on a Federal contract to one employee. For example, if that employee currently receives five paid sick leave days per year, he or she would receive a transfer of two additional days of paid sick leave. If instead half this work was completed by one employee and half by another employee, the Executive Order would require that each receive 3.5 sick days per year; however, since each employee already receives 5 days of paid sick leave, there would be no incremental transfer. The Department estimated that the maximum size of the overestimate due to the assumption of employees working exclusively on Federal contracts is $27.0 million in Year 1 (31.6 percent of the $85.5 million in total transfers).[92] Conversely, if this work is spread across multiple employees, and these employees currently do not receive any paid sick leave, and the propensity to take the paid sick leave diminishes with the number of days, then this methodology could result in an underestimate of transfers.

Another consideration is that some of the transfers may be reduced by employer responses to the rule. Employers may reduce vacation time, reduce wages, or increase health insurance premiums in order to diminish some of their increased costs. (These outcomes may be unlikely in the short run due to stickiness of compensation.) Employers may also reallocate days of leave to keep total benefits the same. For example, an employer that used to provide 5 sick days and 5 vacation days could now provide 5 sick days, 3 vacation days, and 2 days that can be used for any purpose. This would leave exactly zero employer-employee transfer because an employee could take 7 days paid sick leave if necessary but could still only take a maximum of 5 days of vacation. (Provided the policy met the requirements of section 2 of the Order and this Final Rule and employees could use accrued paid sick leave and the 2 "any-purpose" days for the same purposes and under the same conditions as described in the Order and this Final Rule, the employer would be in compliance and transfers would be zero).

Some commenters expressed concern that because monitoring hours worked on Federal contracts will be very burdensome employers may provide paid sick leave to all workers for all hours worked in order to reduce the monitoring costs. For example, the ERISA Industry Committee asserted that many large employers are likely to apply the Executive Order's requirements to a larger group than what is mandated by the Executive Order to reduce the risk of excluding covered employees. However, benefits potentially provided to workers on non-covered contracts are not quantified.

Transfer payments were calculated assuming paid sick leave is accrued for all 52 weeks of the year. If workers take paid sick leave or other leave, and do not accrue hours while on leave, then transfers may be slightly lower. The impact for full-time employees will be negligible. An employee who works 40 hours per week will reach the 56 hour cap after 42 weeks of work. Therefore, they will reach the cap regardless of whether paid sick leave is accrued while on leave. For part-time employees, hours of accrual are slightly overestimated. For example, an employee who works 25 hours per week will accrue 43.3 hours of paid sick leave annually (assuming no leave). If this worker takes a week of sick leave, and paid sick leave is not accrued during this week, then they will accrue 0.8 fewer hours of paid sick leave (25/30). If this worker also took two weeks of vacation, they would accrue 1.7 fewer hours of paid sick leave ((25 × 2)/30).

---

[91] The Department calculated how estimates would change if we used the GDP deflator instead of the CPI–U to adjust wages and benefits. The differences are small. Average annualized transfers would increase by 0.89% from $349.6 million to $352.7 (costs would not change).

[92] The maximum possible overestimate was calculated by eliminating transfers associated with employees who currently receive any paid sick leave.

iv. Deadweight Loss

Deadweight loss (DWL) occurs when a market operates at less than optimal equilibrium output. This typically results from an intervention that sets, in the case of a labor market, compensation above the equilibrium level.[93] The higher cost of labor leads to a decrease in the total number of labor hours that are purchased on the market. DWL is a function of the difference between the compensation the employers were willing to pay for the hours lost and the compensation employees were willing to take for those hours. In other words, DWL represents the total loss in economic surplus resulting from a "wedge" between the employer's willingness to pay and the employee's willingness to accept work arising from the Final Rule. DWL may vary in magnitude depending on market parameters, but it is typically small when wage changes are small or when labor supply and labor demand are relatively inelastic with respect to compensation.

The DWL resulting from this Final Rule was estimated based on the average decrease in hours worked and increase in average hourly compensation (again, without accounting for offsetting benefits of the Executive Order and the Final Rule). As the cost of labor rises due to the requirement to pay sick leave, the quantity of labor demanded decreases, which results in fewer hours worked. To calculate the DWL, the annual increase in compensation (*i.e.*, transfers per worker) was divided by the total number of hours worked to estimate the average hourly increase in compensation.[94] Using the estimated percent change in compensation and the elasticity of labor demand with respect to wage (as a proxy for compensation), the Department estimated the percent decrease in average hours per employee.[95] To estimate the percent decrease in average hourly wages associated with labor supply, the Department used the decrease in average hours per employee and the elasticity of labor supply with respect to wage (again, as a proxy for compensation).[96]

Using these values the Department calculated DWL per affected employee (Table 15). This was multiplied by the number of affected employees to estimate total DWL; $182,900 in Year 1. Projected DWL is shown in Table 16. Average annualized DWL during the first ten years the rule is in effect is estimated to be $734,500.

TABLE 15—DEADWEIGHT LOSS CALCULATION

Industry	Average base hourly wage	Percent change in wage from base[a]		Average annual hours per employee	Percent change in hours	DWL per affected employee	Affected employees	Total DWL
		Change in Ld wage	Change in Ls wage					
Ag., forestry, fish. and hunting	$15.96	1.48	−1.98	2,182	−0.30	$1.79	58	$104
Mining	28.79	0.12	−0.16	2,473	−0.02	0.02	39	1
Utilities	29.67	0.75	−1.00	2,172	−0.15	0.84	294	247
Construction	22.06	1.01	−1.35	2,126	−0.20	1.12	20,280	22,728
Manufacturing	24.16	0.78	−1.04	2,157	−0.16	0.74	6,372	4,718
Wholesale trade	23.59	0.67	−0.89	2,151	−0.13	0.53	133	71
Retail trade	16.14	0.82	−1.10	1,804	−0.16	0.46	16,709	7,690
Transportation and warehousing	21.56	0.90	−1.20	2,165	−0.18	0.89	15,609	13,826
Information	27.13	0.61	−0.82	1,971	−0.12	0.47	2,587	1,218
Finance and insurance	28.10	0.69	−0.93	2,083	−0.14	0.66	2,484	1,636
Real estate and rental and leasing	23.17	1.38	−1.85	1,949	−0.28	2.02	95	192
Prof., sci., and tech. services	31.73	0.83	−1.11	2,044	−0.17	1.05	72,713	76,026
Management of companies	27.40	0.47	−0.62	2,104	−0.09	0.29	0	0
Administrative and waste services	17.67	0.68	−0.91	1,957	−0.14	0.37	50,648	18,913
Educational services	22.78	1.26	−1.68	1,601	−0.25	1.36	2,456	3,329
Health care and social assistance	22.33	1.10	−1.47	1,877	−0.22	1.19	19,587	23,260
Arts, entertainment, and recreation	17.40	1.33	−1.77	1,680	−0.27	1.21	2,184	2,634
Accommodation and food services	13.52	1.08	−1.44	1,721	−0.22	0.63	7,718	4,889
Other services	18.33	0.95	−1.26	1,803	−0.19	0.69	2,092	1,451
Total private	....	....	....	....	....	....	222,059	182,934

[a] This is the change in the wage rate associated with the labor supply (Ls) or labor demand (Ld) curve and the new level of hours.

---

[93] The estimate of DWL assumes the market meets the theoretical conditions for an efficient market in the absence of this intervention (*e.g.*, all conditions of a perfectly competitive market hold: Full information, no barriers to entry, etc.). Since labor markets are generally not perfectly competitive, this estimate is necessarily imprecise.

[94] For the purposes of the DWL calculation, we treat the increase in employee benefits resulting from the paid leave requirement as if it were equivalent to an increase in employees' hourly wage. This is necessary because the parameters needed to evaluate the DWL (*i.e.*, the wage elasticities) are expressed strictly in terms of wages. However, to the extent that employers may replace ("crowd out") some of their employees' wages with the required paid sick benefit, this will result in an overestimate of DWL. (It may also change the nature of the DWL in ways not captured by this numerical analysis.)

[95] An elasticity of −0.2 was used based on the Department's analysis of Lichter, A., Peichl, A., and Siegloch, A. (2014). The Own-Wage Elasticity of Labor Demand: A Meta-Regression Analysis. IZA DP No. 7958.

[96] An elasticity of 0.15 was used based on a literature review and specifically results from Bargain, O., Orsini, K., and Peichl, A. (2011). Labor Supply Elasticities in Europe and the US. IZA DP No. 5820.

TABLE 16—DWL IN YEARS 1 THROUGH 10

Year/discount rate	DWL (millions of 2015$)
Years 1 through 10	
Year 1	$0.18
Year 2	0.38
Year 3	0.57
Year 4	0.77
Year 5	0.96
Year 6	0.98
Year 7	0.99
Year 8	1.00
Year 9	1.01
Year 10	1.03
Average Annualized Amounts	
3% discount rate	0.76
7% discount rate	0.73

v. Benefits

There are a variety of benefits associated with this rule; however, due to data limitations these are not monetized. The following benefits were discussed qualitatively in the NPRM: Improved employee health, improved health of dependents, increased productivity, reduced hiring costs, decreased healthcare expenditures, improved firm profits and decreased government expenditures relative to what would be expected if the rule's costs and transfer impacts were considered in isolation, and job growth. The first part of this section considers these benefits and related comments. The second part of this section considers benefits discussed by commenters that were not included in the benefits section of the NPRM RIA.

1. Benefits Discussed Qualitatively in the NPRM

Improved Employee Health

Multiple studies have shown that paid sick leave greatly reduces the chance of employee injury and/or exposure to illness. When sick employees attend their jobs, they engage in a practice known as "presenteeism." Presenteeism is detrimental to productivity, and increases the probability of workplace injury and illness, resulting in greater employer and employee costs. In one study from the American Journal of Public Health, which many commenters cited, researchers used data from multiple industries (construction, retail, manufacturing, health care, etc.) to show that employees with access to paid sick leave were 28 percent less likely to incur a non-fatal work injury than their counterparts without paid sick leave.[97]

In a similar study, data from the outbreak of the 2009 H1N1 pandemic showed that individuals who were not paid for absences had a 4.4 percentage point greater change of contracting an influenza-type illness than those with sick leave pay (9.2 percent versus 13.6 percent; only the rate for workers without paid leave is statistically significant at the 10 percent level).[98] A study of Connecticut's paid sick leave law, cited by many commenters, found 18.8 percent of employers reported reduced presenteeism and 14.8 percent reported a reduction in spread of illness.[99]

Diminishing presenteeism by providing paid sick leave can be expected to have positive impacts on employee health, as it would reduce the possibility that sick employees could potentially expose their colleagues to infection or disease. Studies have linked the incidence of presenteeism to a lack of paid sick leave. For instance, a 2010 survey found that 37 percent of the working respondents who had paid sick leave, had attended work with a contagious illness.[100] Meanwhile, 55 percent of employees with no paid sick leave had attended work with a contagious illness.[101]

Many commenters discussed the health benefits of paid leave. In particular, commenters stressed the reduction in the spreading of contagious illnesses. The Iowa Main Street Alliance wrote: "Our businesses know that when employees stay home rather than reporting to work sick, their co-workers and customers stay healthy. Preventing the spread of illness in the workplace saves money." Many form letter submissions cited studies demonstrating how paid sick leave reduces the prevalence of presenteeism and prevents spreading illnesses. The first is a national survey that found "87 percent of employers reported that employees had come to work with short-term, easily spread illnesses such as a cold or the flu." [102] The second reported that "people without paid sick time are 1.5 times more likely than people with paid sick time to go to work with a contagious illness like the flu." [103] The third examined Google flu data from 2003 to 2015 and found "that when workers gained access to paid sick days, the number of workers going to work with contagious illnesses decreased, causing infection rates to decrease by up to 20 percent." [104]

Contagious illnesses in industries where employees interact with the public may be especially problematic. One commenter in particular mentioned the Chipotle Mexican Grill case.[105] According to NELP, "[t]he poultry industry receives hundreds of millions of dollars in federal contracts . . . The lack of paid sick leave [in the industry], and the widespread use of putative sick leave policies, often means workers are required to choose between their health and their employment. This has serious implications not only for workers, but may also impact the safety of our food." [106] NELP and the Nebraska Appleseed Center for Law in the Public Interest cited a survey that found 62 percent of workers reported they have gone to work while sick. When asked why they had gone to work sick, 77 percent responded they did not have paid sick leave and needed the money.[107]

---

[97] Asfaw, A, Pana-Cryan, R., and Rosa, R. (2012). Paid Sick Leave and Nonfatal Occupational Injuries. *American Journal of Public Health,* 102(9), e59–e64.

[98] Kumar, S., Quinn, S.C., Kim, K.H., Daniel, L.H., and Freimuth, V.S. (2011) The Impact of Workplace Policies and Other Social Factors on Self-Reported Influenza-like Illness Incidence During the 2009 H1N1 Pandemic. *American Journal of Public Health,* 102(1), 134–140.

[99] Appelbaum, E., et al. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Available at: *http://cepr.net/documents/good-for-buisness-2014-02-21.pdf.*

[100] Smith, T.W. and Kim, J. (2010). Paid Sick Days: Attitude and Experiences. Public Welfare Foundation.

[101] These proportions are suggestive of a difference between employees with and without paid sick leave, but no standard errors or sample sizes were provided to determine if these are statistically significantly different proportions.

[102] Wolters Kluwer Law & Business. (2008). On the Job, But Out of It? CCH Survey Looks At Ill Effects of Sick Employees At Work. Available at: *http://www.cch.com/press/news/2008/20080110h.asp.*

[103] Smith, T.W. and Kim, J. (2010). Paid Sick Days: Attitudes and Experiences. National Opinion Research Center at the University of Chicago Publication.

[104] Pichler, S., and Ziebarth, N.R. (2015). The Pros and Cons of Sick Pay Schemes: Testing for Contagious Presenteeism and Shirking Behavior. Deutsches Institut für Wirtschaftsforschung Publication. Available at: *http://www.diw.de/documents/publikationen/73/diw_01.c.514633.de/dp1509.pdf.*

[105] The commenter did not elaborate but for context, this refers to sick employees attending work which led to two norovirus outbreaks. For more information see: *http://www.cnbc.com/2016/02/08/chipotle-blames-norovirus-outbreaks-on-sick-employees.html.*

[106] However, the Department notes that poultry industry contracts with the Federal government may not be covered by this rulemaking because it does not cover contracts for commercial items subject to the Walsh-Healey Public Contracts Act.

[107] Northwest Arkansas Workers' Justice Center. (2016). Wages and Working Conditions in Arkansas Poultry Plants. Available at: *http://nwawjc.org/poultry-report/.*

Improved Health of Dependents

Another potential positive impact of the Final Rule is its indirect effect on the health of an employee's dependents (particularly children). Paid leave has a substantial impact on parents' ability to care for sick children. One study, using the Baltimore Parenthood Study and multivariate analysis, found parents with paid sick leave or vacation leave were 5.2 times more likely to remain home to care for their sick child.[108] According to a study in San Francisco by the Institute for Women's Policy Research, parents that did not have paid sick leave were more than 20 percentage points more likely to send their children to school while sick (75.9 compared with 53.8).[109] This "child presenteeism" is problematic because these pupils have the potential to expose other students and teachers to the illness, decreasing others' health.

Commenters agreed. Legal Aid Society wrote: "Parents' access to paid sick days can positively impact their children's health and academic success . . . Parents without access to paid sick days are 71% more likely to send an ill child to school or child-care than those parents with access to paid sick days."[110] Legal Aid Society also pointed out that: "Sick children can have a significant effect on spreading contagious illness. A study analyzing the spread of pandemic influenza found that children and teenagers make up nearly 65% of those responsible for infectious flu contacts."[111] They also cited research demonstrating that children recover better from illnesses and injuries when their parents care for them.[112]

The ability to take sick leave to care for individuals equivalent to a family relationship may be especially helpful in the LGBT community. The Williams Institute at the UCLA School of Law noted the rule "would also allow employees to use paid sick leave to care for a partner's children, even when the employee has no legally recognized relationship to the children. This policy is particularly important for LGBT people, who continue to experience unique barriers to establishing parental status or legal custody of a partner's children."

Increased Productivity

As noted earlier, the Department expects the costs of providing paid sick leave under the Executive Order will be accompanied by its benefits. The Department particularly anticipates that contractor costs to provide paid leave will be accompanied by increased employee productivity. This increased productivity will occur through numerous channels, such as improved health, employee retention, and level of effort. When workers attend work while sick they tend to have diminished productivity. Goetzel et al. (2004) found that on-the-job productivity loss due to sickness represented 18 percent to 60 percent of employer costs associated with 10 health conditions.[113]

A strand of economic research, commonly referred to as "efficiency wage" theory, considers how an increase in compensation may be met with greater productivity.[114] To the degree that the Final Rule increases employee compensation it could yield some of the benefits associated with efficiency wages.[115] Efficiency wages may reduce employer costs by reducing turnover, allowing workers to gain more firm-specific human capital that enhances their productivity and reducing the cost of replacing workers. Efficiency wages may also elicit greater effort on the part of workers, making them more effective on the job.[116] A higher wage implies a larger cost of losing one's job; employees will put in more effort in order to reduce the risk of losing the job. This is commonly referred to as the shirking model.[117] Third, efficiency wages may attract higher-quality applicants.

Providing paid sick leave to employees has been associated with decreased job separations. In one 2013 study, the author showed that paid sick leave is associated with a decrease in the probability of job separation of 25 percent.[118] Such a reduction in job separation would increase marginal productivity because new employees have less firm-specific capital (*i.e.,* skills and knowledge that have productive value in their particular company) and thus would require additional supervision and training to match the productivity of former workers.[119] Other research supports the hypothesis that paid leave encourages employees to remain at their respective companies. In a survey of two hundred human resource managers, two-thirds cited family-supportive policies as the single most important factor in attracting and retaining employees.[120] By providing paid sick leave, companies may be able to reduce the firm's turnover rate and increase productivity (and therefore reduce hiring costs, *see* the section on reduced hiring costs below).

Commenters agreed that the rule will increase productivity. Many form letter submissions cited studies demonstrating how paid sick leave improves productivity. The first uses results from the American Productivity Audit to estimate that presenteeism cost the economy $206.6 billion in 2005 (after adjusting for inflation).[121] The second is a survey of human resources executives that found "38 percent reported presenteeism being a problem in their organizations, and 69 percent reported having paid sick time or other paid time off policies in place as measures to prevent this problem." [122] The third is a survey showing that "26 percent of workers without paid time off to see a doctor reported having six or more days in which they were unable to concentrate at work, compared to 17 percent of workers who had such paid time off." [123] The fourth demonstrates that paid sick days "help workers recover and return to work more quickly: Nationally, workers without paid sick days spent more days bedridden due to illness than workers with paid sick days." [124] The last showed that in Jersey City, "businesses that changed their policies to comply with the law reported significant benefits, including a reduction in the number of sick employees coming to work, [and] an increase in productivity." [125]

---

[108] Heymann, S.J., Toomey, S., and Furstenberg, F. (1999) Working Parents: What Factors are involved in Their Ability to Take Time off from Work When Their Children Are Sick? *Archives of Pediatrics and Adolescent Medicine,* 153(8): 870–874.

[109] Drago, R. and Lovell, V. (2011). San Francisco's Paid Sick Leave Ordinance: Outcomes for Employees and Employers. Institute for Women's Policy Research.

[110] Kim, J. and Smith, T.W. (2010). Paid Sick Days: Attitudes and Experiences, National Opinion Research Center At The University Of Chicago. Available at: *http://news.uchicago.edu/static/newsengine/pdf/100621.paid.sick.leave.pdf.*

[111] Beyeler, W.E., Glass, L.M., and Glass, R.J. (2005). National Infrastructure Simulation and Analysis Center, Sandia National Laboratories, Local Mitigation Strategies for Pandemic Influenza. Available at: *http://www.sandia.gov/CasosEngineering/docs/FluMitigationPaperWithFullSOMTables.pdf.*

[112] Chung, P.J. and Schuster, M.A. (2014). Time Off to Care for a Sick Child—Why Family-Leave Policies Matter. *New England Journal of Medicine,* 37(493). Earle, A. and Heymann, J. (2010). Raising The Global Floor: Dismantling The Myth That We Can't Afford Good Working Conditions For Everyone.

[113] Goetzel, R.Z., et al. (2004). Health, Absence, Disability, and Presenteeism Cost Estimates of Certain Physical and Mental Health Conditions Affecting U.S. Employers. *JOEM,* 46(4), 398–412.

[114] Akerlof, G.A. (1982). Labor Contracts as Partial Gift Exchange. *The Quarterly Journal of Economics,* 97(4), 543–569.

[115] As we note elsewhere in this analysis, increased compensation is not guaranteed for all affected workers because some employers may respond to the paid sick leave requirement by reducing other fringe benefits, such as paid vacation, or by decreasing base wages.

[116] Another model of efficiency wages, which is less applicable here, is the adverse selection model in which higher wages raise the quality of the pool of applicants.

[117] Shapiro, C. and Stiglitz, J.E. (1984). Equilibrium Unemployment as a Worker Discipline Device. *The American Economic Review,* 74(3), 433–444.

[118] Hill, H. (2013). Paid Sick Leave and Job Stability. *Work and Occupations,* 40(2), 10.

[119] Argote, L., Insko, C.A., Yovetich, N., and Romero, A.A. (1995). Group Learning Curves: The Effects of Turnover and Task Complexity on Group Performance. *Journal of Applied Social Psychology,* 25(6), 512–529.

Shaw, J.D. (2011). Turnover Rates and Organizational Performance: Review, Critique, and Research Agenda. *Organizational Psychology Review,* 1(3), 187–213.

Dube, A., Lester, T.W., and Reich, M. (2013). Minimum Wage Shocks, Employment Flows and Labor Market Frictions. IRLE Working Paper #149–13.

[120] Williams, J. (2001). Unbending Gender: Why Work and Family Conflict and What to Do About It. Oxford University Press.

[121] Stewart, W.F., Ricci, J.A., Chee, E., and Morganstein, D. (2003). Lost Productive Work Time Costs from Health Conditions in the United States: Results From the American Productivity Audit. *Journal of Occupational and Environmental Medicine,* 45(12), 1234–1246. (Unpublished calculation based on $226 billion annually in lost productivity, 71 percent due to presenteeism.)

Finally, productivity may increase due to the ability to attract more productive employees. Many commenters cited the same Jersey City study, which found that benefits to businesses that changed their policy to adhere to the city's paid sick leave law experienced "an improvement in the quality of job applicants."

Reduced Hiring Costs

By providing paid sick leave, employers may experience lower job turnover, resulting in higher productivity and lower hiring costs, both of which would positively impact profits (the benefit of increased productivity was discussed above and profits are discussed below). Multiple studies demonstrate an inverse relationship between sick leave pay and employee turnover. One 2003 study from the University of Michigan found that when employers in upstate New York implemented a paid sick leave policy, they experienced modest reductions in employee turnover.[126] Lowering employee turnover reduces hiring costs, boosting profitability. Various research shows that firms incur a substantial cost for hiring new employees. A review of 27 case studies found that the median cost of replacing an employee was 21 percent of the employee's annual salary.[127] These costs might be diminished by incorporating paid sick leave into family friendly policies. Even though marginal labor costs may rise when employers provide paid sick leave, the Department expects the new, higher wages will be partially offset by increased productivity, and reduced hiring and training costs.

The potential reduction in turnover is a function of several variables: The current wage, hours worked, turnover rate, industry, and occupation. Additionally, the estimated cost of replacing a separated employee, and providing paid sick leave to an employee, varies significantly based on factors such as industry and geographic region.[128] Therefore, quantifying the potential benefits associated with a decrease in turnover attributed to this Final Rule would require many sources of data and assumptions.

Many commenters agreed that the rule will increase retention and diminish hiring costs. One commenter wrote: "An employer is much more likely to lose their employee when a mother is forced to choose between a job and [her] child, or to have an employee who is struggling to balance the needs of work and childcare." The Main Street Alliance wrote: "The costs of turnover can be high, and many business owners do not fully realize how providing paid sick time can reduce this cost. Employers who begin providing paid sick time often report that employee turnover is reduced, saving them the cost of hiring and training replacements, as well as that of lost productivity while the positions are unfilled." Many commenters submitting a form letter noted that in Jersey City, "businesses that changed their policies to comply with the law reported significant benefits, including . . . a reduction in employee turnover." [129] Many of these same commenters also cited research, noted above, that "shows that an employee is at least 25 percent less likely to voluntarily leave a job when the employee has access to paid sick days." [130] A study of Connecticut's paid sick leave law, cited by many commenters, found 3.3 percent of employers reported reduced employee turnover.[131] However, 10.6 percent reported increased loyalty which may result in additional long-term reductions in turnover.

Some commenters noted the high cost of turnover. The Main Street Alliance wrote: "In middle- and low-wage jobs, turnover costs are estimated to be 16 to 20 percent of workers' annual wages." [132] Commenters submitting a form letter noted, as we did above, that "[a]cross all occupations, median turnover costs are estimated to be 21 percent of workers' annual wages." [133] Additionally, one of the two authors of this study wrote in support of this rulemaking and confirmed the high cost of turnover.

Firm Profits/Earnings

To the extent that productivity increases and turnover and hiring costs are reduced, offering paid sick leave will increase profits relative to what would be expected if the rule's costs and transfers were considered in isolation. Some studies have suggested there may be a positive relationship between paid sick leave and profits. In one such study from 2001, researchers discovered that having a paid sick leave policy had a positive effect on firms' profits.[134] The authors note, however, that efficiency wage theory underpins their empirical result and thus requires compensation to increase, which is not guaranteed to result from this rule because employers may respond to the paid sick leave requirement, where permitted by law, by reducing other fringe benefits, such as paid vacation, or by decreasing base wages. Additionally, even if compensation increases, efficiency wage theory may not apply if the main reason for the improved productivity is a response to the goodwill created by a voluntary increase in compensation offered by an employer.[135] Therefore, it may not be valid to assume that Meyer et al.'s results would be comparable.[136]

---

[122] Wolters Kluwer Law & Business. (2008). On the Job, But Out of It? CCH Survey Looks At Ill Effects of Sick Employees At Work. Available at: *http://www.cch.com/press/news/2008/20080110h.asp.*

[123] Davis, K., Collins, S.R., Doty, M.M., Ho, A., and Holmgren, A.L. (2005). Issue Brief: Health and Productivity among U.S. Workers. The Commonwealth Fund Publication. The Department notes that this study does not provide information to determine whether the point estimate of 26 percent is statistically significantly higher than the 17 percentage point estimate.

[124] Human Impact Partners. (2009). A Health Impact Assessment of the Healthy Families Act of 2009. Available at: *http://www.humanimpact.org/downloads/national-paid-sick-days-hia-report/.*

[125] Lindemann, D. and Britton, D. (2015). Earned Sick Days in Jersey City: A Study of Employers and Employees at Year One. Center for Women and Work at Rutgers, the State University of New Jersey Publication. Available at: *http://cww.rutgers.edu/sites/cww.rutgers.edu/files/documents/working_families/Jersey_City_ESD_Issue_Brief.pdf.*

[126] Baughman, R., Holtz-Eakin, D. and DiNaridi, D. (2002). Productivity and Wage Effects of "Family-Friendly" Fringe Benefits. *International Journal of Manpower,* 24(3), 247–259.

[127] Boushey, H. and Glynn, S. (2012). There are Significant Business Costs to Replacing Employees. Center for American Progress. Available at: *http://www.americanprogress.org/wp-content/uploads/2012/11/CostofTurnover.pdf.*

[128] One 2008 study conducted by professors at San Francisco State University showed that in California providing sick leave to employees in the construction, retail, restaurant, and hotel industries could increase employer's payroll costs by between $299 and $862 per employee annually. Potepan, M.J. (2008). Paid Sick Leave: Access, Costs and Feasibility of Implementation at the State Level. Sacramento State: Center for California Studies.

[129] Lindemann, D. and Britton, D. (2015). Earned Sick Days in Jersey City: A Study of Employers and Employees at Year One. Center for Women and Work at Rutgers, the State University of New Jersey Publication. Available at: *http://cww.rutgers.edu/sites/cww.rutgers.edu/files/documents/working_families/Jersey_City_ESD_Issue_Brief.pdf.*

[130] Hill, H.D. (2013). Paid Sick Leave and Job Stability. Work and Occupations, 40(2), 143–173.

[131] Appelbaum, E., et al. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Available at: *http://cepr.net/documents/good-for-buisness-2014-02-21.pdf.*

[132] Ibid.

[133] Boushey, H. and Glynn, S.J. (2012). There Are Significant Business Costs to Replacing Employees. Center for American Progress Publication. Available at: *http://www.americanprogress.org/wp-content/uploads/2012/11/CostofTurnover.pdf.*

Few commenters discussed increased profits or earnings. The Legal Aid Society reported: "A study published three years after [San Francisco's] ordinance's implementation found that over 70 percent of employers did not report any impact on profitability." [137] Conversely, the HR Policy Association noted that "the studies [cited in the NPRM] on productivity and firm profits are based on general efficiency wage theory and presented without a quantitative cost-benefit analysis of the specific leave mandate for current and future beneficiaries of Executive Order 13706." The Department did not quantify the value of these benefits since none of the studies provided estimates that were directly applicable to employees covered by this Final Rule.

Government Expenditures

As noted in the section on costs (V.C.ii.), contractors may pass along part or all of the potentially increased costs to the government in the form of higher contract prices. However, to the extent that benefits from increased productivity and reduced turnover offset these higher costs which the Department expects, this will reduce government contract spending relative to what would be expected if the rule's costs and transfers were considered in isolation.

Some commenters believe the rule may reduce government contracting costs. Others noted that we did not adequately justify the assertion that the rulemaking will provide cost savings. The National Association of Manufacturers wrote the following: "Simply stated, there is no concrete evidence that requiring federal contractors to increase the benefits they provide to their workers will result in cost savings or efficiency." As previously noted, the Department discussed benefits qualitatively because quantitative research findings related to benefits were not directly applicable to the population of employees and contracting firms impacted by this Final Rule.

Regardless of the direct impact on contract costs, there are other important channels through which the Final Rule might affect government expenditures. The transfer of income resulting from this Final Rule may result in reduced social assistance payments, and thus decrease government expenditures. For example, providing access to paid sick leave may help workers retain their jobs, reducing eligibility for government social assistance programs and lowering government expenditures. Studies have shown that the more paid family leave an employee receives, the less likely he/she is to utilize various social assistance programs. For instance, a 2012 study by Rutgers University's Center for Women and Work showed that women who received paid maternity leave reported receiving $413 less in public assistance in the year after their child was born than women who took no leave after childbirth.[138] The National Partnership for Women & Families also cited research showing that "allowing all workers to earn paid sick time would result in . . . more than $500 million in savings to publicly funded health insurance programs such as Medicare, Medicaid and the State Children's Health Insurance Program." [139]

Decreased Healthcare Expenditures

One positive impact of mandating paid sick leave benefits would be that employees could mitigate future health costs by more frequently investing in preventive care. For example, employees would likely use paid sick leave to visit a physician, who could diagnose illnesses and other ailments before they become more serious and costlier to patients. A study analyzing data from the 2008 NHIS shows that employees with paid sick leave were 12 percent more likely to have visited a doctor in the past year.[140] Additionally, employees with paid sick leave were more likely to have received preventive procedures such as an endoscopy (9.6 percent) or mammogram (7.8 percent).[141] Researchers at the Institute for Women's Policy Research used data from the NHIS on emergency room visits by workers with and without paid sick leave to project that requiring employers to provide paid sick leave would prevent roughly 1.3 million hospital emergency department visits nationally each year, resulting in $1.1 billion in medical savings annually (this includes the $500 million in savings to publicly funded health insurance programs mentioned previously).[142]

Commenters agreed that the rule could reduce health care costs through preventative care and reduced use of emergency rooms. Several commenters wrote: "A day or more to recover can prevent routine illnesses from turning into something much more serious. Those who earn paid time for a doctor's visit are more likely to get annual check-ups and critical screenings like mammograms, to identify any health problems and seek timely treatment. They're less likely to be injured on the job, and less likely to use an emergency room because the doctor's office is closed after hours or an untreated condition worsened." According to the National Partnership for Women & Families, individuals without paid sick time are "almost three times as likely to report taking their child or a family member to a hospital emergency room because they were unable to take time off work during their regular work hours.[143] The National Women's Law Center cited research finding "one-third of workers with annual family incomes below $35,000 who lacked paid sick days delayed seeking medical care, or did not seek care, for an ill family member."[144]

---

[134] Meyer, C.S., Mukerjee, S., and Sestero, A. (2001). Work-family Benefits: Which Ones Maximize Profits? *Journal of Managerial Issues,* 13(1), 28–44.

[135] Although efficiency wage literature tends to focus on firms voluntarily paying higher wages and thus distinguishing themselves from other firms, the literature provides no evidence that voluntarily paying higher wages is a necessary condition for efficiency wages. Efficiency wage theory may hold because employers paying higher wages attract more productive workers.

[136] Akerlof, G.A. (1982). Labor Contracts as Partial Gift Exchange. *The Quarterly Journal of Economics,* 97(4), 543–569.

[137] Drago, R. and Lovell, V. (2011). San Francisco's Paid Sick Leave Ordinance: Outcomes for Employees and Employers. Institute for Women's Policy Research.

[138] Houser, L. and Vartanian, T. (2012). Pay Matters: The Positive Economic Impacts of Paid Family Leave for Families, Businesses, and the Public. Rutgers University, Center for Women and Work.

[139] Miller, K., Williams, C., and Youngmin Yi. (2011). Paid Sick Days and Health: Cost Savings from Reduced Emergency Department Visits. Institute for Women's Policy Research.

[140] Peipins, L., Soman, A., Berkowitz, Z., and White, M.C. (2012). The Lack of Paid Sick Leave as a Barrier to Cancer Screening and Medical Care Seeking. *BMC Public Health,* 12(250), 1–9.

[141] Ibid.

[142] Miller, K., Williams, C., and Youngmin Yi. (2011). Paid Sick Days and Health: Cost Savings from Reduced Emergency Department Visits. Institute for Women's Policy Research.

[143] Smith, T.W. and Kim, J. (2010). Paid Sick Days: Attitudes and Experiences. National Opinion Research Center at the University of Chicago Publication. Available at: *http://news.uchicago.edu/static/newsengine/pdf/100621.paid.sick.leave.pdf.*

Job Growth and Labor Force Retention

One critique of the proposal to mandate paid sick leave has been that the transfer of income from employers to employees might reduce employment. However, various studies have argued the opposite, claiming that paid sick leave are associated with greater job growth. Recently, it has been shown that counties in which a city has implemented paid sick leave have experienced greater job growth than neighboring counties with no cities with paid leave laws. San Francisco County, for example, saw a 3.5 percent increase in employment between the years of 2006 (when a paid sick leave law was implemented) and 2010, while the five counties surrounding it experienced an employment decrease of 3.4 percent on average (the analysis did not control for other characteristics that may affect employment or assess statistical significance).[145] Additionally, King County, the county in which Seattle (which instituted a similar paid sick leave policy to San Francisco in 2011) is located, found that the rate of annual job growth in the food and retail industries increased much faster than within the state of Washington as a whole between 2011 and 2013.[146] We note, however, that these results might also be associated with other economic factors, such as labor migration as a result of the Great Recession, and historically greater employment trends in the urban areas of San Francisco and Seattle in comparison to neighboring regions.

Job growth was not mentioned by many commenters. However, Legal Aid Society cited a study that found "the sectors most affected by the ordinance, including the food service and accommodation [industries], experienced higher rates of job and business growth than neighboring counties following the [San Francisco] ordinance's passage."[147]

A related topic discussed by some commenters is that paid sick leave can prevent workers from leaving the labor force. The New Hampshire Campaign for a Family Friendly Economy noted, "[w]hen families are able to provide for their basic needs and know that their loved ones are well cared for they are more likely to stay in the workforce." Sarah Damaske, a researcher from Pennsylvania State University, wrote: "Access to paid sick leave is an important feature of the types of jobs that college educated women find and that helps workers maintain their employment." She explained how research she and Adrianne Frech conducted suggests that maintaining full-time employment has long-term physical and mental health benefits.

2. Benefits Mentioned by Commenters Not Previously Addressed in This Section

Expanded Covered Reasons for Use

Commenters discussed the benefits associated with expanding applicable uses of leave. In this rulemaking, the Department estimates transfers by comparing current days of paid sick leave and newly mandated days of sick leave. Benefits are then associated with additional sick days provided and expected to be taken. The Department notes that workers who currently have access to paid sick leave may take more sick days to the extent the permitted uses under the Executive Order and this Final Rule are broader than under their existing paid sick leave or paid time off program. This impact is not quantified in benefits or transfers due to a lack of applicable quantitative evidence. The Williams Institute at the UCLA School of Law wrote "[t]he Propose[d] Rule could protect many more LGBT employees who may not currently be able to use their paid sick leave to care for their families." They also wrote that the rule "would also allow employees to care for the children of a same-sex spouse or partner, even when the employee has not been able to form a legal relationship with the child, for example, because of obstacles to adoption, parental status, or custody." Legal Aid Society wrote that the rule "will increase job security for workers and families who have fewer workplace protections, such as LGBT workers, and for workers who need paid sick time to ensure their safety, such as survivors of domestic violence."

Allowing paid sick leave to be used by victims of domestic violence, sexual assault, and stalking also provides benefits. According to surveys from the Bureau of Justice Statistics, reported by the National Partnership for Women & Families, "36 percent of rape and sexual assault victims lost more than 10 days of work following victimization, and more than half of stalking victims lost five or more days of work."[148]

Disadvantaged Groups

As discussed above, the rulemaking may be especially helpful to the LGBT community by allowing paid sick leave to be used to care for certain individuals not related by blood or marriage. Additionally, some minority groups, women, and low-wage earners, who have lower prevalence of paid sick leave, will be helped by this rule. The Center for the Study of Social Policy wrote: "[P]aid sick time can be an effective tool for advancing equity by providing crucial economic stability to families and reducing familial stress during illnesses and times of hardship," and observed that ensuring the ability to accrue and use paid sick leave is particularly important for part-time, low-income and single head of household workers who are disproportionately women and people of color. The National Hispanic Council on Aging wrote: "According to a report released by the Congressional Joint Economic Committee in March, 2010, about 49% of Hispanics working for firms hiring over 15 employees did not have paid sick leave, while about 60% of White workers overall reported receiving paid sick leave."[149] According to the AFL–CIO: "Those with lower incomes are especially vulnerable to the lack of paid sick days. Sixty-two percent of low-wage private sector workers do not have employer-paid sick leave."[150]

The National Organization for Women noted that "[t]he burden of inadequate paid sick leave and paid sick family leave falls heaviest on mothers. Given current norms of caregiving, women are more likely to need to stay home with a sick family member than fathers, yet mothers are less likely than fathers to have any paid time off, and those who do have some paid leave have fewer weeks of paid time off than dads."[151] They also noted that "[s]ingle parent families, mostly headed by women, are disproportionately affected by the inability to access paid sick leave."

---

[144] Human Impact Partners. (2009). A Health Impact Assessment of the Healthy Families Act of 2009. Available at: *http://www.humanimpact.org/downloads/national-paid-sick-days-hia-report/*.

[145] Petro, J. (2010). Paid Sick Leave Does Not Harm Business Growth or Job Growth. Drum Major Institute for Public Policy.

[146] The Main Street Alliance of Washington. (2013). Paid Sick Days and the Seattle Economy: Job Growth and Business Formation at the 1-year Anniversary of Seattle's Paid Sick and Safe Leave Law.

[147] Miller, K. and Towne, S. (2011). San Francisco Employment Growth Remains Stronger With Paid Sick Days Law Than Surrounding Counties. Institute for Women's Policy Research.

[148] Bureau of Justice Statistics, U.S. Department of Justice. (2013). Stalking. Available at: *http://www.bjs.gov/index.cfm?ty=tp&tid=973;* Bureau of Justice Statistics, U.S. Department of Justice. (2002). National Crime Victimization Survey: Personal and Property Crimes, 2000.

[149] Congressional Joint Economic Committee. (2010). Expanding Access to Paid Sick Leave: The Impact of the Healthy Families Act on America's Workers. Available at: *http://www.jec.senate.gov/public/_cache/files/abf8aca7-6b94-4152-b720-2d8d04b81ed6/sickleavereportfinal.pdf.*

[150] Institute for Women's Policy Research. (2015). Workers' Access to Paid Sick Days in the States; DeRigne, L., Stoddard-Dare, P., and Quinn, L. (2016). Workers Without Paid Sick Leave Less Likely To Take Time Off For Illness Or Injury Compared To Those With Paid Sick Leave. *Health Affairs,* 35(3), 520–527. (The AFL–CIO compared the nearly 65 percent of families with incomes below $35,000 who had no paid sick leave to the 25 percent of families who earned more than $100,000 a year).

Fair Competition

One business owner wrote: "this rule will help level the playing field so that businesses, like mine, that provide earned paid leave, are more cost competitive. Right now we compete against other companies that do not provide these benefits to their employees, therefore these competitors have lower overhead and lower hourly rates." The public policy organization Demos cited their report that quantified "how the federal contracting system fuels inequality by funding low-wage jobs that lack critical benefits such as leave."[152] The U.S. Women's Chamber of Commerce wrote: "Requiring more businesses to provide paid sick leave will help level the playing field for those business owners who are doing the right thing for their workers." Bredhoff & Kaiser cited a 2015 study by the Department that found lack of paid sick leave results in competitive disadvantages against those employers who do provide such paid leave.[153]

Morale, Stress, Financial Stability, and Job Retention

Commenters noted that the rule could help morale. Many commenters cited a study of Connecticut's paid sick leave law that found "employers identified several positive effects of paid sick days, including improved employee productivity and morale."[154] This study found 29.6 percent of employers reported an increase in morale and 12.5 reported an increase in motivation. According to the Americans United for Change: "In jurisdictions where paid sick leave has been implemented, research has shown that businesses reported positive benefits such as improved morale."[155]

Commenters believe the rule will reduce stress and improve financial and job stability. NLWC noted that "a lack of paid time off can be a major stressor in parents' lives, which can impair their interactions with their children and affect their development."[156] Bredhoff & Kaiser wrote: "As one 2011 report observed, missing just three and a half days of work due to illness can cause a worker to forfeit wages equivalent to the average monthly grocery bill for an American family."[157] NWLC cited research finding "almost one in five low-wage working mothers reported losing a job due to her own illness or caring for a family member."[158] Job stability benefits may accrue to both workers with and without current paid sick leave. According to the AFL–CIO, "49 percent of private sector workers who have paid sick leave report that their employers have dismissal policies for missed time that, in practice, penalize their use of paid sick time, and 34 percent fear penalties for using paid sick leave."[159] This Final Rule may reduce employees' fear of retribution because the rule proscribes interference and discrimination.

vi. Regulatory Alternatives

The Department notes that Executive Order 13706 delegates to the Secretary the authority only to issue regulations to "implement the requirements of this order." Because the Executive Order itself establishes the basic paid sick leave requirements that the Department is responsible for implementing, many potential regulatory alternatives are beyond the scope of the Department's authority in issuing this Final Rule. However, the Chamber/IFA expressed concern that the Department did not present alternatives and wrote "it is a well-established principle of regulatory impact analysis under Executive Order 12866 to present comparative costs and benefits for various alternatives, including those the underlying law or Executive Order may seem to exclude." In response, the Department has discussed some alternatives posed by commenters in this section.

1. Alternative With Unlimited Accrual

As was done in the NPRM, for illustrative purposes only, this section presents an alternative to the provisions set forth in this Final Rule. The Department notes, however, that it considers this alternative to be beyond the scope of the Department's authority under the Executive Order. This alternative considers how transfer payments would be affected if employees could accrue an unlimited number of hours of paid sick leave, as long as they kept a maximum balance of 56 hours. For example, if paid sick leave is used periodically throughout the year, an employee who works 80 hours per week could accrue and use 138.7 hours of paid sick leave (80 hours × 52 weeks × accrual rate of one hour per 30 hours worked (1/30)). To calculate transfers associated with this alternative, the modeling allows employees to accrue more than 7 days of paid sick leave annually. The number of days of leave accrued is based on the mean number of hours worked among full-time employees in an industry. For example, in administrative and waste services full-time employees work on average 41.7 hours per week. With no cap on paid leave accrual, this would result in 9.0 days of leave accrued annually for employees in this industry. Using this alternative across all industries, the Department estimated 1.2 million additional days of paid sick leave would be accrued by full-time employees in Year 1. If only a fraction of these additional sick days are actually taken (as assumed earlier in the analysis and shown in Table 12) then 488,200 days will be taken by full-time employees and total transfer payments would be $132.0 million. This is 54 percent higher than the current transfer estimate of $85.5 million. However, this might be an overestimate because employees are not required to accrue paid sick leave while on vacation or leave.

2. Alternatives Suggested by Commenters

Some commenters made suggestions that could help reduce costs while maintaining the intent of the rulemaking and continuing to provide the intended benefits. Some of these have been incorporated in the Final Rule. The impact of these alternatives on costs was generally not quantifiable.

---

[151] Phillips, K.R. (2004). Getting Time Off: Access to Leave among Working Parents. The Urban Institute. Available at: *http://www.urban.org/sites/default/files/alfresco/publication-pdfs/310977-Getting-Time-Off.PDF.*

[152] Hiltonsmith, R. and Daly, L. (2014). Underwriting Good Jobs: How to Place over 20 Million Americans on a Pathway to the Middle Class Using Federal Purchasing Power. Available at: *http://www.demos.org/publication/underwriting-good-jobs-how-place-over-20-million-americans-pathway-middle-class-using-fe.*

[153] U.S. Department of Labor. (2015). The Cost of Doing Nothing—The Price We All Pay Without Paid Leave Policies to Support America's 21st Century Working Families.

[154] Appelbaum, E., et al. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Available at: *http://cepr.net/documents/good-for-buisness-2014-02-21.pdf.*

[155] Ibid.

[156] Vogtman, J. and Schulman, K. (2016). Set Up To Fail: When Low-Wage Work Jeopardizes Parents' And Children's Success. National Women's Law Center. Available at: *http://nwlc.org/wp-content/uploads/2016/01/FINAL-Set-Up-To-Fail-When-Low-Wage-Work-Jeopardizes-Parents%E2%80%99-and-Children%E2%80%99s-Success.pdf.*

[157] Green, A., Filion, K., and Gould, E. (2011). The Need for Paid Sick Days. Economic Policy Institute. Available at: *http://www.epi.org/publication/the_need_for_paid_sick_days/.*

[158] Vogtman, J. and Schulman, K. (2016). Set Up To Fail: When Low-Wage Work Jeopardizes Parents' And Children's Success. National Women's Law Center. Available at: *http://nwlc.org/wp-content/uploads/2016/01/FINAL-Set-Up-To-Fail-When-Low-Wage-Work-Jeopardizes-Parents%E2%80%99-and-Children%E2%80%99s-Success.pdf.*

[159] Miller, K., Drago, R., and Williams, C. (2011). Paid Sick Days and Employer Penalties for Absence. Institute for Women's Policy Research.

The American Benefits Council believes the requirement that employers allow paid leave in increments of only 1 hour could cost tens of thousands of dollars in adjustment costs which is "an excessive burden on such employers, and serves only to preserve an extra 3 hours of paid leave for the employee." The Department believes that changing a firm's tracking system to allow paid sick leave to be taken in increments of one hour is not excessively burdensome, and the American Benefits Council provided no basis for its estimate. The Department also did not have the necessary data to estimate the impact on regulatory costs of allowing a larger minimum hour requirement.

Commenters believe the requirement to allow accrual of paid sick leave while on leave (*e.g.,* sick leave, vacation) will be costly to firms. The Equal Employment Advisory Council (EEAC) believes because this definition of "hours worked" differs from the FLSA and FMLA this requirement will "be extremely confusing for federal contractors" and "changing the established rules and procedures for one particular set of regulations will be significantly more difficult, requiring an additional set of records that must be kept." They also noted that "counting hours not actually 'worked' as 'hours worked' artificially inflates the employee's entitlement under the Executive Order, which likely used that term of art in accord with its traditional meaning." The Department adjusted this requirement such that paid sick leave is only required to be earned on time suffered or permitted to work and not paid time off. The transfer estimates presented in this analysis continue to include accrual while on leave because of the difficulty in adjusting them due to lack of reliable data; furthermore, these adjustments are likely to be small since hours on vacation and paid sick leave are a fraction of work hours and the paid sick leave time that might be accrued in those periods will only be one-thirtieth of the hours spent on vacation and sick leave (*see* V.C.iii.2.).

The Department notes that this change may reduce employer costs by creating consistency across regulations. However, the Department believes this change will have a small impact on the amount of leave full-time employees accrue because annual accrual is limited to 56 hours. A worker who works 40 hours per week will reach this cap after 42 weeks of work. Therefore, even if they are on vacation/leave for the other 10 weeks and technically accruing leave, this will not increase their accrued hours. For part-time workers accruing while on vacation or leave, this change will impact total hours accrued. The Department made some calculations to demonstrate how transfers may change for the 19 percent of affected workers who work part-time now that accrual is not required while on leave. We quantified the additional hours accrued due to accruing while on paid sick leave and found it to be small. For example, a worker who works 25 hours per week will accrue 43.3 hours of paid sick leave annually (assuming no leave). If this worker takes a week of sick leave, and paid sick leave is not accrued during this week, then he will accrue 0.8 hours less of paid sick leave (25/30). If this worker also took two weeks of vacation, he would accrue 1.7 fewer hours of paid sick leave ((25 × 2)/30).

vii. Average Annualized Impacts by Industry

Commenters expressed concern that the Department did not adequately consider costs for specific industries. For example, the MCAA wrote that OMB Circular A–4 requires a more specific examination of the impact of the rule on Federal construction projects. A recreation permit holder on public lands wrote that the Department "should demonstrate how the costs associated with the rule make sense given the . . . volume and gross revenues of small permit holders." In response, the Department has added this section analyzing average annualized costs and transfers by industry relative to payroll and revenue.

Table 17 shows 10-year average annualized costs and transfers by industry using both a 3 percent and a 7 percent interest rate. These annualized costs are then compared to estimated Federal contractors' payroll and revenue. Across all industries, these average annualized costs are less than 0.07 percent of payroll and less than 0.01 percent of revenue. The industry where costs and transfers are the largest share of both payroll and revenue is the professional, scientific, and technical services industry. This industry is followed by the construction industry (when looking at payroll) and the administrative and waste services industry (when considering revenue).

TABLE 17—AVERAGE ANNUALIZED COSTS AND TRANSFERS

[1,000s of 2015$]

Industry	NAICS	Average annualized costs and transfers (1,000s)		Relative to payroll[a]		Relative to revenue[a]	
		3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate
Agriculture, forestry, fishing and hunting	11	$349	$384	0.015	0.016	0.003	0.003
Mining	21	61	68	0.001	0.001	0.000	0.000
Utilities	22	715	721	0.001	0.001	0.000	0.000
Construction	23	44,397	42,986	0.168	0.163	0.034	0.033
Manufacturing	31–33	12,189	12,143	0.008	0.007	0.001	0.001
Wholesale trade	42	966	1,090	0.003	0.003	0.000	0.000
Retail trade	44–45	17,126	16,605	0.167	0.162	0.015	0.014
Transportation and warehousing	48–49	27,132	26,257	0.139	0.134	0.034	0.032
Information	51	3,900	3,866	0.006	0.006	0.001	0.001
Finance and insurance	52	4,298	4,150	0.071	0.069	0.010	0.010
Real estate and rental and leasing	53	795	882	0.012	0.013	0.002	0.002
Professional, scientific, and technical	54	162,894	157,110	0.208	0.201	0.081	0.078

TABLE 17—AVERAGE ANNUALIZED COSTS AND TRANSFERS—Continued

[1,000s of 2015$]

Industry	NAICS	Average annualized costs and transfers (1,000s)		Relative to payroll[a]		Relative to revenue[a]	
		3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate
Management of companies and enterprises	55	7	9	0.000	0.000	0.000	0.000
Administrative and waste services	56	53,427	51,586	0.149	0.144	0.073	0.071
Educational services	61	4,903	4,792	0.025	0.025	0.008	0.008
Health care and social assistance	62	39,867	38,397	0.115	0.111	0.045	0.044
Arts, entertainment, and recreation	71	4,234	4,226	0.027	0.027	0.009	0.009
Accommodation and food services	72	8,712	8,464	0.146	0.142	0.042	0.041
Other services	81	3,167	3,149	0.078	0.078	0.020	0.020
Total private	....	389,139	376,884	0.065	0.063	0.010	0.009

[a] Source: Total payroll and revenue from 2012 SUSB; inflated to 2015$ using the CPI–U. Payroll and revenue for contractors estimated by taking ratio of potentially affected contractors relative to all firms, within an industry, and multiplying by total payroll or revenue. If contractors tend to be larger or smaller than other firms in the industry then revenue and payroll may be under or over estimated. These calculations assume no growth in real value of revenue or payroll over these ten years.

Many commenters expressed concern that the rule would be especially costly in the construction industry. However, as modeled, costs in the construction industry are small compared with payroll and revenues (less than 0.2 percent of payroll and less than 0.04 percent of revenue). Moreover, the Department does not believe that one of the primary concerns for the construction industry—the segregating of time between Federal contracts and non-covered contracts (*e.g.*, SBA Advocacy, Sheet Metal and Air Conditioning National Association)—will result in substantial costs because hours worked by laborers and mechanics on DBA contracts must already be monitored. 29 CFR 5.5(a)(3). Thus, in nearly all instances, if a construction contractor complies with its existing DBA recordkeeping obligation, it will have effectively segregated these employees' time. Therefore, there should be minimal, or no, additional costs associated with tracking hours for these employees. In addition, for employees working "in connection with" covered contracts the Department has reduced the costs associated with monitoring hours by permitting contractors to make estimates consistent with § 13.5(a)(1)(i). For these reasons, we believe the estimated costs to the construction industry are appropriate.

Another concern expressed by members of the construction industry is the higher costs associated with absenteeism in this industry. The AGC noted that "absenteeism is particularly problematic in the construction industry, where cost and schedule concerns are critical and highly dependent on labor productivity." They also cite research demonstrating these costs: "Nicholson et al. (2006)[160] have used economic models to estimate that when a carpenter in construction is absent, the cost of the absence is 50% greater than his/her daily wage, and when a laborer in construction is absent, the cost is 9% greater than his/her daily wage." The Department notes that even if costs and transfers are 50 percent larger than estimated, they would still be less than 0.3 percent of payroll and less than 0.06 percent of revenues in the construction industry.

Appendix A

TABLE 18—PERCENT OF WORKERS WITH FIXED NUMBER OF PAID SICK LEAVE PLANS, BY NUMBER OF DAYS OFFERED, PRIVATE INDUSTRY WORKERS, MARCH 2015

Industry	<5 days	5 to 9 days	10 to 14 days	15 to 29 days	>29 days	Mean days	Median days
Agriculture, forestry, fishing and hunting	....	....	....	....	....	....	....
Mining and logging	....	42	15	....	....	27	6
Utilities	....	34	38	....	....	21	10
Construction	31	57	11	....	....	6	5
Manufacturing	30	53	12	....	....	8	5
Wholesale trade	26	61	8	....	....	8	5
Retail trade	21	70	7	....	....	6	6
Transportation and warehousing	16	44	34	....	....	9	7
Information	6	65	26	....	....	9	7
Finance and insurance	7	49	39	....	....	12	8
Real estate and rental and leasing	....	65	....	....	....	6	6
Professional, scientific, and	11	59	22	....	....	8	6
Management of companies and	14	66	....	....	....	12	6
Administrative and waste services	36	40	22	....	....	8	5
Educational services	8	35	52	....	....	11	10

---

[160] Nicholson, S., Pauly, M.V., Polsky, D., Sharda, C., Szrek, H., and Berger, M.L. (2006). Measuring the effects of work loss on productivity with team production. *Health Economics,* 15(2), 111–123.

TABLE 18—PERCENT OF WORKERS WITH FIXED NUMBER OF PAID SICK LEAVE PLANS, BY NUMBER OF DAYS OFFERED, PRIVATE INDUSTRY WORKERS, MARCH 2015—Continued

Industry	<5 days	5 to 9 days	10 to 14 days	15 to 29 days	>29 days	Mean days	Median days
Health care and social assistance	22	42	34	....	....	8	7
Arts, entertainment, and recreation	....	47	....	....	....	6	6
Accommodation and food services	37	58	....	....	....	6	5
Other services	22	47	21	....	....	8	6
Total private	21	53	21	3	2	8	6

Source: Bureau of Labor Statistics, National Compensation Survey; Unpublished data
Note: Dashes indicate data not available or do not meet publication criteria.

TABLE 19—DOL CALCULATED PERCENT OF FULL-TIME WORKERS WITH FIXED NUMBER OF PAID SICK LEAVE PLANS, BY NUMBER OF DAYS OFFERED

Industry	Number of days[a]									
	1	2	3	4	5	6	7	8	9	10
Agriculture, forestry, fishing and hunting	1	3	8	16	10	13	12	12	11	8
Mining and logging	0	0	0	0	9	41	3	9	29	0
Utilities	0	0	0	0	0	1	4	12	29	3
Construction	2	5	11	17	16	14	13	10	7	6
Manufacturing	1	4	11	23	10	10	12	12	11	5
Wholesale trade	1	4	11	22	13	12	14	14	13	3
Retail trade	1	3	6	9	16	16	16	12	8	4
Transportation and warehousing	0	2	6	13	6	10	13	11	12	11
Information	0	1	2	5	9	14	19	16	17	8
Finance and insurance	0	1	2	6	3	7	12	19	19	8
Real estate and rental and leasing	1	4	7	11	13	14	14	11	8	3
Professional, scientific, and technical services	0	2	5	10	14	19	13	14	13	8
Management of companies and enterprises	0	2	7	20	7	14	12	19	26	0
Administrative and waste services	1	4	12	25	7	8	9	9	9	8
Educational services	0	0	2	5	2	4	6	9	11	11
Health care and social assistance	1	2	7	14	7	9	11	10	9	13
Arts, entertainment, and recreation	1	4	9	13	11	12	10	8	6	12
Accommodation and food services	2	5	11	17	14	15	13	10	7	2
Other services	1	3	8	17	9	12	11	11	10	8
Total private	1	3	8	16	10	13	12	12	11	8

[a] Workers may receive more than 10 days of sick leave but since these data are not used in the analysis the Department does not present shares above 10 days.

TABLE 20—DOL CALCULATED PERCENT OF PART-TIME WORKERS WITH FIXED NUMBER OF PAID SICK LEAVE PLANS, BY NUMBER OF DAYS OFFERED

Industry	Number of days[a]									
	1	2	3	4	5	6	7	8	9	10
Agriculture, forestry, fishing and hunting	1	3	8	14	11	13	12	11	9	8
Mining and logging	0	0	0	0	10	40	3	10	27	0
Utilities	0	0	0	0	1	2	5	13	27	3
Construction	2	6	11	15	16	15	12	8	5	5
Manufacturing	1	5	12	21	11	11	12	11	9	4
Wholesale trade	1	4	11	20	14	13	14	12	10	3
Retail trade	1	3	6	8	16	15	14	10	6	3
Transportation and warehousing	1	2	6	12	7	10	12	10	9	11
Information	0	1	2	5	11	15	17	15	13	8
Finance and insurance	0	1	2	6	4	8	12	16	16	8
Real estate and rental and leasing	2	4	7	10	14	13	13	9	5	3
Professional, scientific, and technical services	1	2	5	9	15	18	13	12	10	8
Management of companies and enterprises	0	2	7	18	8	15	13	18	21	0
Administrative and waste services	1	5	13	23	8	9	9	8	7	8
Educational services	0	1	2	5	3	5	7	8	9	11
Health care and social assistance	1	3	7	13	7	9	9	9	7	12
Arts, entertainment, and recreation	2	5	9	12	12	11	10	7	4	11
Accommodation and food services	2	6	11	15	15	15	12	8	5	2
Other services	1	4	8	15	10	12	11	10	8	8
Total private	1	3	8	14	11	13	12	11	9	8

[a] Workers may receive more than 10 days of sick leave but since these data are not used in the analysis the Department does not present shares above 10 days.

V. Final Regulatory Flexibility Analysis (FRFA)

The Regulatory Flexibility Act of 1980 (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), hereafter jointly referred to as the RFA, requires agencies to prepare regulatory flexibility analyses when they propose regulations that will have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603. This rule is expected to have a significant economic impact, and thus the Department has prepared a FRFA.

The RFA defines a "small entity" as a (1) small not-for-profit organization, (2) small governmental jurisdiction, or (3) small business. SBA establishes separate standards for each 6-digit NAICS industry code, and standard cutoffs are typically based on either the average annual number of employees or average annual receipts. For example, small businesses are generally defined as having fewer than 500, 1,000, or 1,250 employees in manufacturing industries and less than $7.5 million in average annual receipts for many nonmanufacturing industries.[161] SBA revised its size standards February 26, 2016.[162] In this analysis, the Department used the indicator in the SAM data to identify small contractors based on the six-digit NAICS code listed as their primary NAICS.[163] However, because most firms would have registered on SAM prior to SBA's update of its size standards, the Department expected more firms would have been listed as small had they registered after the update. To account for this, the Department used SBA's estimates of the increase in the number of small business in each industry,[164] converted it to a percentage increase in the number of small businesses in that industry, and applied it to the number of entities listed as small in the SAM database. For example, SBA estimated the revised standards would result in an additional 1,250 manufacturers classified as small, about 0.5 percent of small manufacturing firms. We therefore increased the number of small affected manufacturers by 0.5 percent. The subcontracting firms identified were all assumed to be small. The Department applied the national ratio of small businesses to total business by industry (determined by applying the updated SBA standards to the 2012 Statistics of U.S. Businesses (SUSB) data) to estimate the number of small entities operating under covered contracts on Federal property.

A. Commenters' Response

The Department specifically asked for comments on the impacts of the proposed rule on small businesses, particularly whether alternatives exist that will reduce burdens on small entities and still meet the rule's objectives. Most small businesses that commented expressed concern the rulemaking will increase their costs in general. Some noted the costs will be more burdensome for small businesses. The National Federation of Independent Business wrote:

> At the majority of these [small] businesses, the task of compliance will fall on the small business owner. This individual is unlikely to be an expert in the complex details of paid sick leave program management. Accordingly, it will take additional time to comprehend the requirement and may also require the covered small business to hire a consultant or other expert to assist with implementation.

Women Impacting Public Policy wrote that "[l]arger contractors with higher revenues and large administrative staffs are more capable of handling this compliance burden and are more likely to already have the necessary systems in place. Women-owned businesses, which are by-and-large small businesses, will encounter costs and burdens that are not experienced by other firms."

Other small businesses supported the rulemaking. For example, the U.S. Women's Chamber of Commerce wrote: "These women business owners nationwide already provide paid sick leave to their employees because many of them have been previously in workforces that did not offer these critical benefits . . . Requiring more businesses to provide paid sick leave will help level the playing field for those business owners who are doing the right thing for their workers."

Commenters questioned the Department's estimated implementation and regulatory familiarization cost estimates. Other commenters argued that the administrative costs are more burdensome for small businesses. The National Electrical Contractors Association wrote that "smaller companies usually only have a single person—at the most two employees—that handle time keeping and record keeping of items such as this requirement." A small business owner commented that he offers paid time off, and that "[g]oing backwards to a mandatory 'sick time' including tracking with all of the required documentation would add more complications." Other commenters stated that the definition of family in the NPRM lowers the administrative costs compared to more restrictive definitions. A small business owner stated that administrative efficiency was improved and wrote: "As a small business owner, the administrative hassle of having to dig into employee's personal life to determine their eligibility is not worth the effort. Any specific limitations on the proposed definition of family would only increase the administrative burden." As noted in Section V.C.ii. the Department has increased the estimated time required for regulatory familiarization and recurring administrative costs for this Final Rule.

Last, in terms of specific costs, commenters expressed skepticism about the average payroll increase estimates for small businesses. SBA Advocacy stated that "a small recreation company with 20 full-time staff and 220 seasonal workers estimated costs of $25,000 to comply with this regulation. Multiple small restaurant franchisees located in military bases reported costs from $5,000 to $35,000." However, these estimates are difficult to evaluate because we do not know what assumptions were made in developing them and furthermore what "costs" are included in these estimates.

Some commenters believe the Executive Order and implementing regulations will hurt small businesses' ability to compete in bidding. SBA Advocacy noted that "[s]mall recreation companies have stated that they will be reluctant to sign a new contract to provide services such as food or equipment rentals on federal lands, as they may not be able to increase the price of their products to offset these costs." The National Federation of Independent Business wrote that "[m]ost small companies will have to increase the price of their bids to maintain the same return on the contract. Higher prices will make their bids less competitive than a larger federal contractor that may already have a compliant paid sick leave program in place."

---

[161] However, some exceptions do exist, the most notable being that depository institutions (including credit unions, commercial banks, and non-commercial banks) are classified by total assets. Small governmental jurisdictions are another noteworthy exception. They are defined as the governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000 people. *See http://www.sba.gov/advocacy/regulatory-flexibility-act.*

[162] *See https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.*

[163] The "NAICS CODE STRING" variable (column 33) and the "PRIMARY NAICS" variable (column 31) were the specific variables used. If the primary NAICS value contained a "Y" at the end when listed in the "NAICS CODE STRING" column, the firm was identified as small.

[164] *See https://www.sba.gov/contracting/getting-started-contractor/make-sure-you-meet-sba-size-standards/whats-new-size-standards.*

Some commenters suggested alternatives that would reduce the burden on small entities, including an exemption for small businesses. Several commenters, such as the General Contractors Association of Hawaii and the Hawaiian Dredging Construction Company, stated that small businesses should be exempt from the requirement of providing paid sick leave, although they varied on the size of contracting firms that should be excluded. Independent Electrical Contractors commented that "the Department should take into account processes and procedures already in place in most small businesses," and further recommended that the Department should allow companies to "apply a 90 day probationary period to new employees before they are able to take paid sick leave." SBA Advocacy stated that DOL should consider alternatives suggested by commenters "such as exemptions for certain part-time and seasonal work." The Department has addressed requests for exclusions, like those described above, in the subpart A preamble.

The Chief Counsel for Advocacy of the Small Business Administration (SBA) was notified of this rule upon its submission to OMB under EO 12866. Advocacy noted several concerns; in addition to those described in the preceding paragraphs, it stated that the Department underestimated the number of small businesses affected by this Final Rule by only including contracting companies registered in SAM. SBA Advocacy wrote: "Advocacy believes that there may be hundreds or thousands of small businesses such as restaurants, retail, and outdoor recreation companies operating on federal lands, in federal buildings and on military bases that DOL has not adequately counted in determining the numbers of small businesses affected or in estimating the costs of this rule." SBA Advocacy provided additional information about the number of concessions contracts, commercial use authorizations, and permits issued by the National Park Service, the U.S. Forest Service, GSA, and the Army and Air Force Exchange Service. As described in section V.B.ii., the Department included estimates of these potentially affected contractors in this Final Rule.

The Department describes responses to some of these comments in the appropriate part of the FRFA. Responses to comments that also apply to the overall analysis were generally included in the appropriate section of the RIA.

B. Number of Small Entities and Employees to Which the Final Rule Will Apply

The number of prime contracting entities was estimated based on the GSA's System for Award Management (SAM) for August 2015 (415,300).[165] This number is lower than in the proposed rulemaking because firms enrolled on SAM strictly for grants have now been excluded (*see* V.B.ii).[166] The Department understands that many entities that are prime contractors listed in SAM are also subcontractors, and therefore SAM includes both. However, we were unable to determine the number of subcontractors who are not in the SAM database. Therefore, the Department examined five years of USASpending data[167] and found 24,400 subcontractors who do not hold contracts as primes (and thus may not be included in SAM), and added these subcontractors to the total from SAM to obtain a total estimate of 439,700 firms that may be holding procurement contracts. In response to comments from SBA Advocacy and others, the Department has also included an estimated 49,800 entities operating under covered contracts on Federal property or lands. Estimating the number of entities operating under covered contracts on Federal property or lands involved many data sources and assumptions as described in section V.B.ii. These calculations result in 489,400 potentially affected contractors. Of these, an estimated 320,000 are considered small contracting firms.[168]

This estimated number of potentially affected small contractors includes those that strictly provide materials and supplies to the government and other firms with no Federal contracts covered by the Executive Order. These firms may accrue regulatory familiarization costs despite not having employees affected, although their cost will be minimal.[169] However, these firms should be eliminated when we consider costs per establishment with affected employees. Information was not available to eliminate these firms from the SAM database.[170]

Thus, the Department used data from USASpending to estimate a more appropriate number of small contractors with affected employees. Using the FY2015 USASpending database, the Department found 70,600 unique private small prime contracting firms.[171] Adding in the small subcontractors and the small entities operating under covered contracts on Federal property yields an estimated 143,400 small contractors with active contracts in Year 1. Because this Final Rule only applies to new contracts, the Department divided the number of contractors by 5 to represent the number of contractors with new contracts in Year 1 (28,700 firms). Lastly, the Department adjusted this estimate to exclude a share of potentially affected contractors who have potentially affected employees but no affected employees because they already provide the required number of days of paid sick leave.[172] The ratio of affected employees to potentially affected employees in small businesses was calculated and multiplied by the number of small contractors with potentially affected employees by industry to make this adjustment. These calculations result in an estimated 21,400 small contractors with affected employees in Year 1. The calculations of direct costs and transfers per small contractor with affected employees shown in Table 23 include only these 21,400 small contractors.

---

[165] Data are released in monthly files.

[166] Entities registering in SAM are asked if they wish to bid on contracts. If a non-Federal entity answers "Yes" to this question, SAM marks the registration as being "All Awards." This is the "Purpose of Registration" column in the SAM data. The Department included only firms with a value of "Z2," which denotes "All Awards." See section "3.2 Determining your Purpose of Registration" in the System for Award Management User Guide available at: *https://test.sam.gov/sam/SAM_Guide/SAM_User_Guide.htm#_Toc330768975.*

[167] The Department identified subawardees from the *USASpending.gov* data between FY2011 and FY2015 who did not perform work as a prime during those years.

[168] SAM data for August 2015 provides information on which contractors are small. All subcontractors (identified with USASpending data for FY2011–FY2015) are considered small due to lack of data. The proportion of entities operating under covered contracts on Federal property or lands that are small were assumed to be the same as the national proportions in 2012 SUSB data. These proportions were calculated and applied by industry.

[169] In the proposed rule the Department said these firms may not incur familiarization costs. Commenters contended that these firms will still accrue regulatory familiarization costs because, as the U.S. Chamber of Commerce wrote: "[e]ven contractors exempt from the proposed rule for some reason will, first, have to review the regulation and their own book of contracts (and prospective bids) to make such a determination."

[170] This may also be an overestimate since some firms in the SAM database do not currently have contracts with the Federal government.

[171] In the USASpending data, small contractors were identified based on the "contractingofficerbusinesssizedetermination" variable. The description of this variable in the *USASpending.gov* Data Dictionary is: "The Contracting Officer's determination of whether the selected contractor meets the small business size standard for award to a small business for the NAICS code that is applicable to the contract." The Data Dictionary is available at: *https://www.usaspending.gov/DownloadCenter/Documents/USAspending.govDownloadsDataDictionary.pdf.*

[172] As discussed in the RIA, some potentially affected employees considered not affected in the Department's analysis may actually be affected due to a broader scope of uses allowed for taking paid sick leave. However, data are not sufficient to estimate the number of additional employees that will be affected due to this, how many additional days of paid sick leave will be taken by these employees, or the transfers associated with any additional affected employees. Thus, for the purpose of calculating average costs and transfers per contractor with affected employees, any possible additional employees affected are excluded from both the numerator and denominator for consistency.

The number of employees in small contracting firms is unknown. The Department estimated the share of total Federal contracting expenditures in the USASpending data associated with contractors labeled as small, by industry. The Department then applied these shares to all affected employees to estimate the share of affected employees in small entities. However, based on 2015 NCS data, smaller firms are less likely to offer sick leave pay, and therefore employees in small contracting firms are more likely to be affected. The Department adjusted for this using data from the 2015 NCS on the distribution of employees with paid sick leave by employer size. For these purposes, small businesses were approximated as those having less than 500 employees. The Department found that employees in firms with less than 500 employees were 1.1 times more likely to not have paid sick leave than employees in all firms. Therefore, the Department multiplied the previously estimated share of affected employees working for small contractors (*e.g.*, 22.3 percent in the information industry) by 1.1 to better estimate the percent of affected employees in small businesses in each industry (*e.g.*, 24.9 percent in the information industry). The Department then multiplied the percent affected that are in small businesses by the total number of affected employees by industry, then summed over all industries, to find that 66,800 employees employed by small contractors in Year 1 would be affected by the rule.

TABLE 21—SMALL FEDERAL CONTRACTING FIRMS AND THEIR EMPLOYEES

Industry	NAICS	Contractors [a]		% of expenditure in small contracting firms [c]	% of affected employees in small contracting firms [d]	Affected employees in year 1	
		Total	Small [b]			Total	Small
Agriculture, forestry, fishing and hunting	11	8,525	4,200	82.4	92.3	58	54
Mining	21	1,668	1,384	56.4	63.1	39	24
Utilities	22	5,641	4,569	11.9	13.3	294	39
Construction	23	61,399	52,251	55.2	61.8	20,280	12,526
Manufacturing	31–33	69,513	8,332	13.2	14.8	6,372	942
Wholesale trade	42	28,626	24,009	51.5	57.6	133	77
Retail trade	44–45	17,682	11,421	29.4	32.9	16,709	5,497
Transportation and warehousing	48–49	17,780	13,158	19.0	21.3	15,609	3,321
Information	51	19,511	16,443	22.3	24.9	2,587	645
Finance and insurance	52	2,712	1,631	2.6	2.9	2,484	72
Real estate and rental and leasing	53	20,705	15,326	28.1	31.4	95	30
Professional, scientific, and technical serv.	54	101,538	69,335	26.1	29.2	72,713	21,254
Management of companies and enterprises	55	264	157	9.3	10.4	0	0
Administrative and waste services	56	33,374	27,598	25.4	28.4	50,648	14,377
Educational services	61	13,645	9,074	14.7	16.4	2,456	403
Health care and social assistance	62	27,314	12,099	16.2	18.1	19,587	3,548
Arts, entertainment, and recreation	71	26,922	25,336	54.4	60.8	2,184	1,329
Accommodation and food services	72	14,524	12,376	22.2	24.8	7,718	1,915
Other services	81	18,077	11,262	30.7	34.4	2,092	719
Total private	....	489,419	319,962	24.7	27.7	222,059	66,772

[a] Source: GSA's System for Award Management (SAM) for August 2015. Companies without a primary NAICS code are distributed proportionately amongst all industries. All firms are assumed to be potentially affected. Includes 24,352 additional subcontractors identified in *USASpending.gov* from FY2011–FY2015 and includes 49,757 firms with operations on Federal land or property.

[b] SAM for August 2015. Companies without a primary NAICS code are distributed proportionately amongst all industries. All small firms are assumed to be potentially affected. Assume all 24,352 additional subcontractors identified in *USASpending.gov* are small.

[c] Source: *USASpending.gov*. Percentage of contracting expenditures for covered contracts in small businesses in FY2013–FY2015.

[d] Employees in firms with less than 500 employees were 1.1 times more likely to have no paid sick leave than employees in all firms. The Department adjusted upward the number of affected employees by 1.1.

C. Small Entity Costs of the Final Rule

Employers will need to keep additional records for affected employees. This will result in an increase in employer burden, which was estimated in the PRA portion (section V.I.). Note that the burdens reported for the PRA section of this Final Rule include the entire information collection and not merely the additional burden estimated as a result of this Final Rule.

Small entities will also have regulatory familiarization, implementation, administrative, and payroll costs (*i.e.*, transfers). These are discussed in section V.C. Total direct costs (*i.e.*, excluding transfers) to small contractors in Year 1 were estimated to be $78.9 million (Table 22). This is 63 percent of total direct costs in Year 1 (compared with 30 percent of affected employees in small contracting firms). Calculation of these costs is discussed in the following paragraphs.

Estimated regulatory familiarization costs and initial implementation costs in Year 1 apply to all small firms that potentially hold covered contracts (320,000). Regulatory familiarization costs were assumed to take two hours of time in Year 1, on average across these potentially affected contractors of all sizes. In the NPRM, the Department estimated one hour of time was necessary for this purpose, but due to comments the Department has increased this time estimate to two hours in the Final Rule. An hour of a human resource manager's time is valued at $82.17 per hour.[173] [174] Initial implementation costs, the upfront cost that is thought to be comparable across contractors of all sizes, and thus is a fraction of the total implementation costs, were estimated as taking either 1 or 10 hours of a human resource worker's time, (depending on whether the contractor has a paid leave system in place), valued at $27.50 per hour.[175]

---

[173] This includes the mean base wage of $56.29 from the OES plus benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's ECEC data. OES data available at: *http://www.bls.gov/oes/current/oes113121.htm.*

[174] Time and wage estimates for small establishments are the same as used in the analysis for all contractors. We have not tailored these to small businesses due to lack of data.

In addition to upfront implementation costs, contractors with affected employees will experience recurring implementation costs as employees gradually become covered. As each employee is affected, the contractor will need to spend some time updating the accounting systems used to track paid sick leave. Therefore, implementation costs are modeled as a function of newly affected employees for the first five years.[176] Because of this component, costs vary with contractor size. The Department estimated one hour of time per newly affected employee will be spent by a human resources worker on implementation costs. Contractors may also incur recurring administrative costs associated with maintaining records of paid sick leave and adjusting scheduling. In the NPRM, the Department assumed a human resource worker will spend an additional fifteen minutes per affected employee annually on ongoing administrative costs. Due to comments the Department has increased this time estimate to twenty minutes in the Final Rule.

To calculate payroll costs, the Department began with total transfers estimated in section V.C.iii., and multiplied this by the ratio of affected employees in small contracting firms to all affected employees. This yields the share of transfers occurring in small Federal contracting firms, $26.1 million in Year 1 (Table 22), which is 31 percent of total transfers for all contracting firms in Year 1. As noted in V.C.iii., total transfers may be an overestimate if contractors tend to perform work for multiple clients, rather than working exclusively on Federal contracts. This may be especially pertinent for small business since according to a report by American Express Open, Federal contracting comprises 19 percent of revenues for small contracting firms.[177] Table 23 contains the average costs and transfers per small contractor with affected employees by industry (*see* VI.B. for explanation). Average Year 1 costs and transfers per small contractor with affected employees range from $174 to $3,391.

To estimate whether these costs and transfers will have a substantial impact on small entities they are compared to total revenues for these firms. Based on Statistics of U.S. Businesses (SUSB) data, small Federal contractors had total annual revenues of $566.6 billion in 2015 from all sources (Table 24).[178] Transfers from small contractors and costs to small contractors in Year 1 ($105.0 million) are less than 0.02 percent of revenues on average and are no more than 0.17 percent in any industry. Therefore, the Department believes this Final Rule will not have a significant impact on small businesses.

To estimate average annualized costs to small contracting firms the Department projected small business costs and transfers forward 9 years. To do this the Department calculated the ratio of affected employees in small contracting firms to all affected employees in Year 1, then multiplied this ratio by the 10-year projections of national costs and transfers (*see* section V.C.). This yields the share of projected costs and transfers attributable to small businesses (Table 25).

TABLE 22—COSTS AND TRANSFERS TO SMALL CONTRACTORS IN YEAR 1

Industry	NAICS	Direct employer costs ($1,000s)					Transfers ($1,000s)
		Regulatory familiarization	Initial implementation	Recurring implementation	Recurring administrative	Total	
Agriculture, forestry, fishing and	11	$690	$313	$1	$0	$1,005	$26
Mining	21	227	103	1	0	331	2
Utilities	22	751	341	1	0	1,093	19
Construction	23	8,587	3,894	344	115	12,940	5,908
Manufacturing	31–33	1,369	621	26	9	2,025	378
Wholesale trade	42	3,945	1,789	2	1	5,738	25
Retail trade	44–45	1,877	851	151	50	2,930	1,273
Transportation and warehousing	48–49	2,162	981	91	30	3,265	1,383
Information	51	2,702	1,225	18	6	3,951	198
Finance and insurance	52	268	122	2	1	392	28
Real estate and rental and leasing	53	2,519	1,142	1	0	3,662	17
Professional, scientific, and	54	11,394	5,167	585	195	17,341	10,678
Management of companies and	55	26	12	0	0	38	0
Administrative and waste services	56	4,535	2,057	395	132	7,119	3,310
Educational services	61	1,491	676	11	4	2,182	171
Health care and social assistance	62	1,988	902	98	33	3,020	1,529
Arts, entertainment, and recreation	71	4,164	1,888	37	12	6,100	496
Accommodation and food services	72	2,034	922	53	18	3,026	464
Other services	81	1,851	839	20	7	2,716	211
Total private	....	52,580	23,846	1,836	612	78,874	26,116

TABLE 23—AVERAGE COSTS AND TRANSFERS PER SMALL CONTRACTOR WITH AFFECTED EMPLOYEES IN YEAR 1

Industry	NAICS	Total small contractors with potentially affected employees[a]	Small contractors with potentially affected employees in year 1[b]	Small contractors with affected employees in year 1[c]	Direct employer costs per small contractor	Transfers per small contractor	Total costs and transfers per small contractor
Agriculture, forestry, fishing and hunting	11	1,957	391	391	$161.73	$66.08	$227.81

---

[175] This includes the mean base wage of $18.84 from the OES plus benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's ECEC data. OES data available at: *http://www.bls.gov/oes/current/oes113121.htm.*

[176] The Final Rule will only apply to employees on new contracts. The Department estimates it will take five years for all employees to be affected. Therefore, adjustment costs will accrue over the first five years.

[177] American Express OPEN. (2013). Trends in Federal Contracting for Small Businesses: A Research Summary for the American Express OPEN for Government Contracts Program.

[178] Total revenue for small firms from 2012 SUSB; inflated to 2015$ using the CPI–U. Revenues for small contractors calculated by multiplying total revenue by the ratio of number of small contracting firms to total number of small firms.

TABLE 23—AVERAGE COSTS AND TRANSFERS PER SMALL CONTRACTOR WITH AFFECTED EMPLOYEES IN YEAR 1—Continued

Industry	NAICS	Total small contractors with potentially affected employees[a]	Small contractors with potentially affected employees in year 1[b]	Small contractors with affected employees in year 1[c]	Direct employer costs per small contractor	Transfers per small contractor	Total costs and transfers per small contractor
Mining	21	184	37	28	189.18	72.85	262.03
Utilities	22	2,661	532	74	176.12	254.88	431.00
Construction	23	17,899	3,580	3,368	293.08	1,754.34	2,047.42
Manufacturing	31–33	10,941	2,188	1,784	176.05	211.87	387.91
Wholesale trade	42	1,484	297	230	168.89	109.97	278.85
Retail trade	44–45	5,578	1,116	857	391.94	1,485.43	1,877.37
Transportation and warehousing	48–49	7,931	1,586	925	288.37	1,495.84	1,784.21
Information	51	8,293	1,659	701	190.45	282.19	472.64
Finance and insurance	52	198	40	12	383.26	2,440.85	2,824.12
Real estate and rental and leasing	53	2,326	465	328	160.04	52.86	212.91
Professional, scientific, and technical services	54	26,396	5,279	3,542	376.70	3,014.52	3,391.22
Management of companies and enterprises	55	2	0	0	158.77	15.31	174.08
Administrative and waste services	56	13,533	2,707	2,390	377.26	1,384.81	1,762.07
Educational services	61	3,140	628	230	220.97	742.28	963.25
Health care and social assistance	62	4,916	983	581	380.47	2,629.11	3,009.58
Arts, entertainment, and recreation	71	23,191	4,638	3,665	169.99	135.36	305.34
Accommodation and food services	72	7,715	1,543	1,503	203.41	308.64	512.06
Other services	81	5,007	1,001	774	190.72	272.77	463.49
Total private	....	143,352	28,670	21,383	271.19	1,221.33	1,492.52

[a] Source: *USASpending.gov* FY2015. Firms with contracting revenue, excluding contracts only for goods. Also includes 24,352 additional subcontractors identified in *USASpending.gov* from FY2011–FY2015 and 48,400 firms with operations on Federal land or property.

[b] Estimated as 20 percent of contractors with revenue from service contracts in FY2015. If affected employees in Year 1 are spread over more than 20 percent of these contractors, average costs and transfers per small contractor in Year 1 would be lower.

[c] Calculated by multiplying the number of small contractors with potentially affected employees in Year 1 by percentage of potentially affected workers who are affected, by industry. This may be an underestimate of the number of small contractors with affected employees if contractors have some potentially affected employees who are affected and others who are not affected.

TABLE 24—COSTS AND TRANSFERS AS SHARE OF REVENUE IN SMALL CONTRACTING FIRMS IN YEAR 1

Industry	NAICS	Total transfers & costs ($1,000s)	Small contracting firm revenues (billions)[a]	Total as share of revenues (%)
Agriculture, forestry, fishing and hunting	11	$1,031	$4.2	0.025
Mining	21	333	7.7	0.004
Utilities	22	1,112	80.6	0.001
Construction	23	18,848	58.1	0.032
Manufacturing	31–33	2,403	40.7	0.006
Wholesale trade	42	5,763	159.6	0.004
Retail trade	44–45	4,202	22.6	0.019
Transportation and warehousing	48–49	4,648	17.6	0.026
Information	51	4,149	41.8	0.010
Finance and insurance	52	421	1.8	0.024
Real estate and rental and leasing	53	3,679	10.6	0.035
Professional, scientific, and technical services	54	28,019	53.5	0.052
Management of companies and enterprises	55	38	0.0	0.162
Administrative and waste services	56	10,429	20.9	0.050
Educational services	61	2,353	8.2	0.029
Health care and social assistance	62	4,549	11.2	0.041
Arts, entertainment, and recreation	71	6,597	19.5	0.034
Accommodation and food services	72	3,490	2.2	0.161
Other services	81	2,928	5.9	0.050
Total private	....	104,990	566.6	0.019

[a] Source: Total revenue for small firms from 2012 SUSB; inflated to 2015$ using the CPI–U. Adjusted with ratio of small contracting firms to all small firms.

TABLE 25—PROJECTED COSTS TO SMALL BUSINESSES

[Millions of 2015$]

Year/discount rate	Direct employer costs	Transfers	Total
Years 1 Through 10			
Year 1	$78.9	$26.1	$105.0
Year 2	3.2	53.8	57.0

TABLE 25—PROJECTED COSTS TO SMALL BUSINESSES—Continued

[Millions of 2015$]

Year/discount rate	Direct employer costs	Transfers	Total
Year 3	3.8	81.9	85.8
Year 4	4.5	110.5	114.9
Year 5	5.1	139.5	144.6
Year 6	3.2	141.8	145.0
Year 7	3.2	144.2	147.5
Year 8	3.3	146.7	149.9
Year 9	3.3	149.2	152.5
Year 10	3.3	151.7	155.0
Average Annualized Amounts			
3% discount rate	12.2	111.2	123.4
7% discount rate	13.7	106.8	120.5

D. Differing Compliance and Reporting Requirements for Small Entities

This Final Rule provides no differing compliance and reporting requirements for small entities.

E. Least Burdensome Option or Explanation Required

The Department believes it has chosen the most effective option that implements the Executive Order, and limits burdens to the extent reasonably possible given the requirements of the Executive Order. Taking no regulatory action does not address the Department's concerns discussed above (*see* Need for Regulation section) and would contravene the Executive Order. The Department also found the option to allow unlimited accrual (section V.C.vi.) to be overly burdensome on business as well as beyond the scope of the Executive Order.

Pursuant to section 603(c) of the RFA, the following alternatives are to be addressed:

i. Differing compliance or reporting requirements for small entities. To establish differing compliance or reporting requirements for small businesses would undermine the impact of the rule. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance. Therefore, the Department is not implementing differing compliance or reporting requirements for small businesses.

ii. The clarification, consolidation, or simplification of compliance and reporting requirements for small entities. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance. As such, the Department has not clarified, consolidated, or simplified the rule.

iii. The use of performance rather than design standards. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance. Therefore, the Department is not relying upon performance to determine compliancy.

iv. An exemption from coverage of the rule, or any part thereof, for such small entities. To exempt small businesses from the Final Rule would undermine the impact of the rule. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance. Therefore, the Department is not implementing a "small business" exemption.

F. Identification, to the Extent Practicable, of all Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Final Rule

The Department is not aware of any Federal rules that duplicate, overlap, or conflict with this Final Rule.

VI. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1532, requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing any Federal mandate that may result in excess of $100 million (adjusted annually for inflation) in expenditures in any one year by state, local, and tribal governments in the aggregate, or by the private sector. However, this rulemaking applies almost entirely to private employees on Federal contracts and is not expected to affect state, local, or tribal governments. Please see section V.C. for an assessment of anticipated costs and benefits to the private sector.

A few commenters discussed the cost of the proposed rule to tribes. Elk Valley Rancheria wrote that they have "limited staff available to perform both direct and indirect services for federal contracts. . . The recordkeeping requirements, ambiguity in covered contracts, limited budgets of federal agencies, and potential penalties that could be imposed upon the Tribe as a federal contractor could result in the Tribe having to forego important federal contracting opportunities to the detriment of both the Tribe and federal agencies such as the Federal Highway Administration and the National Park Service." The Chamber/IFA believes some costs may be passed on to state, local and tribal governments and believes "the Department neglected to identify the various parties or types of contracts that would be implicated. The Department has therefore not addressed these important issues in its Unfunded Mandates Reform Act analysis." The Department believes that because costs are a small share of revenues, impacts to governments and tribes should be small.

VII. Executive Order 13132, Federalism

The Department has (1) reviewed this rule in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The Final Rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

VIII. Executive Order 13175, Indian Tribal Governments

This Final Rule will not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The rule will not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

IX. Effects on Families

The undersigned hereby certifies that the Final Rule will not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

X. Executive Order 13045, Protection of Children

This Final Rule will have no environmental health risk or safety risk that may disproportionately affect children.

XI. Environmental Impact Assessment

A review of this Final Rule in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.;* the regulations of the Council on Environmental Quality, 40 CFR 1500 *et seq.;* and the Departmental NEPA procedures, 29 CFR part 11, indicates that the rule will not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

XII. Executive Order 13211, Energy Supply

This rule is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

XIII. Executive Order 12630, Constitutionally Protected Property Rights

This Final Rule is not subject to Executive Order 12630 because it does not involve implementation of a policy that has takings implications or that could impose limitations on private property use.

XIV. Executive Order 12988, Civil Justice Reform Analysis

This Final Rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

List of Subjects in 29 CFR Part 13

Administrative practice and procedure, Construction, Government contracts, Law enforcement, Paid sick leave, Reporting and recordkeeping requirements.

David Weil,
Administrator, Wage and Hour Division.

■ For the reasons set out in the preamble, the Department of Labor amends Title 29 of the Code of Federal Regulations by adding part 13 to read as follows:

PART 13—ESTABLISHING PAID SICK LEAVE FOR FEDERAL CONTRACTORS

Subpart A—General

Sec.
13.1 Purpose and scope.
13.2 Definitions.
13.3 Coverage.
13.4 Exclusions.
13.5 Paid sick leave for Federal contractors and subcontractors.
13.6 Prohibited acts.
13.7 Waiver of rights.
13.8 Multiemployer plans or other funds, plans, or programs.

Subpart B—Federal Government Requirements

13.11 Contracting agency requirements.
13.12 Department of Labor requirements.

Subpart C—Contractor Requirements

13.21 Contract clause.
13.22 Paid sick leave.
13.23 Deductions.
13.24 Anti-kickback.
13.25 Records to be kept by contractors.
13.26 Notice.
13.27 Timing of pay.

Subpart D—Enforcement

13.41 Complaints.
13.42 Wage and Hour Division conciliation.
13.43 Wage and Hour Division investigation.
13.44 Remedies and sanctions.

Subpart E—Administrative Proceedings

13.51 Disputes concerning contractor compliance.
13.52 Debarment proceedings.
13.53 Referral to Chief Administrative Law Judge; amendment of pleadings.
13.54 Consent findings and order.
13.55 Administrative Law Judge proceedings.
13.56 Petition for review.
13.57 Administrative Review Board proceedings.
13.58 Administrator ruling.
Appendix A to Part 13—Contract Clause

Authority: 5 U.S.C. 301; E.O. 13706, 80 FR 54697, 3 CFR, 2016 Comp., p. 367; Secretary's Order 01–2014, 79 FR 77527.

Subpart A—General

§ 13.1 Purpose and scope.

(a) *Purpose.* This part contains the Department of Labor's rules relating to the administration and enforcement of Executive Order 13706 (Executive Order or the Order), "Establishing Paid Sick Leave for Federal Contractors." The Order states that providing paid sick leave to employees will improve the health and performance of employees of Federal contractors and will bring benefits packages offered by Federal contractors in line with model employers, ensuring they remain competitive in the search for dedicated and talented employees. The Executive Order concludes that providing paid sick leave will result in savings and quality improvements in the work performed by parties who contract with the Federal Government that will in turn lead to improved economy and efficiency in Government procurement.

(b) *Policy.* Executive Order 13706 sets forth the general position of the Federal Government that providing access to paid sick leave on Federal contracts will increase efficiency and cost savings for the Federal Government. The Order therefore provides that executive departments and agencies shall, to the extent permitted by law, ensure that new covered contracts, contract-like instruments, and solicitations (collectively referred to as "contracts") include a clause, which the contractor and any subcontractors shall incorporate into lower-tier subcontracts, specifying, as a condition of payment, that employees will earn not less than 1 hour of paid sick leave for every 30 hours worked on or in connection with covered contracts.

(c) *Scope.* Neither Executive Order 13706 nor this part creates or changes any rights under the Contract Disputes Act or creates any private right of action. The Executive Order provides that disputes regarding whether a contractor has provided paid sick leave as prescribed by the Order, to the extent permitted by law, shall be disposed of only as provided in this part. However, nothing in the Order or this part is intended to limit or preclude a civil action under the False Claims Act, 31 U.S.C. 3730, or criminal prosecution under 18 U.S.C. 1001. The Order and this part similarly do not preclude judicial review of final decisions by the Secretary of Labor in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

§ 13.2 Definitions.

For purposes of this part:

Accrual year means the 12-month period during which a contractor may limit an employee's accrual of paid sick leave to no less than 56 hours.

Administrative Review Board (ARB or Board) means the Administrative Review Board, U.S. Department of Labor.

Administrator means the Administrator of the Wage and Hour Division and includes any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under this part.

As soon as is practicable means as soon as both possible and practical, taking into account all of the facts and circumstances of the individual case.

Certification issued by a health care provider means any type of written document created or signed by a health care provider (or by a representative of the health care provider) that contains information verifying that the physical or mental illness, injury, medical condition, or need for diagnosis, care, or preventive care or other need for care referred to in § 13.5(c)(1)(i), (ii), or (iii) exists. The health care provider (or representative) need not have seen the employee or the individual for whom the employee is caring in person to create a valid certification.

Child means:

(1) A biological, adopted, step, or foster son or daughter of the employee;

(2) A person who is a legal ward or was a legal ward of the employee when that individual was a minor or required a legal guardian;

(3) A person for whom the employee stands *in loco parentis* or stood *in loco parentis* when that individual was a minor or required someone to stand *in loco parentis;* or

(4) A child, as described in paragraphs (1) through (3) of this definition, of an employee's spouse or domestic partner.

Concessions contract or *contract for concessions* means a contract under which the Federal Government grants a right to use Federal property, including land or facilities, for furnishing services. The term *concessions contract* includes, but is not limited to, a contract the principal purpose of which is to furnish food, lodging, automobile fuel, souvenirs, newspaper stands, and/or recreational equipment, regardless of whether the services are of direct benefit to the Government, its personnel, or the general public.

Contract or *contract-like instrument* means an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. This definition includes, but is not limited to, a mutually binding legal relationship obligating one party to furnish services (including construction) and another party to pay for them. The term *contract* includes all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing. The term *contract* shall be interpreted broadly to include, but not be limited to, any contract that may be consistent with the definition provided in the Federal Acquisition Regulation (FAR) or applicable Federal statutes. This definition includes, but is not limited to, any contract that may be covered under any Federal procurement statute. Contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. In addition to bilateral instruments, contracts include, but are not limited to, awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. The term *contract* includes contracts covered by the Service Contract Act, contracts covered by the Davis-Bacon Act, concessions contracts not subject to the Service Contract Act, and contracts in connection with Federal property or land and related to offering services for Federal employees, their dependents, or the general public.

Contracting officer means a representative of an executive department or agency with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. This term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer.

Contractor means any individual or other legal entity that is awarded a Federal Government contract or subcontract under a Federal Government contract. The term *contractor* refers to both a prime contractor and all of its subcontractors of any tier on a contract with the Federal Government. The term *contractor* includes lessors and lessees. The term *employer* is used interchangeably with the terms *contractor* and *subcontractor* in various sections of this part. The U.S. Government, its agencies, and instrumentalities are not contractors, subcontractors, employers, or joint employers for purposes of compliance with the provisions of the Executive Order.

Davis-Bacon Act (DBA) means the Davis-Bacon Act of 1931, as amended, 40 U.S.C. 3141 *et seq.*, and its implementing regulations.

Domestic partner means an adult in a committed relationship with another adult. A committed relationship is one in which the employee and the domestic partner of the employee are each other's sole domestic partner (and are not married to or domestic partners with anyone else) and share responsibility for a significant measure of each other's common welfare and financial obligations. This includes, but is not limited to, any relationship between two individuals of the same or opposite sex that is granted legal recognition by a State or by the District of Columbia as a marriage or analogous relationship (including, but not limited to, a civil union).

Domestic violence means:

(1) Felony or misdemeanor crimes of violence (including threats or attempts) committed:

(i) By a current or former spouse, domestic partner, or intimate partner of the victim;

(ii) By a person with whom the victim shares a child in common;

(iii) By a person who is cohabitating with or has cohabitated with the victim as a spouse, domestic partner, or intimate partner;

(iv) By a person similarly situated to a spouse of the victim under civil or criminal domestic or family violence laws of the jurisdiction in which the victim resides or the events occurred; or

(v) By any other adult person against a victim who is protected from that person's acts under the civil or criminal domestic or family violence laws of the jurisdiction in which the victim resides or the events occurred.

(2) Domestic violence also includes any crime of violence considered to be an act of domestic violence under the civil or criminal domestic or family violence laws of the jurisdiction in which the victim resides or the events occurred.

Employee means any person engaged in performing work on or in connection with a contract covered by the Executive Order, and whose wages under such contract are governed by the Service Contract Act, the Davis-Bacon Act, or the Fair Labor Standards Act, including employees who qualify for an exemption from the Fair Labor Standards Act's minimum wage and overtime provisions, regardless of the contractual relationship alleged to exist between the individual and the employer. The term *employee* includes any person performing work on or in connection with a covered contract and individually registered in a bona fide apprenticeship or training program registered with the U.S. Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship. An employee performs "on" a contract if the employee directly performs the specific services called for by the contract. An employee performs "in connection with" a contract if the employee's work activities are necessary to the performance of a contract but are not the specific services called for by the contract.

Executive departments and agencies means executive departments within the meaning of 5 U.S.C. 101, military departments within the meaning of 5 U.S.C. 102, or any independent establishments within the meaning of 5 U.S.C. 104(1) or 39 U.S.C. 201, and any wholly owned Government corporation within the meaning of 31 U.S.C. 9101.

Executive Order 13495 or *Nondisplacement Executive Order* means Executive Order 13495 of January 30, 2009, Nondisplacement of Qualified Workers Under Service Contracts, 74 FR 6103 (Feb. 4, 2009), and its implementing regulations at 29 CFR part 9.

Executive Order 13658 or *Minimum Wage Executive Order* means Executive Order 13658 of February 12, 2014, Establishing a Minimum Wage for Contractors, 79 FR 9851 (Feb. 20, 2014), and its implementing regulations at 29 CFR part 10.

Fair Labor Standards Act (FLSA) means the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et seq.*, and its implementing regulations.

Family and Medical Leave Act (FMLA) means the Family and Medical Leave Act of 1993, as amended, 29 U.S.C. 2601 *et seq.*, and its implementing regulations.

Family violence means any act or threatened act of violence, including any forceful detention of an individual that results or threatens to result in physical injury and is committed by a person against another individual (including an elderly individual) to or with whom such person is related by blood, is or was related by marriage or is or was otherwise legally related, or is or was lawfully residing.

Federal Government means an agency or instrumentality of the United States that enters into a contract pursuant to authority derived from the Constitution or the laws of the United States. For purposes of the Executive Order and this part, this definition does not include the District of Columbia, any Territory or possession of the United States, or any independent regulatory agency within the meaning of 44 U.S.C. 3502(5).

Health care provider means any practitioner who is licensed or certified under Federal or State law to provide the health-related service in question or any practitioner recognized by an employer or the employer's group health plan. The term includes, but is not limited to, doctors of medicine or osteopathy, podiatrists, dentists, psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers, physician assistants, physical therapists, and Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts.

Independent agencies means independent regulatory agencies within the meaning of 44 U.S.C. 3502(5).

Individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship means any person with whom the employee has a significant personal bond that is or is like a family relationship, regardless of biological or legal relationship.

Intimate partner means a person who is or has been in a social relationship of a romantic or intimate nature with the victim, where the existence of such a relationship shall be determined based on a consideration of the length of the relationship; the type of relationship; and the frequency of interaction between the persons involved in the relationship.

Multiemployer plan means a plan to which more than one employer is required to contribute and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer.

New contract means a contract that results from a solicitation issued on or after January 1, 2017, or a contract that is awarded outside the solicitation process on or after January 1, 2017. This term includes both new contracts and replacements for expiring contracts. It does not apply to the unilateral exercise of a pre-negotiated option to renew an existing contract by the Federal Government. For purposes of the Executive Order, a contract that is entered into prior to January 1, 2017 will constitute a *new contract* if, through bilateral negotiation, on or after January 1, 2017:

(1) The contract is renewed;

(2) The contract is extended, unless the extension is made pursuant to a term in the contract as of December 31, 2016 providing for a short-term limited extension; or

(3) The contract is amended pursuant to a modification that is outside the scope of the contract.

Obtain additional counseling, seek relocation, seek assistance from a victim services organization, or take related legal action, used in reference to domestic violence, sexual assault, or stalking, means to spend time arranging, preparing for, or executing acts related to addressing physical injuries or mental or emotional impacts resulting from being a victim of domestic violence, sexual assault, or stalking. Such acts include finding and using services of a counselor or victim services organization intended to assist a victim to respond to or prevent future incidents of domestic violence, sexual assault, or stalking; identifying and moving to a different residence to avoid being a victim of domestic violence, sexual assault, or stalking; or a victim's pursuing any related legal action.

Obtaining diagnosis, care, or preventive care from a health care provider means receiving services from a health care provider, whether to identify, treat, or otherwise address an existing condition or to prevent potential conditions from arising. The term includes time spent traveling to and from the location at which such services are provided or recovering from receiving such services.

Office of Administrative Law Judges means the Office of Administrative Law Judges, U.S. Department of Labor.

Option means a unilateral right in a contract by which, for a specified time, the Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract.

Paid sick leave means compensated absence from employment that is required by Executive Order 13706 and this part.

Parent means:

(1) A biological, adoptive, step, or foster parent of the employee, or a person who was a foster parent of the employee when the employee was a minor;

(2) A person who is the legal guardian of the employee or was the legal guardian of the employee when the

employee was a minor or required a legal guardian;

(3) A person who stands *in loco parentis* to the employee or stood *in loco parentis* to the employee when the employee was a minor or required someone to stand *in loco parentis;* or

(4) A parent, as described in paragraphs (1) through (3) of this definition, of an employee's spouse or domestic partner.

Physical or mental illness, injury, or medical condition means any disease, sickness, disorder, or impairment of, or any trauma to, the body or mind.

Procurement contract for construction means a procurement contract for the construction, alteration, or repair (including painting and decorating) of public buildings or public works and which requires or involves the employment of mechanics or laborers, and any subcontract of any tier thereunder. The term *procurement contract for construction* includes any contract subject to the Davis-Bacon Act.

Procurement contract for services means a contract the principal purpose of which is to furnish services in the United States through the use of service employees, and any subcontract of any tier thereunder. The term *procurement contract for services* includes any contract subject to the Service Contract Act.

Related legal action or *related civil or criminal legal proceeding,* used in reference to domestic violence, sexual assault, or stalking, means any type of legal action, in any forum, that relates to the domestic violence, sexual assault, or stalking, including, but not limited to, family, tribal, territorial, immigration, employment, administrative agency, housing matters, campus administrative or protection or stay-away order proceedings, and other similar matters; and criminal justice investigations, prosecutions, and post-trial matters (including sentencing, parole, and probation) that impact the victim's safety and privacy.

Secretary means the Secretary of Labor and includes any official of the U.S. Department of Labor authorized to perform any of the functions of the Secretary of Labor under this part.

Service Contract Act (SCA) means the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. 6701 *et seq.,* and its implementing regulations.

Sexual assault means any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent.

Solicitation means any request to submit offers, bids, or quotations to the Federal Government.

Spouse means the other person with whom an individual entered into marriage as defined or recognized under State law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a common law marriage that was entered into in a State that recognizes such marriages or, if entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

Stalking means engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

United States means the United States and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States, including corporations of which all or substantially all of the stock is owned by the United States, by the foregoing departments, establishments, agencies, and instrumentalities, including nonappropriated fund instrumentalities. When used in a geographic sense, the *United States* means the 50 States and the District of Columbia.

Victim services organization means a nonprofit, nongovernmental, or tribal organization or rape crisis center, including a State or tribal coalition, that assists or advocates for victims of domestic violence, sexual assault, or stalking, including domestic violence shelters, faith-based organizations, and other organizations, with a documented history of effective work concerning domestic violence, sexual assault, or stalking.

Violence Against Women Act (VAWA) means the Violence Against Women Act of 1994, 42 U.S.C. 13925 *et seq.,* and its implementing regulations.

Wage and Hour Division means the Wage and Hour Division, U.S. Department of Labor.

§ 13.3 Coverage.

(a) This part applies to any new contract with the Federal Government, unless excluded by § 13.4, provided that:

(1)(i) It is a procurement contract for construction covered by the Davis-Bacon Act;

(ii) It is a contract for services covered by the Service Contract Act;

(iii) It is a contract for concessions, including any concessions contract excluded from coverage under the Service Contract Act by Department of Labor regulations at § 4.133(b); or

(iv) It is a contract in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and

(2) The wages of employees performing on or in connection with such contract are governed by the Davis-Bacon Act, the Service Contract Act, or the Fair Labor Standards Act, including employees who qualify for an exemption from the Fair Labor Standards Act's minimum wage and overtime provisions.

(b) For contracts covered by the Service Contract Act or the Davis-Bacon Act, this part applies to prime contracts only at the thresholds specified in those statutes. For procurement contracts where employees' wages are governed by the Fair Labor Standards Act, this part applies when the prime contract exceeds the micro-purchase threshold, as defined in 41 U.S.C. 1902(a). For all other prime contracts covered by Executive Order 13706 and this part and for all subcontracts awarded under prime contracts covered by Executive Order 13706 and this part, this part applies regardless of the value of the contract.

(c) This part only applies to contracts with the Federal Government requiring performance in whole or in part within the United States. If a contract with the Federal Government is to be performed in part within and in part outside the United States and is otherwise covered by the Executive Order and this part, the requirements of the Order and this part would apply with respect to that part of the contract that is performed within the United States.

(d) This part does not apply to contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government, including those that are subject to the Walsh-Healey Public Contracts Act, 41 U.S.C. 6501 *et seq.*

§ 13.4 Exclusions.

(a) *Grants.* The requirements of this part do not apply to grants within the meaning of the Federal Grant and Cooperative Agreement Act, as amended, 31 U.S.C. 6301 *et seq.*

(b) *Contracts and agreements with and grants to Indian Tribes.* This part does not apply to contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 450 *et seq.*

(c) *Procurement contracts for construction that are excluded from coverage of the Davis-Bacon Act.* Procurement contracts for construction that are not covered by the Davis-Bacon Act are not subject to this part.

(d) *Contracts for services that are exempted from coverage under the Service Contract Act.* Service contracts, except for those expressly covered by § 13.3(a)(1)(iii) or (iv), that are exempt from coverage of the Service Contract Act pursuant to its statutory language at 41 U.S.C. 6702(b) or its implementing regulations, including those at § 4.115 through 4.122 and § 4.123(d) and (e), are not subject to this part.

(e) *Employees performing in connection with covered contracts for less than 20 percent of their work hours in a given workweek.* The accrual requirements of this part do not apply to employees performing in connection with covered contracts, *i.e.,* those employees who perform work duties necessary to the performance of the contract but who are not directly engaged in performing the specific work called for by the contract, who spend less than 20 percent of their hours worked in a particular workweek performing in connection with such contracts. This exclusion is inapplicable to employees performing on covered contracts, *i.e.,* those employees directly engaged in performing the specific work called for by the contract, at any point during the workweek. This exclusion is also inapplicable to employees performing in connection with covered contracts with respect to any workweek in which the employees spend 20 percent or more of their hours worked performing in connection with a covered contract.

(f) *Employees whose covered work is governed by a collective bargaining agreement that already provides 56 hours of paid sick time.* If a collective bargaining agreement ratified before September 30, 2016 applies to an employee's work performed on or in connection with a covered contract and provides the employee with at least 56 hours (or 7 days, if the agreement refers to days rather than hours) of paid sick time (or paid time off that may be used for reasons related to sickness or health care) each year, the requirements of the Executive Order and this part do not apply to the employee until the earlier of the date the agreement terminates or January 1, 2020. If a collective bargaining agreement ratified before September 30, 2016 applies to an employee's work performed on or in connection with a covered contract and provides the employee with paid sick time (or paid time off that may be used for reasons related to sickness or health care) each year, but the amount of such leave provided under the agreement is less than 56 hours (or 7 days, if the agreement refers to days rather than hours), the requirements of the Executive Order and this part do not apply to the employee until the earlier of the date the agreement terminates or January 1, 2020, *provided that* each year the contractor provides covered employees with the difference between 56 hours (or 7 days) and the amount provided under the existing agreement in a manner consistent with either the Executive Order and this part or the terms and conditions of the collective bargaining agreement.

§ 13.5 Paid sick leave for Federal contractors and subcontractors.

(a) *Accrual.* (1) A contractor shall permit an employee to accrue not less than 1 hour of paid sick leave for every 30 hours worked on or in connection with a covered contract. A contractor shall aggregate an employee's hours worked on or in connection with all covered contracts for that contractor for purposes of paid sick leave accrual.

(i) Hours worked has the same meaning for purposes of Executive Order 13706 and this part as it does under the Fair Labor Standards Act, as set forth in 29 CFR part 785. To properly exclude time spent on non-covered work from an employee's hours worked that count toward the accrual of paid sick leave, a contractor must accurately identify in its records the employee's covered and non-covered hours worked, or, if the employee performs work in connection with rather than on covered contracts, a contractor may estimate the portion of an employee's hours worked spent in connection with covered contracts provided the estimate is reasonable and based on verifiable information.

(ii) A contractor shall calculate an employee's accrual of paid sick leave no less frequently than at the conclusion of each pay period or each month, whichever interval is shorter. A contractor need not allow an employee to accrue paid sick leave in increments smaller than 1 hour for completion of any fraction of 30 hours worked. Any such fraction of hours worked shall be added to hours worked for the same contractor in subsequent pay periods to reach the next 30 hours worked provided that the next pay period in which the employee performs on or in connection with a covered contract occurs within the same accrual year.

(iii) If a contractor is not obligated by the Service Contract Act, Davis-Bacon Act, or Fair Labor Standards Act to keep records of an employee's hours worked, such as because the employee is employed in a bona fide executive, administrative, or professional capacity as those terms are defined in 29 CFR part 541, the contractor may, as to that employee, calculate paid sick leave accrual by tracking the employee's actual hours worked or by using the assumption that the employee works 40 hours on or in connection with a covered contract in each workweek. If such an employee regularly works fewer than 40 hours per week on or in connection with covered contracts, whether because the employee's time is split between covered and non-covered contracts or because the employee has a part-time schedule, the contractor may allow the employee to accrue paid sick leave based on the employee's typical number of hours worked on or in connection with covered contracts per workweek provided the contractor has probative evidence to support the number it uses or, if the employee performs work in connection with rather than on covered contracts, a contractor may estimate the employee's typical number of hours worked in connection with covered contracts per workweek provided the estimate is reasonable and based on verifiable information.

(2) A contractor shall inform an employee, in writing, of the amount of paid sick leave that the employee has accrued but not used no less than once each pay period or each month, whichever interval is shorter, as well as upon a separation from employment and upon reinstatement of paid sick leave pursuant to paragraph (b)(4) of this section. A contractor's existing procedure for informing employees of their available leave, such as notification accompanying each paycheck or an online system an employee can check at any time, may be used to satisfy or partially satisfy these requirements provided it is written (including electronically, if the contractor customarily corresponds with or makes information available to its employees by electronic means).

(3) A contractor may choose to provide an employee with at least 56 hours of paid sick leave at the beginning of each accrual year rather than allowing the employee to accrue such leave based on hours worked over time.

(i) If a contractor chooses to use the option described in this paragraph, the contractor need not comply with the accrual requirements described in paragraph (a)(1) of this section. The contractor must, however, allow carryover of paid sick leave as required by paragraph (b)(2) of this section, and although the contractor may limit the amount of paid sick leave an employee may carry over to no less than 56 hours, the contractor may not limit the amount of paid sick leave an employee has available for use at any point as is otherwise permitted by paragraph (b)(3) of this section.

(ii) If a contractor chooses to use the option described in this paragraph and the contractor hires an employee or newly assigns the employee to work on or in connection with a covered contract after the beginning of the accrual year, the contractor may provide the employee with a prorated amount of paid sick leave based on the number of pay periods remaining in the accrual year.

(iii) A contractor may use the option described in this paragraph as to any or all of its employees in any or all accrual years.

(b) *Maximum accrual, carryover, reinstatement, and payment for unused leave.* (1) A contractor may limit the amount of paid sick leave an employee is permitted to accrue to not less than 56 hours in each accrual year. An accrual year is a 12-month period beginning on the date an employee's work on or in connection with a covered contract began or any other fixed date chosen by the contractor, such as the date a covered contract began, the date the contractor's fiscal year begins, a date relevant under State law, or the date a contractor uses for determining employees' leave entitlements under the FMLA pursuant to § 825.200 of this title. A contractor may choose its accrual year but must use a consistent option for all, or across similarly situated groups of, employees and may not select or change any employee's accrual year in order to avoid the paid sick leave requirements of Executive Order 13706 and this part.

(2) Paid sick leave shall carry over from one accrual year to the next. Paid sick leave carried over from the previous accrual year shall not count toward any limit the contractor sets on annual accrual.

(3) A contractor may limit the amount of paid sick leave an employee is permitted to have available for use at any point to not less than 56 hours. Accordingly, even if an employee has accrued fewer than 56 hours of paid sick leave since the beginning of the accrual year, the employee need only be permitted to accrue additional paid sick leave if the employee has fewer than 56 hours available for use.

(4) Paid sick leave shall be reinstated for employees rehired by the same contractor within 12 months after a job separation. This reinstatement requirement applies whether the employee leaves and returns to a job on or in connection with a single covered contract or works for a single contractor on or in connection with more than one covered contract, regardless of whether the employee remains employed by the contractor in between periods of working on covered contracts.

(5) Nothing in Executive Order 13706 or this part shall require a contractor to make a financial payment to an employee for accrued paid sick leave that has not been used upon a separation from employment. If a contractor nevertheless makes such a payment in an amount equal to or greater than the value of the pay and benefits the employee would have received pursuant to paragraph (c)(3) of this section had the employee used the paid sick leave, the contractor is relieved of the obligation to reinstate an employee's accrued paid sick leave upon rehiring the employee within 12 months of the separation pursuant to paragraph (b)(4) of this section.

(c) *Use.* (1) Subject to the conditions described in paragraphs (d) and (e) of this section and the amount of paid sick leave the employee has available for use, a contractor must permit an employee to use paid sick leave to be absent from work for that contractor during time the employee would have been performing work on or in connection with a covered contract or, if the contractor estimates the employee's hours worked in connection with such contracts for purposes of accrual, during any work time because of:

(i) A physical or mental illness, injury, or medical condition of the employee;

(ii) Obtaining diagnosis, care, or preventive care from a health care provider by the employee;

(iii) Caring for the employee's child, parent, spouse, domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship who has any of the conditions or needs for diagnosis, care, or preventive care referred to in paragraphs (c)(1)(i) or (ii) of this section or is otherwise in need of care; or

(iv) Domestic violence, sexual assault, or stalking, if the time absent from work is for the purposes otherwise described in paragraphs (c)(1)(i) or (ii) of this section or to obtain additional counseling, seek relocation, seek assistance from a victim services organization, take related legal action, including preparation for or participation in any related civil or criminal legal proceeding, or assist an individual related to the employee as described in paragraph (c)(1)(iii) of this section in engaging in any of these activities.

(2) A contractor shall account for an employee's use of paid sick leave in increments of no greater than 1 hour.

(i) A contractor may not reduce an employee's accrued paid sick leave by more than the amount of time the employee is actually absent from work, and a contractor may not require an employee to use more leave than is necessary to address the circumstances that precipitated the need for the leave, provided that the leave is counted using an increment of no greater than 1 hour.

(ii) The amount of paid sick leave used may not exceed the hours an employee would have worked if the need for leave had not arisen.

(iii) If it is physically impossible for an employee using paid sick leave to commence or end work mid-way through a shift, such as if a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed "clean room" during a certain period of time, and no equivalent position is available, the entire period that the employee is forced to be absent constitutes paid sick leave. The period of the physical impossibility is limited to the period during which the contractor is unable to permit the employee to work prior to the use of paid sick leave or return the employee to the same or an equivalent position due to the physical impossibility after the use of paid sick leave.

(3) A contractor shall provide to an employee using paid sick leave the same regular pay and benefits the employee would have received had the employee not been absent from work. Regular pay means payments that would be included in the calculation of the employee's regular rate for hours worked under the Fair Labor Standards Act as set forth in 29 CFR part 778.

(4) A contractor may not limit the amount of paid sick leave an employee may use per year or at once on any basis other than the amount of paid sick leave an employee has available.

(5) An employee is encouraged to make a reasonable effort to schedule preventive care or another foreseeable need to use paid sick leave to suit the needs of both the contractor and employee, and a contractor may ask an employee to make a reasonable effort to schedule foreseeable paid sick leave so as to not disrupt unduly the contractor's operations, but a contractor may not make an employee's use of paid sick leave contingent on the employee's finding a replacement worker to cover any work time to be missed or on the

fulfillment of the contractor's operational needs.

(d) *Request for leave.* (1) A contractor shall permit an employee to use any or all of the employee's available paid sick leave upon the oral or written request of an employee that includes information sufficient to inform the contractor that the employee is seeking to be absent from work for a purpose described in paragraph (c)(1) of this section and, to the extent reasonably feasible, the anticipated duration of the leave.

(i) An employee's request to use paid sick leave need not include a specific reference to the Executive Order or this part or even use the words "sick leave" or "paid sick leave," and a contractor may not require an employee to provide extensive or detailed information about the need to be absent from work or the employee's family or family-like relationship with an individual for whom the employee is requesting to care.

(ii) Although an employee shall make a good faith effort to provide a reasonable estimate of the length of the requested absence from work, a contractor shall permit the employee to return to work earlier, or continue to use available paid sick leave for longer, than anticipated.

(iii) The employee's request shall be directed to the appropriate personnel pursuant to a contractor's policy or, in the absence of a formal policy, any personnel who typically receive requests for other types of leave or otherwise address scheduling issues on behalf of the contractor.

(iv) The contractor shall maintain the confidentiality of any medical or other personal information contained in an employee's request to use paid sick leave as required by § 13.25(d).

(2) If the need for leave is foreseeable, the employee's request shall be made at least 7 calendar days in advance. If the employee is unable to request paid sick leave at least 7 calendar days in advance, the request shall be made as soon as is practicable. When an employee becomes aware of a need to use paid sick leave less than 7 calendar days in advance, it should typically be practicable for the employee to make a request for leave either the day the employee becomes aware of the need to use paid sick leave or the next business day. In all cases, however, the determination of when an employee could practicably make a request must take into account the individual facts and circumstances.

(3)(i) A contractor may communicate its grant of a request to use paid sick leave either orally or in writing (including electronically, if the contractor customarily corresponds with or makes information available to its employees by such means).

(ii) A contractor shall communicate any denial of a request to use paid sick leave in writing (including electronically, if the contractor customarily corresponds with or makes information available to its employees by such means), with an explanation for the denial. Denial is appropriate if, for example, the employee did not provide sufficient information about the need for paid sick leave; the reason given is not consistent with the uses of paid sick leave described in paragraph (c)(1) of this section; the employee did not indicate when the need would arise; the employee has not accrued, and will not have accrued by the date of leave anticipated in the request, a sufficient amount of paid sick leave to cover the request (in which case, if the employee will have any paid sick leave available for use, only a partial denial is appropriate); or the request is to use paid sick leave during time the employee is scheduled to be performing non-covered work. If the denial is based on insufficient information provided in the request, such as if the employee did not state the time of an appointment with a health care provider, the contractor must permit the employee to submit a new, corrected request. If the denial is based on an employee's request to use paid sick leave during time she is scheduled to be performing non-covered work, the denial must be supported by records adequately segregating the employee's time spent on covered and non-covered contracts.

(iii) A contractor shall respond to any request to use paid sick leave as soon as is practicable after the request is made. Although the determination of when it is practicable for a contractor to provide a response will take into account the individual facts and circumstances, it should in many circumstances be practicable for the contractor to respond to a request immediately or within a few hours. In some instances, however, such as if it is unclear at the time of the request whether the employee will be working on or in connection with a covered or non-covered contract at the time for which paid sick leave is requested, as soon as practicable could mean within a day or no longer than within a few days.

(e) *Certification or documentation for leave of 3 or more consecutive full workdays.* (1)(i) A contractor may require certification issued by a health care provider to verify the need for paid sick leave used for a purpose described in paragraphs (c)(1)(i), (ii), or (iii) of this section only if the employee is absent for 3 or more consecutive full workdays. The contractor shall protect the confidentiality of any certification as required by § 13.25(d).

(ii) A contractor may only require documentation from an appropriate individual or organization to verify the need for paid sick leave used for a purpose described in paragraph (c)(1)(iv) of this section only if the employee is absent for 3 or more consecutive full workdays. The source of such documentation may be any person involved in providing or assisting with the care, counseling, relocation, assistance of a victim services organization, or related legal action, such as, but not limited to, a health care provider, counselor, representative of a victim services organization, attorney, clergy member, family member, or close friend. Self-certification is also permitted. The contractor may only require that such documentation contain the minimum necessary information establishing a need for the employee to be absent from work. The contractor shall not disclose any verification information and shall maintain confidentiality about the domestic abuse, sexual assault, or stalking, as required by § 13.25(d).

(2) If certification or documentation is to verify the illness, injury, or condition, need for diagnosis, care, or preventive care, or activity related to domestic violence, sexual assault, or stalking of an individual related to the employee as described in paragraph (c)(1)(iii) of this section, a contractor may also require the employee to provide reasonable documentation or a statement of the family or family-like relationship. This documentation may take the form of a simple written statement from the employee or could be a legal or other document proving the relationship, such as a birth certificate or court order.

(3)(i) A contractor may only require certification or documentation if the contractor informs an employee before the employee returns to work that certification or documentation will be required to verify the use of paid sick leave if the employee is absent for 3 or more consecutive full workdays. The contractor may inform an employee of this requirement each time the employee requests to use or does use paid sick leave, or the contractor may inform employees of a general policy to require certification or documentation for absences of 3 or more consecutive full workdays if it does so in a manner reasonably calculated to provide actual notice of the requirement to employees.

(ii) A contractor may require the employee to provide certification or documentation within 30 days of the first day of the 3 or more consecutive full workdays of paid sick leave but may not set a shorter deadline for its submission.

(iii) While a contractor is waiting for or reviewing certification or documentation, it must treat the employee's otherwise proper request for 3 or more consecutive full workdays of paid sick leave as valid. If the employee provides certification or documentation that is insufficient to verify the employee's need for paid sick leave, the contractor shall notify the employee of the deficiency and allow the employee at least 5 days to provide new or supplemental certification or documentation. If after 30 days the employee has not provided any certification or documentation, or if after the 5 or more days allowed for resubmission the employee has either provided no new or supplemental certification or documentation or the new certification or documentation is still insufficient to verify the employee's need for paid sick leave, the contractor may, within 10 calendar days of the employee's deadline for providing sufficient certification or documentation, retroactively deny the employee's request to use paid sick leave. In such circumstances, the contractor may recover the value of the pay and benefits the employee received but to which the employee was not entitled, including through deduction from any sums due to the employee (*e.g.*, unpaid wages, vacation pay, profit sharing, etc.), provided such deductions do not otherwise violate applicable Federal, State, or local wage payment or other laws.

(4) A contractor may contact the health care provider or other individual who created or signed the certification or documentation only for purposes of authenticating the document or clarifying its contents. The contractor may not request additional details about the medical or other condition referenced, seek a second opinion, or otherwise question the substance of the certification. To make such contact, the contractor must use a human resources professional, a leave administrator, or a management official. The employee's direct supervisor may not contact the employee's health care provider unless there is no other appropriate individual who can do so. The requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, set forth at 45 CFR parts 160 and 164, must be satisfied when individually identifiable health information of an employee is shared with a contractor by a HIPAA-covered health care provider.

(f) *Interaction with other laws and paid time off policies.* (1) *General.* Nothing in Executive Order 13706 or this part shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights than those established under the Executive Order and this part.

(2) *SCA and DBA requirements.* (i) Paid sick leave required by Executive Order 13706 and this part is in addition to a contractor's obligations under the Service Contract Act and Davis-Bacon Act. A contractor may not receive credit toward its prevailing wage or fringe benefit obligations under those Acts for any paid sick leave provided in satisfaction of the requirements of Executive Order 13706 and this part.

(ii) A contractor may count the value of any paid sick time provided in excess of the requirements of Executive Order 13706 and this part (and any other law) toward its obligations under the Service Contract Act or Davis-Bacon Act in keeping with the requirements of those Acts.

(3) *FMLA.* A contractor's obligations under the Executive Order and this part have no effect on its obligations to comply with, or ability to act pursuant to, the Family and Medical Leave Act. Paid sick leave may be substituted for (that is, may run concurrently with) unpaid FMLA leave under the same conditions as other paid time off pursuant to § 825.207 of this title. As to time off that is designated as FMLA leave and for which an employee uses paid sick leave, all notices and certifications that satisfy the FMLA requirements set forth at § 825.300 through 300.308 of this title will satisfy the request for leave and certification requirements of paragraphs (d) and (e) of this section.

(4) *State and local paid sick time laws.* A contractor's compliance with a State or local law requiring that employees be provided with paid sick time does not excuse the contractor from compliance with any of its obligations under the Executive Order 13706 or this part. A contractor may, however, satisfy its obligations under the Order and this part by providing paid sick time that fulfills the requirements of a State or local law provided that the paid sick time is accrued and may be used in a manner that meets or exceeds all of the requirements of the Order and this part including but not limited to the accrual and use requirements in this section and the prohibitions on interference and discrimination in § 13.6. Where the requirements of an applicable State or local law and the Order and this part differ, satisfying both will require a contractor to comply with the requirement that is more generous to employees.

(5) *Paid time off policies.* (i) The paid sick leave requirements of Executive Order 13706 and this part need not have any effect on a contractor's voluntary paid time off policy, whether provided pursuant to a collective bargaining agreement or otherwise.

(ii) A contractor's existing paid time off policy (if provided in addition to the fulfillment of Service Contract Act or Davis-Bacon Act obligations, if applicable) will satisfy the requirements of the Executive Order and this part if the paid time off is made available to all employees described in § 13.3(a)(2) (other than those excluded by § 13.4(e)); may be used for at least all of the purposes described in paragraph (c)(1) of this section; is provided in a manner and an amount sufficient to comply with the rules and restrictions regarding the accrual of paid sick leave set forth in paragraph (a) of this section and regarding maximum accrual, carryover, reinstatement, and payment for unused leave set forth in paragraph (b) of this section; is provided pursuant to policies sufficient to comply with the rules and restrictions regarding use of paid sick leave set forth in paragraph (c) of this section, regarding requests for leave set forth in paragraph (d) of this section, and regarding certification and documentation set forth in paragraph (e) of this section, at least with respect to any paid time off used for the purposes described in paragraph (c)(1) of this section; and is protected by the prohibitions against interference, discrimination, and recordkeeping violations described in § 13.6 and the prohibition against waiver of rights described in § 13.7, at least with respect to any paid time off used for the purposes described in paragraph (c)(1) of this section.

(iii) A contractor satisfying the requirements of the Executive Order and this part with a paid time off policy that provides more than 56 hours of leave per accrual year may choose to either provide all paid time off as described in paragraph (f)(5)(ii) of this section or track, and make and maintain records reflecting, the amount of paid time off an employee uses for the purposes described in paragraph (c)(1) of this section, in which case the contractor need only provide, for each accrual year, up to 56 hours of paid time off the employee requests to use for such purposes in compliance with the Order and this part.

§ 13.6 Prohibited acts.

(a) *Interference.* (1) A contractor may not in any manner interfere with an employee's accrual or use of paid sick leave as required by Executive Order 13706 or this part.

(2) Interference includes, but is not limited to, miscalculating the amount of paid sick leave an employee has accrued, denying or unreasonably delaying a response to a proper request to use paid sick leave, discouraging an employee from using paid sick leave, reducing an employee's accrued paid sick leave by more than the amount of such leave used, transferring the employee to work on non-covered contracts to prevent the accrual or use of paid sick leave, disclosing confidential information contained in certification or other documentation provided to verify the need to use paid sick leave, or making the use of paid sick leave contingent on the employee's finding a replacement worker or the fulfillment of the contractor's operational needs.

(b) *Discrimination.* (1) A contractor may not discharge or in any other manner discriminate against any employee for:

(i) Using, or attempting to use, paid sick leave as provided for under Executive Order 13706 and this part;

(ii) Filing any complaint, initiating any proceeding, or otherwise asserting any right or claim under Executive Order 13706 or this part;

(iii) Cooperating in any investigation or testifying in any proceeding under Executive Order 13706 or this part; or

(iv) Informing any other person about his or her rights under Executive Order 13706 or this part.

(2) Discrimination includes, but is not limited to, a contractor's considering any of the activities described in paragraph (b)(1) of this section as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions, or a contractor's counting paid sick leave under a no fault attendance policy.

(c) *Recordkeeping.* A contractor's failure to make and maintain or to make available to authorized representatives of the Wage and Hour Division records for inspection, copying, and transcription as required by § 13.25, or any other failure to comply with the requirements of § 13.25, constitutes a violation of Executive Order 13706, this part, and the underlying contract.

§ 13.7 Waiver of rights.

Employees cannot waive, nor may contractors induce employees to waive, their rights under Executive Order 13706 or this part.

§ 13.8 Multiemployer plans or other funds, plans, or programs.

(a) A contractor may fulfill its obligations under Executive Order 13706 and this part jointly with other contractors—that is, as though all of the contractors are a single contractor—through a multiemployer plan that provides paid sick leave in compliance with the rules and requirements of Executive Order 13706 and this part. Regardless of what functions the plan performs, each contractor remains responsible for any violation of the Order or this part that occurs during its employment of the employee.

(b) Nothing in this part prohibits a contractor from providing paid sick leave through a fund, plan, or program. Regardless of the manner in which a contractor provides paid sick leave or what functions any fund, plan, or program performs, the contractor remains responsible for any violation of the Order or this part with respect to any of its employees.

Subpart B—Federal Government Requirements

§ 13.11 Contracting agency requirements.

(a) *Contract clause.* The contracting agency shall include the Executive Order paid sick leave contract clause set forth in Appendix A of this part in all covered contracts and solicitations for such contracts, as described in § 13.3, except for procurement contracts subject to the FAR. The required contract clause directs, as a condition of payment, that all employees performing work on or in connection with covered contracts shall be provided paid sick leave as required by Executive Order 13706 and this part. For procurement contracts subject to the FAR, contracting agencies must use the clause set forth in the FAR developed to implement this rule. Such clause will accomplish the same purposes as the clause set forth in Appendix A and be consistent with the requirements set forth in this rule.

(b) *Failure to include the contract clause.* Where the Department of Labor or the contracting agency discovers or determines, whether before or subsequent to a contract award, that a contracting agency made an erroneous determination that Executive Order 13706 and this part did not apply to a particular contract and/or failed to include the applicable contract clause in a contract to which the Executive Order and this part apply, the contracting agency, on its own initiative or within 15 calendar days of notification by an authorized representative of the Department of Labor, shall incorporate the contract clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination).

(c) *Withholding.* A contracting officer shall, upon his or her own action or upon written request of the Administrator, withhold or cause to be withheld from the prime contractor under the covered contract or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay employees the full amount owed to compensate for any violation of Executive Order 13706 or this part. In the event of any such violation, the agency may, after authorization or by direction of the Administrator and written notification to the contractor, take action to cause suspension of any further payment, advance, or guarantee of funds until such violations have ceased. Additionally, any failure to comply with the requirements of Executive Order 13706 or this part may be grounds for termination of the right to proceed with the contract work. In such event, the contracting agency may enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost.

(d) *Suspending payment.* A contracting officer shall, upon his or her own action or upon the direction of the Administrator and notification of the contractor, take action to cause suspension of any further payment, advance, or guarantee of funds to a contractor that has failed to make available for inspection, copying, and transcription any of the records identified in § 13.25.

(e) *Actions on complaints*—(1) *Reporting time frame.* The contracting agency shall forward all information listed in paragraph (e)(2) of this section to the Office of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210 within 14 calendar days of receipt of a complaint alleging contractor noncompliance with Executive Order 13706 or this part or within 14 calendar days of being contacted by the Wage and Hour Division regarding any such complaint.

(2) *Report contents.* The contracting agency shall forward to the Office of Government Contracts Enforcement,

Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210 any:

(i) Complaint of contractor noncompliance with Executive Order 13706 or this part;

(ii) Available statements by the worker, contractor, or any other person regarding the alleged violation;

(iii) Evidence that the Executive Order paid sick leave contract clause was included in the contract;

(iv) Information concerning known settlement negotiations between the parties, if applicable; and

(v) Any other relevant facts known to the contracting agency or other information requested by the Wage and Hour Division.

§ 13.12 Department of Labor requirements.

(a) *Notice*—(1) *Wage Determinations OnLine Web site.* The Administrator will publish and maintain on Wage Determinations OnLine (WDOL), *http://www.wdol.gov*, or any successor site, a notice that Executive Order 13706 creates a requirement to allow employees performing work on or in connection with contracts covered by Executive Order 13706 and this part to accrue and use paid sick leave, as well as an indication of where to find more complete information about that requirement.

(2) *Wage determinations.* The Administrator will publish on all wage determinations issued under the Davis-Bacon Act and the Service Contract Act a notice that Executive Order 13706 creates a requirement to allow employees performing work on or in connection with contracts covered by Executive Order 13706 and this part to accrue and use paid sick leave, as well as an indication of where to find more complete information about that requirement.

(b) *Notification to a contractor of the withholding of funds.* If the Administrator requests that a contracting agency withhold funds from a contractor pursuant to § 13.11(c), or suspend payment, advance, or guarantee of funds pursuant to § 13.11(d), the Administrator and/or contracting agency shall notify the affected prime contractor of the Administrator's request to the contracting agency.

Subpart C—Contractor Requirements

§ 13.21 Contract clause.

(a) The contractor, as a condition of payment, shall abide by the terms of the applicable Executive Order paid sick leave contract clause referred to in § 13.11(a).

(b) The contractor shall include in any covered subcontracts the applicable Executive Order paid sick leave contract clause referred to in § 13.11(a) and shall require, as a condition of payment, that the subcontractor include the contract clause in any lower-tier subcontracts. The prime contractor and any upper-tier contractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the requirements of Executive Order 13706 and this part, whether or not the contract clause was included in the subcontract.

§ 13.22 Paid sick leave.

The contractor shall allow all employees performing work on or in connection with a covered contract to accrue and use paid sick leave as required by Executive Order 13706 and this part.

§ 13.23 Deductions.

The contractor may make deductions from the pay and benefits of an employee who is using paid sick leave only if such deduction qualifies as a:

(a) Deduction required by Federal, State, or local law, such as Federal or State withholding of income taxes;

(b) Deduction for payments made to third parties pursuant to court order;

(c) Deduction directed by a voluntary assignment of the employee or his or her authorized representative;

(d) Deduction for the reasonable cost or fair value, as determined by the Administrator, of furnishing such employee with "board, lodging, or other facilities," as defined in 29 U.S.C. 203(m) and 29 CFR part 531;

(e) Deduction, to the extent permitted by law, for the purpose of recouping pay and benefits provided for paid sick leave as to which the contractor retroactively denied the employee's request pursuant to § 13.5(e)(3)(iii) or because the contractor approved the use of the paid sick leave based on a fraudulent request.

§ 13.24 Anti-kickback.

All paid sick leave used by employees performing on or in connection with covered contracts must be paid free and clear and without subsequent deduction (except as set forth in § 13.23), rebate, or kickback on any account. Kickbacks directly or indirectly to the contractor or to another person for the contractor's benefit for the whole or part of the paid sick leave are prohibited.

§ 13.25 Records to be kept by contractors.

(a) The contractor and each subcontractor performing work subject to Executive Order 13706 and this part shall make and maintain during the course of the covered contract, and preserve for no less than 3 years thereafter, records containing the information specified in paragraphs (a)(1) through (15) of this section for each employee and shall make them available for inspection, copying, and transcription by authorized representatives of the Wage and Hour Division of the U.S. Department of Labor:

(1) Name, address, and Social Security number of each employee;

(2) The employee's occupation(s) or classification(s);

(3) The rate or rates of wages paid (including all pay and benefits provided);

(4) The number of daily and weekly hours worked;

(5) Any deductions made;

(6) The total wages paid (including all pay and benefits provided) each pay period;

(7) A copy of notifications to employees of the amount of paid sick leave the employees have accrued as required under § 13.5(a)(2);

(8) A copy of employees' requests to use paid sick leave, if in writing, or, if not in writing, any other records reflecting such employee requests;

(9) Dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy satisfies the requirements of Executive Order 13706 and this part as described in § 13.5(f)(5), leave must be designated in records as paid sick leave pursuant to Executive Order 13706);

(10) A copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests, as required under § 13.5(d)(3);

(11) Any records relating to the certification and documentation a contractor may require an employee to provide under § 13.5(e), including copies of any certification or documentation provided by an employee;

(12) Any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave;

(13) The relevant covered contract;

(14) The regular pay and benefits provided to an employee for each use of paid sick leave; and

(15) Any financial payment made for unused paid sick leave upon a separation from employment intended, pursuant to § 13.5(b)(5), to relieve a contractor from the obligation to reinstate such paid sick leave as otherwise required by § 13.5(b)(4).

(b) *Segregation of time.* (1) If a contractor wishes to distinguish between an employee's covered and non-covered work (such as time spent performing work on or in connection with a covered contract versus time spent performing work on or in connection with non-covered contracts or time spent performing work on or in connection with a covered contract in the United States versus time spent performing work outside the United States, or to establish that time spent performing solely in connection with covered contracts constituted less than 20 percent of an employee's hours worked during a particular workweek), the contractor must keep records or other proof reflecting such distinctions. Only if the contractor adequately segregates the employee's time will time spent on non-covered work be excluded from hours worked counted toward the accrual of paid sick leave. Similarly, only if that contractor adequately segregates the employee's time may a contractor properly deny an employee's request to take leave under § 13.5(d) on the ground that the employee was scheduled to perform non-covered work during the time she asked to use paid sick leave.

(2) If a contractor estimates covered hours worked by an employee who performs work in connection with covered contracts pursuant to § 13.5(a)(1)(i) or (iii), the contractor must keep records or other proof of the verifiable information on which such estimates are reasonably based. Only if the contractor relies on an estimate that is reasonable and based on verifiable information will an employee's time spent in connection with non-covered contracts be excluded from hours worked counted toward the accrual of paid sick leave. If a contractor estimates the amount of time an employee spends performing in connection with covered contracts, the contractor must permit the employee to use her paid sick leave during any work time for the contractor.

(c) If a contractor is not obligated by the Service Contract Act, Davis-Bacon Act, or Fair Labor Standards Act to keep records of an employee's hours worked, such as because the employee is employed in a bona fide executive, administrative, or professional capacity as those terms are defined in 29 CFR part 541, and the contractor chooses to use the assumption permitted by § 13.5(a)(1)(iii), the contractor is excused from the requirement in paragraph (a)(4) of this section to keep records of the employee's number of daily and weekly hours worked.

(d)(1) Records relating to medical histories or domestic violence, sexual assault, or stalking, created by or provided to a contractor for purposes of Executive Order 13706, whether of an employee or an employee's child, parent, spouse, domestic partner, or other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship, shall be maintained as confidential records in separate files/records from the usual personnel files.

(2) If the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA), section 503 of the Rehabilitation Act of 1973, and/or the Americans with Disabilities Act (ADA) apply to medical information contained in records or documents that the contractor created or received in connection with compliance with the recordkeeping or other requirements of this part, the records and documents must also be maintained in compliance with the confidentiality requirements of the GINA, section 503 of the Rehabilitation Act of 1973, and/or ADA as described in § 1635.9 of this title, 41 CFR 60–741.23(d), and § 1630.14(c)(1) of this title, respectively.

(3) The contractor shall not disclose any documentation used to verify the need to use 3 or more consecutive days of paid sick leave for the purposes listed in § 13.5(c)(1)(iv) (as described in § 13.5(d)(2)) and shall maintain confidentiality about any domestic abuse, sexual assault, or stalking, unless the employee consents or when disclosure is required by law.

(e) The contractor shall permit authorized representatives of the Wage and Hour Division to conduct interviews with employees at the worksite during normal working hours.

(f) Nothing in this part limits or otherwise modifies the contractor's recordkeeping obligations, if any, under the Davis-Bacon Act, the Service Contract Act, the Fair Labor Standards Act, the Family and Medical Leave Act, Executive Order 13658, their implementing regulations, or other applicable law.

§ 13.26 Notice.

(a) The contractor must notify all employees performing work on or in connection with a covered contract of the paid sick leave requirements of Executive Order 13706 and this part by posting a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by employees.

(b) Contractors that customarily post notices to employees electronically may post the notice electronically, provided such electronic posting is displayed prominently on any Web site that is maintained by the contractor, whether external or internal, and customarily used for notices to employees about terms and conditions of employment.

§ 13.27 Timing of pay.

The contractor shall compensate an employee for time during which the employee used paid sick leave no later than one pay period following the end of the regular pay period in which the paid sick leave was used.

Subpart D—Enforcement

§ 13.41 Complaints.

(a) Any employee, contractor, labor organization, trade organization, contracting agency, or other person or entity that believes a violation of the Executive Order or this part has occurred may file a complaint with any office of the Wage and Hour Division. No particular form of complaint is required. A complaint may be filed orally or in writing. If the complainant is unable to file the complaint in English, the Wage and Hour Division will accept the complaint in any language.

(b) It is the policy of the Department of Labor to protect the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy. Accordingly, the identity of any individual who makes a written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal the individual's identity, shall not be disclosed in any manner to anyone other than Federal officials without the prior consent of the individual. Disclosure of such statements shall be governed by the provisions of the Freedom of Information Act, 5 U.S.C. 552, 29 CFR part 70, and the Privacy Act of 1974, 5 U.S.C. 552a.

§ 13.42 Wage and Hour Division conciliation.

After receipt of a complaint, the Administrator may seek to resolve the matter through conciliation.

§ 13.43 Wage and Hour Division investigation.

The Administrator may investigate possible violations of the Executive Order or this part either as the result of a complaint or at any time on his or her own initiative. As part of the investigation, the Administrator may conduct interviews with the relevant contractor, as well as the contractor's employees at the worksite during normal work hours; inspect the relevant contractor's records (including contract documents and payrolls, if applicable); make copies and transcriptions of such records; and require the production of any documentary or other evidence the Administrator deems necessary to determine whether a violation, including conduct warranting imposition of debarment, has occurred. Federal agencies and contractors shall cooperate with any authorized representative of the Department of Labor in the inspection of records, in interviews with employees, and in all aspects of investigations.

§ 13.44 Remedies and sanctions.

(a) *Interference.* When the Administrator determines that a contractor has interfered with an employee's accrual or use of paid sick leave in violation of § 13.6(a), the Administrator will notify the contractor and the relevant contracting agency of the interference and request that the contractor remedy the violation. If the contractor does not remedy the violation, the Administrator shall direct the contractor to provide any appropriate relief to the affected employee(s) in the investigative findings letter issued pursuant to § 13.51. Such relief may include any pay and/or benefits denied or lost by reason of the violation; other actual monetary losses sustained as a direct result of the violation; or appropriate equitable or other relief. Payment of liquidated damages in an amount equaling any monetary relief may also be directed unless such amount is reduced by the Administrator because the violation was in good faith and the contractor had reasonable grounds for believing it had not violated the Order or this part. The Administrator may additionally direct that payments due on the contract or any other contract between the contractor and the Federal Government be withheld as may be necessary to provide any appropriate monetary relief. Upon the final order of the Secretary that monetary relief is due, the Administrator may direct the relevant contracting agency to transfer the withheld funds to the Department of Labor for disbursement.

(b) *Discrimination.* When the Administrator determines that a contractor has discriminated against an employee in violation of § 13.6(b), the Administrator will notify the contractor and the relevant contracting agency of the discrimination and request that the contractor remedy the violation. If the contractor does not remedy the violation, the Administrator shall direct the contractor to provide appropriate relief to the affected employee(s) in the investigative findings letter issued pursuant to § 13.51. Such relief may include, but is not limited to, employment, reinstatement, promotion, restoration of leave, or lost pay and/or benefits. Payment of liquidated damages in an amount equaling any monetary relief may also be directed unless such amount is reduced by the Administrator because the violation was in good faith and the contractor had reasonable grounds for believing the contractor had not violated the Order or this part. The Administrator may additionally direct that payments due on the contract or any other contract between the contractor and the Federal Government be withheld as may be necessary to provide any appropriate monetary relief. Upon the final order of the Secretary that monetary relief is due, the Administrator may direct the relevant contracting agency to transfer the withheld funds to the Department of Labor for disbursement.

(c) *Recordkeeping.* When a contractor fails to comply with the requirements of § 13.25 in violation of § 13.6(c), the Administrator will request that the contractor remedy the violation. If the contractor fails to produce required records upon request, the contracting officer, upon direction of an authorized representative of the Department of Labor, or under its own action, shall take such action as may be necessary to cause suspension of any further payment, advance, or guarantee of funds on the contract until such time as the violations are discontinued.

(d) *Debarment.* Whenever a contractor is found by the Secretary to have disregarded its obligations under the Executive Order or this part, such contractor and its responsible officers, and any firm, corporation, partnership, or association in which the contractor or responsible officers have an interest, shall be ineligible to be awarded any contract or subcontract subject to the Executive Order for a period of up to 3 years from the date of publication of the name of the contractor or responsible officer on the excluded parties list currently maintained on the System for Award Management Web site, *http://www.SAM.gov.* Neither an order of debarment of any contractor or its responsible officers from further Government contracts nor the inclusion of a contractor or its responsible officers on a published list of noncomplying contractors under this section shall be carried out without affording the contractor or responsible officers an opportunity for a hearing before an Administrative Law Judge.

(e) *Civil actions to recover greater underpayments than those withheld.* If the payments withheld under § 13.11(c) are insufficient to reimburse all monetary relief due, or if there are no payments to withhold, the Department of Labor, following a final order of the Secretary, may bring an action against the contractor in any court of competent jurisdiction to recover the remaining amount. The Department of Labor shall, to the extent possible, pay any sums it recovers in this manner directly to the employees who suffered the violation(s) of § 13.6(a) or (b). Any sum not paid to an employee because of inability to do so within 3 years shall be transferred into the Treasury of the United States as miscellaneous receipts.

(f) *Retroactive inclusion of contract clause.* If a contracting agency fails to include the applicable contract clause in a contract to which the Executive Order applies, the contracting agency, on its own initiative or within 15 calendar days of notification by an authorized representative of the Department of Labor, shall incorporate the contract clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination).

Subpart E—Administrative Proceedings

§ 13.51 Disputes concerning contractor compliance.

(a) This section sets forth the procedures for resolution of disputes of fact or law concerning a contractor's compliance with this part. The procedures in this section may be initiated upon the Administrator's own motion or upon request of the contractor.

(b)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that relevant facts are at issue, the Administrator will notify the affected contractor(s) and the prime contractor (if different) of the investigative findings by certified mail to the last known address.

(2) A contractor desiring a hearing concerning the Administrator's investigative findings letter shall request such a hearing by letter postmarked within 30 calendar days of the date of the Administrator's letter. The request shall set forth those findings that are in dispute with respect to the violations and/or debarment, as appropriate, explain how the findings are in dispute including by making reference to any affirmative defenses.

(3) Upon receipt of a timely request for a hearing, the Administrator shall refer the case to the Chief

Administrative Law Judge by Order of Reference, to which shall be attached a copy of the investigative findings letter from the Administrator and response thereto, for designation to an Administrative Law Judge to conduct such hearings as may be necessary to resolve the disputed matters. The hearing shall be conducted in accordance with the procedures set forth in 29 CFR part 6.

(c)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that there are no relevant facts at issue, and where there is not at that time reasonable cause to institute debarment proceedings under § 13.52, the Administrator shall notify the contractor(s) of the investigative findings by certified mail to the last known address, and shall issue a ruling in the investigative findings letter on any issues of law known to be in dispute.

(2)(i) If the contractor disagrees with the factual findings of the Administrator or believes that there are relevant facts in dispute, the contractor shall so advise the Administrator by letter postmarked within 30 calendar days of the date of the Administrator's letter. In the response, the contractor shall explain in detail the facts alleged to be in dispute and attach any supporting documentation.

(ii) Upon receipt of a timely response under paragraph (c)(2)(i) of this section alleging the existence of a factual dispute, the Administrator shall examine the information submitted. If the Administrator determines that there is a relevant issue of fact, the Administrator shall refer the case to the Chief Administrative Law Judge in accordance with paragraph (b)(3) of this section. If the Administrator determines that there is no relevant issue of fact, the Administrator shall so rule and advise the contractor accordingly.

(3) If the contractor desires review of the ruling issued by the Administrator under paragraph (c)(1) or the final sentence of (c)(2)(ii) of this section, the contractor shall file a petition for review thereof with the Administrative Review Board postmarked within 30 calendar days of the date of the ruling, with a copy thereof to the Administrator. The petition for review shall be filed in accordance with the procedures set forth in 29 CFR part 7.

(d) If a timely response to the Administrator's investigative findings letter is not made or a timely petition for review is not filed, the Administrator's investigative findings letter shall become the final order of the Secretary. If a timely response or petition for review is filed, the Administrator's letter shall be inoperative unless and until the decision is upheld by an Administrative Law Judge or the Administrative Review Board or otherwise becomes a final order of the Secretary.

§ 13.52 Debarment proceedings.

(a) Whenever any contractor is found by the Secretary of Labor to have disregarded its obligations to employees or subcontractors under Executive Order 13706 or this part, such contractor and its responsible officers, and any firm, corporation, partnership, or association in which such contractor or responsible officers have an interest, shall be ineligible for a period up to 3 years to receive any contracts or subcontracts subject to Executive Order 13706 from the date of publication of the name or names of the contractor or persons on the excluded parties list currently maintained on the System for Award Management Web site, *http://www.SAM.gov*.

(b)(1) Whenever the Administrator finds reasonable cause to believe that a contractor has committed a violation of Executive Order 13706 or this part which constitutes a disregard of its obligations to employees or subcontractors, the Administrator shall notify by certified mail to the last known address or by personal delivery, the contractor and its responsible officers (and any firms, corporations, partnerships, or associations in which the contractor or responsible officers are known to have an interest), of the finding. The Administrator shall afford such contractor and any other parties notified an opportunity for a hearing as to whether debarment action should be taken under Executive Order 13706 or this part. The Administrator shall furnish to those notified a summary of the investigative findings. If the contractor or any other parties notified wish to request a hearing as to whether debarment action should be taken, such a request shall be made by letter to the Administrator postmarked within 30 calendar days of the date of the investigative findings letter from the Administrator, and shall set forth any findings which are in dispute and the reasons therefor, including any affirmative defenses to be raised. Upon receipt of such timely request for a hearing, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the investigative findings letter from the Administrator and the response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to determine the matters in dispute.

(2) Hearings under this section shall be conducted in accordance with the procedures set forth in 29 CFR part 6. If no hearing is requested within 30 calendar days of the letter from the Administrator, the Administrator's findings shall become the final order of the Secretary.

§ 13.53 Referral to Chief Administrative Law Judge; amendment of pleadings.

(a) Upon receipt of a timely request for a hearing under § 13.51 (where the Administrator has determined that relevant facts are in dispute) or § 13.52 (debarment), the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the investigative findings letter from the Administrator and response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to decide the disputed matters. A copy of the Order of Reference and attachments thereto shall be served upon the respondent. The investigative findings letter from the Administrator and response thereto shall be given the effect of a complaint and answer, respectively, for purposes of the administrative proceedings.

(b) At any time prior to the closing of the hearing record, the complaint (investigative findings letter) or answer (response) may be amended with the permission of the Administrative Law Judge and upon such terms as the Administrative Law Judge may approve. For proceedings pursuant to § 13.51, such an amendment may include a statement that debarment action is warranted under § 13.52. Such amendments shall be allowed when justice and the presentation of the merits are served thereby, provided there is no prejudice to the objecting party's presentation on the merits. When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make them conform to the evidence. The presiding Administrative Law Judge may, upon reasonable notice and upon such terms as are just, permit supplemental pleadings setting forth transactions, occurrences, or events that have happened since the date of the pleadings and that are relevant to any of the issues involved. A continuance in the hearing may be granted or the record left open to enable the new allegations to be addressed.

§ 13.54 Consent findings and order.

(a) At any time prior to the receipt of evidence or, at the Administrative Law Judge's discretion prior to the issuance of the Administrative Law Judge's decision, the parties may enter into consent findings and an order disposing of the proceeding in whole or in part.

(b) Any agreement containing consent findings and an order disposing of a proceeding in whole or in part shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the Administrator's findings letter and the agreement;

(3) A waiver of any further procedural steps before the Administrative Law Judge and the Administrative Review Board regarding those matters which are the subject of the agreement; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) Within 30 calendar days after receipt of an agreement containing consent findings and an order disposing of the disputed matter in whole, the Administrative Law Judge shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings and order. If such agreement disposes of only a part of the disputed matter, a hearing shall be conducted on the matters remaining in dispute.

§ 13.55 Administrative Law Judge proceedings.

(a) *Jurisdiction.* The Office of Administrative Law Judges has jurisdiction to hear and decide appeals concerning questions of law and fact from the Administrator's investigative findings letters issued under §§ 13.51 and 13.52.

(b) *Proposed findings of fact, conclusions, and order.* Within 20 calendar days of filing of the transcript of the testimony or such additional time as the Administrative Law Judge may allow, each party may file with the Administrative Law Judge proposed findings of fact, conclusions of law, and a proposed order, together with a supporting brief expressing the reasons for such proposals. Each party shall serve such proposals and brief on all other parties.

(c) *Decision.* (1) Within a reasonable period of time after the time allowed for filing of proposed findings of fact, conclusions of law, and order, or within 30 calendar days of receipt of an agreement containing consent findings and order disposing of the disputed matter in whole, the Administrative Law Judge shall issue a decision. The decision shall contain appropriate findings, conclusions, and an order, and be served upon all parties to the proceeding.

(2) If the respondent is found to have violated Executive Order 13706 or this part, and if the Administrator requested debarment, the Administrative Law Judge shall issue an order as to whether the respondent is to be subject to the excluded parties list, including findings that the contractor disregarded its obligations to employees or subcontractors under the Executive Order or this part.

(d) *Limit on scope of review.* The Equal Access to Justice Act, as amended, does not apply to proceedings under this part. Accordingly, Administrative Law Judges shall have no authority to award attorney's fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act for any proceeding under this part.

(e) *Orders.* If the Administrative Law Judge concludes a violation occurred, the final order shall mandate action to remedy the violation, including any monetary or equitable relief described in § 13.44. Where the Administrator has sought imposition of debarment, the Administrative Law Judge shall determine whether an order imposing debarment is appropriate.

(f) *Finality.* The Administrative Law Judge's decision shall become the final order of the Secretary, unless a timely petition for review is filed with the Administrative Review Board.

§ 13.56 Petition for review.

(a) *Filing.* Within 30 calendar days after the date of the decision of the Administrative Law Judge (or such additional time as is granted by the Administrative Review Board), any party aggrieved thereby who desires review thereof shall file a petition for review of the decision with supporting reasons. Such party shall transmit the petition in writing to the Administrative Review Board with a copy thereof to the Chief Administrative Law Judge. The petition shall refer to the specific findings of fact, conclusions of law, or order at issue. A petition concerning the decision on debarment shall also state the disregard of obligations to employees and/or subcontractors, or lack thereof, as appropriate. A party must serve the petition for review, and all briefs, on all parties and the Chief Administrative Law Judge. It must also timely serve copies of the petition and all briefs on the Administrator, Wage and Hour Division, and on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210.

(b) *Effect of filing.* If a party files a timely petition for review, the Administrative Law Judge's decision shall be inoperative unless and until the Administrative Review Board issues an order affirming the decision, or the decision otherwise becomes a final order of the Secretary. If a petition for review concerns only the imposition of debarment, however, the remainder of the decision shall be effective immediately. No judicial review shall be available unless a timely petition for review to the Administrative Review Board is first filed.

§ 13.57 Administrative Review Board proceedings.

(a) *Authority*—(1) *General.* The Administrative Review Board has jurisdiction to hear and decide in its discretion appeals concerning questions of law and fact from investigative findings letters of the Administrator issued under § 13.51(c)(1) or the final sentence of § 13.51(c)(2)(ii), Administrator's rulings issued under § 13.58, and decisions of Administrative Law Judges issued under § 13.55. In considering the matters within the scope of its jurisdiction, the Administrative Review Board shall act as the authorized representative of the Secretary and shall act fully and finally on behalf of the Secretary concerning such matters.

(2) *Limit on scope of review.* (i) The Administrative Review Board shall not have jurisdiction to pass on the validity of any provision of this part. The Administrative Review Board is an appellate body and shall decide cases properly before it on the basis of substantial evidence contained in the entire record before it. The Administrative Review Board shall not receive new evidence into the record.

(ii) The Equal Access to Justice Act, as amended, does not apply to proceedings under this part. Accordingly, the Administrative Review Board shall have no authority to award attorney's fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act for any proceeding under this part.

(b) *Decisions.* The Administrative Review Board's final decision shall be issued within a reasonable period of time following receipt of the petition for review and shall be served upon all parties by mail to the last known address and on the Chief Administrative Law Judge (in cases involving an appeal from an Administrative Law Judge's decision).

(c) *Orders.* If the Administrative Review Board concludes a violation occurred, the final order shall mandate action to remedy the violation, including, but not limited to, any monetary or equitable relief described in § 13.44. Where the Administrator has sought imposition of debarment, the Administrative Review Board shall determine whether an order imposing debarment is appropriate.

(d) *Finality.* The decision of the Administrative Review Board shall become the final order of the Secretary.

§ 13.58 Administrator ruling.

(a) Questions regarding the application and interpretation of the rules contained in this part may be referred to the Administrator, who shall issue an appropriate ruling. Requests for such rulings should be addressed to the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210.

(b) Any interested party may appeal to the Administrative Review Board for review of a final ruling of the Administrator issued under paragraph (a) of this section. The petition for review shall be filed with the Administrative Review Board within 30 calendar days of the date of the ruling.

Appendix A to Part 13—Contract Clause

The following clause shall be included by the contracting agency in every contract, contract-like instrument, and solicitation to which Executive Order 13706 applies, except for procurement contracts subject to the Federal Acquisition Regulation (FAR):

(a) *Executive Order 13706.* This contract is subject to Executive Order 13706, the regulations issued by the Secretary of Labor in 29 CFR part 13 pursuant to the Executive Order, and the following provisions.

(b) *Paid Sick Leave.* (1) The contractor shall permit each employee (as defined in 29 CFR 13.2) engaged in the performance of this contract by the prime contractor or any subcontractor, regardless of any contractual relationship that may be alleged to exist between the contractor and employee, to earn not less than 1 hour of paid sick leave for every 30 hours worked. The contractor shall additionally allow accrual and use of paid sick leave as required by Executive Order 13706 and 29 CFR part 13. The contractor shall in particular comply with the accrual, use, and other requirements set forth in 29 CFR 13.5 and 13.6, which are incorporated by reference in this contract.

(2) The contractor shall provide paid sick leave to all employees when due free and clear and without subsequent deduction (except as otherwise provided by 29 CFR 13.24), rebate, or kickback on any account. The contractor shall provide pay and benefits for paid sick leave used no later than one pay period following the end of the regular pay period in which the paid sick leave was taken.

(3) The prime contractor and any upper-tier subcontractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the requirements of Executive Order 13706, 29 CFR part 13, and this clause.

(c) *Withholding.* The contracting officer shall, upon its own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the prime contractor under this or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay employees the full amount owed to compensate for any violation of the requirements of Executive Order 13706, 29 CFR part 13, or this clause, including any pay and/or benefits denied or lost by reason of the violation; other actual monetary losses sustained as a direct result of the violation, and liquidated damages.

(d) *Contract Suspension/Contract Termination/Contractor Debarment.* In the event of a failure to comply with Executive Order 13706, 29 CFR part 13, or this clause, the contracting agency may on its own action or after authorization or by direction of the Department of Labor and written notification to the contractor, take action to cause suspension of any further payment, advance, or guarantee of funds until such violations have ceased. Additionally, any failure to comply with the requirements of this clause may be grounds for termination of the right to proceed with the contract work. In such event, the Government may enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost. A breach of the contract clause may be grounds for debarment as a contractor and subcontractor as provided in 29 CFR 13.52.

(e) The paid sick leave required by Executive Order 13706, 29 CFR part 13, and this clause is in addition to a contractor's obligations under the Service Contract Act and Davis-Bacon Act, and a contractor may not receive credit toward its prevailing wage or fringe benefit obligations under those Acts for any paid sick leave provided in satisfaction of the requirements of Executive Order 13706 and 29 CFR part 13.

(f) Nothing in Executive Order 13706 or 29 CFR part 13 shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights than those established under Executive Order 13706 and 29 CFR part 13.

(g) *Recordkeeping.* (1) Any contractor performing work subject to Executive Order 13706 and 29 CFR part 13 must make and maintain, for no less than three (3) years from the completion of the work on the contract, records containing the information specified in paragraphs (i) through (xv) of this section for each employee and shall make them available for inspection, copying, and transcription by authorized representatives of the Wage and Hour Division of the U.S. Department of Labor:

(i) Name, address, and Social Security number of each employee;

(ii) The employee's occupation(s) or classification(s);

(iii) The rate or rates of wages paid (including all pay and benefits provided);

(iv) The number of daily and weekly hours worked;

(v) Any deductions made;

(vi) The total wages paid (including all pay and benefits provided) each pay period;

(vii) A copy of notifications to employees of the amount of paid sick leave the employee has accrued, as required under 29 CFR 13.5(a)(2);

(viii) A copy of employees' requests to use paid sick leave, if in writing, or, if not in writing, any other records reflecting such employee requests;

(ix) Dates and amounts of paid sick leave taken by employees (unless a contractor's paid time off policy satisfies the requirements of Executive Order 13706 and 29 CFR part 13 as described in § 13.5(f)(5), leave must be designated in records as paid sick leave pursuant to Executive Order 13706);

(x) A copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests, as required under 29 CFR 13.5(d)(3);

(xi) Any records reflecting the certification and documentation a contractor may require an employee to provide under 29 CFR 13.5(e), including copies of any certification or documentation provided by an employee;

(xii) Any other records showing any tracking of or calculations related to an employee's accrual or use of paid sick leave;

(xiii) The relevant covered contract;

(xiv) The regular pay and benefits provided to an employee for each use of paid sick leave; and

(xv) Any financial payment made for unused paid sick leave upon a separation from employment intended, pursuant to 29 CFR 13.5(b)(5), to relieve a contractor from the obligation to reinstate such paid sick leave as otherwise required by 29 CFR 13.5(b)(4).

(2)(i) If a contractor wishes to distinguish between an employee's covered and non-covered work, the contractor must keep records or other proof reflecting such distinctions. Only if the contractor adequately segregates the employee's time will time spent on non-covered work be excluded from hours worked counted toward the accrual of paid sick leave. Similarly, only if that contractor adequately segregates the employee's time may a contractor properly refuse an employee's request to use paid sick leave on the ground that the employee was scheduled to perform non-covered work during the time she asked to use paid sick leave.

(ii) If a contractor estimates covered hours worked by an employee who performs work in connection with covered contracts pursuant to 29 CFR 13.5(a)(i) or (iii), the contractor must keep records or other proof of the verifiable information on which such estimates are reasonably based. Only if the contractor relies on an estimate that is reasonable and based on verifiable information will an employee's time spent in connection with non-covered work be excluded from hours worked counted toward the accrual of paid sick leave. If a contractor estimates the amount of time an employee spends performing in connection with covered contracts, the contractor must permit the employee to use her paid sick leave during any work time for the contractor.

(3) In the event a contractor is not obligated by the Service Contract Act, the Davis-Bacon Act, or the Fair Labor Standards Act to keep records of an employee's hours worked, such as because the employee is exempt from the FLSA's minimum wage and overtime requirements, and the contractor chooses to use the assumption permitted by 29 CFR 13.5(a)(1)(iii), the contractor is excused from the requirement in paragraph (1)(d) of this section to keep records of the employee's number of daily and weekly hours worked.

(4)(i) Records relating to medical histories or domestic violence, sexual assault, or stalking, created for purposes of Executive Order 13706, whether of an employee or an employee's child, parent, spouse, domestic partner, or other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship, shall be maintained as confidential records in separate files/records from the usual personnel files.

(ii) If the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA), section 503 of the Rehabilitation Act of 1973, and/or the Americans with Disabilities Act (ADA) apply to records or documents created to comply with the recordkeeping requirements in this contract clause, the records and documents must also be maintained in compliance with the confidentiality requirements of the GINA, section 503 of the Rehabilitation Act of 1973, and/or ADA as described in 29 CFR 1635.9, 41 CFR 60–741.23(d), and 29 CFR 1630.14(c)(1), respectively.

(iii) The contractor shall not disclose any documentation used to verify the need to use 3 or more consecutive days of paid sick leave for the purposes listed in 29 CFR 13.5(c)(1)(iv) (as described in 29 CFR 13.5(e)(1)(ii)) and shall maintain confidentiality about any domestic abuse, sexual assault, or stalking, unless the employee consents or when disclosure is required by law.

(5) The contractor shall permit authorized representatives of the Wage and Hour Division to conduct interviews with employees at the worksite during normal working hours.

(6) Nothing in this contract clause limits or otherwise modifies the contractor's recordkeeping obligations, if any, under the Davis-Bacon Act, the Service Contract Act, the Fair Labor Standards Act, the Family and Medical Leave Act, Executive Order 13658, their respective implementing regulations, or any other applicable law.

(h) The contractor (as defined in 29 CFR 13.2) shall insert this clause in all of its covered subcontracts and shall require its subcontractors to include this clause in any covered lower-tier subcontracts.

(i) *Certification of Eligibility.* (1) By entering into this contract, the contractor (and officials thereof) certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of the sanctions imposed pursuant to section 5 of the Service Contract Act, section 3(a) of the Davis-Bacon Act, or 29 CFR 5.12(a)(1).

(2) No part of this contract shall be subcontracted to any person or firm whose name appears on the list of persons or firms ineligible to receive Federal contracts currently maintained on the System for Award Management Web site, *http://www.SAM.gov.*

(3) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(j) *Interference/Discrimination.* (1) A contractor may not in any manner interfere with an employee's accrual or use of paid sick leave as required by Executive Order 13706 or 29 CFR part 13. Interference includes, but is not limited to, miscalculating the amount of paid sick leave an employee has accrued, denying or unreasonably delaying a response to a proper request to use paid sick leave, discouraging an employee from using paid sick leave, reducing an employee's accrued paid sick leave by more than the amount of such leave used, transferring an employee to work on non-covered contracts to prevent the accrual or use of paid sick leave, disclosing confidential information contained in certification or other documentation provided to verify the need to use paid sick leave, or making the use of paid sick leave contingent on the employee's finding a replacement worker or the fulfillment of the contractor's operational needs.

(2) A contractor may not discharge or in any other manner discriminate against any employee for:

(i) Using, or attempting to use, paid sick leave as provided for under Executive Order 13706 and 29 CFR part 13;

(ii) Filing any complaint, initiating any proceeding, or otherwise asserting any right or claim under Executive Order 13706 and 29 CFR part 13;

(iii) Cooperating in any investigation or testifying in any proceeding under Executive Order 13706 and 29 CFR part 13; or

(iv) Informing any other person about his or her rights under Executive Order 13706 and 29 CFR part 13.

(k) *Waiver.* Employees cannot waive, nor may contractors induce employees to waive, their rights under Executive Order 13706, 29 CFR part 13, or this clause.

(l) *Notice.* The contractor must notify all employees performing work on or in connection with a covered contract of the paid sick leave requirements of Executive Order 13706, 29 CFR part 13, and this clause by posting a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by employees. Contractors that customarily post notices to employees electronically may post the notice electronically, provided such electronic posting is displayed prominently on any Web site that is maintained by the contractor, whether external or internal, and customarily used for notices to employees about terms and conditions of employment.

(m) *Disputes concerning labor standards.* Disputes related to the application of Executive Order 13706 to this contract shall not be subject to the general disputes clause of the contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR part 13. Disputes within the meaning of this contract clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

[FR Doc. 2016–22964 Filed 9–29–16; 8:45 am]

BILLING CODE 4510–27–P

FEDERAL REGISTER

Vol. 81 Friday,
No. 190 September 30, 2016

Part IV

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Chapter 1, et al.
Federal Acquisition Regulations; Final Rules

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR 2016–0051, Sequence No. 5]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–91; Introduction

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of interim and final rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2005–91. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at *http://www.regulations.gov.*

DATES: For effective dates see the separate documents, which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below in relation to the FAR case. Please cite FAC 2005–91 and the specific FAR case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755.

RULES LISTED IN FAC 2005–91

Item	Subject	FAR case	Analyst
I	Prohibition on Contracting with Corporations with Delinquent Taxes or a Felony Conviction	2015–011	Davis.
II	Updating Federal Contractor Reporting of Veterans' Employment	2015–036	Delgado.
III	Non-Retaliation for Disclosure of Compensation Information (Interim)	2016–007	Delgado.
IV	Sole Source Contracts for Women-Owned Small Businesses	2015–032	Uddowla.
V	Unique Identification of Entities Receiving Federal Awards	2015–022	Delgado.
VI	Consolidation and Bundling	2014–015	Uddowla.
VII	Amendment Relating to Multi-year Contract Authority for Acquisition of Property	2016–006	Jackson.
VIII	New Designated Countries—Ukraine and Moldova	2016–009	Davis.
IX	Contractors Performing Private Security Functions	2014–018	Jackson.
X	Limitation on Allowable Government Contractor Employee Compensation Costs	2014–012	Hopkins.
XI	Technical Amendments.		

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these rules, refer to the specific item numbers and subjects set forth in the documents following these item summaries. FAC 2005–91 amends the FAR as follows:

Item I—Prohibition on Contracting With Corporations With Delinquent Taxes or a Felony Conviction (FAR Case 2015–011)

DoD, GSA, and NASA are adopting as final, without change, an interim rule, which amended the FAR to implement sections of the Consolidated and Further Continuing Appropriations Act, 2015. The rule prohibits the Federal Government from entering into a contract with any corporation having a delinquent Federal tax liability or a felony conviction under any Federal law, unless the agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

This final rule will not have a significant economic impact on a substantial number of small entities.

Item II—Updating Federal Contractor Reporting of Veterans' Employment (FAR Case 2015–036)

DoD, GSA, and NASA are adopting as final, without change, an interim rule amending the FAR to implement a final rule issued by the Department of Labor's Veterans' Employment and Training Service (VETS) that revised the regulations at 41 CFR part 61 implementing the reporting requirements under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), as amended and the Jobs for Veterans Act (JVA) (Pub. L. 107–288). VEVRAA requires Federal contractors and subcontractors to annually report on the total number of their employees who belong to the categories of veterans protected under VEVRAA, as amended by the JVA, and the total number of those protected veterans who were hired during the period covered by the report. The VETS rule requires contractors and subcontractors to comply with its revised reporting requirements using the Form VETS–4212, in lieu of the VETS–100 and VETS–100A, beginning with the annual report filed in 2015.

There is no significant impact on small entities imposed by the FAR rule.

Item III—Non-Retaliation for Disclosure of Compensation Information (FAR Case 2016–007) (Interim)

DoD, GSA, and NASA are issuing an interim rule amending the FAR to implement Executive Order (E.O.) 13665, Non-Retaliation for Disclosure of Compensation Information, amending Executive Order 11246, Equal Opportunity in Federal Employment. The E.O. was signed April 8, 2014. The interim rule is also implementing the final rule issued by the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor (DOL) to implement the E.O. The DOL final rule was published in the **Federal Register** at 80 FR 54934, on September 11, 2015, entitled Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions.

E.O. 11246, originally issued September 24, 1965, establishes nondiscrimination and affirmative action obligations in employment for Federal contractors and subcontractors. It prohibits employment discrimination because of race, color, religion, sex, sexual orientation, gender identity, and national origin. E.O. 13665 amends E.O. 11246 and its Equal Opportunity Clause by incorporating, as a covered prohibition, discriminating against employees and job applicants who inquire about, discuss, or disclose the compensation of the employee or applicant or another employee or applicant. Federal contractors and subcontractors must disseminate this nondiscrimination provision, using language prescribed by the Director of OFCCP, including incorporating the provision into existing employee manuals or handbooks and posting it. There is no significant impact on small entities imposed by the FAR rule.

Item IV—Sole Source Contracts for Women-Owned Small Businesses (FAR Case 2015–032)

DoD, GSA, and NASA are adopting as final, with a minor edit, an interim rule that amends the FAR to implement regulatory changes made by the Small Business Administration (SBA) in its final rule as published in the **Federal Register** at 80 FR 55019, on September 14, 2015. SBA's final rule implements the statutory requirements of paragraph (a)(3) of section 825 of the Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, Public Law 113–291, which grants contracting officers the authority to award sole source contracts to economically disadvantaged women-owned small business (EDWOSB) concerns and to women-owned small business (WOSB) concerns eligible under the WOSB Program. The anticipated price, including options, must not exceed $6.5 million for manufacturing North American Industry Classification System (NAICS) codes, or $4 million for other NAICS codes.

This rule may have a positive economic impact on women-owned small businesses.

Item V—Unique Identification of Entities Receiving Federal Awards (FAR Case 2015–022)

DoD, GSA, and NASA are issuing a final rule amending the FAR to redesignate the terminology for unique identification of entities receiving Federal awards. The change to the FAR eliminates references to the proprietary Data Universal Numbering System (DUNS®) number, and provides appropriate references to the Web site where information on the unique entity identifier used for Federal contractors will be located. The Government does not intend to move away from the use of the DUNS® number in the short term. This final rule also establishes definitions of "unique entity identifier", and "electronic funds transfer (EFT) indicator". There is no significant impact on small entities imposed by the FAR rule.

Item VI—Consolidation and Bundling (FAR Case 2014–015)

This final rule incorporates regulatory changes made by the SBA in its final rule which published in the **Federal Register** at 78 FR 61113 on October 2, 2013, concerning consolidation and bundling. SBA's final rule implements sections 1312 and 1313 of the Small Business Jobs Act of 2010 (Pub. L. 111–240), as well as section 1671 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112–239). The FAR final rule adds coverage on consolidations and reorganizes coverage on bundling at FAR 7.107. Before conducting a consolidated acquisition estimated to exceed $2,000,000, the Senior Procurement Executive or Chief Acquisition Officer must make a written determination that the consolidation is necessary and justified. This rule may have a positive economic impact on any small business entity that participates in the Federal procurement arena.

Item VII—Amendment Relating to Multi-Year Contract Authority for Acquisition of Property (FAR Case 2016–006)

DoD, GSA, and NASA are amending FAR subpart 17.1 to implement section 811 of the NDAA for FY 2016 (Pub. L. 114–92). Section 811 amended subsection (a)(1) of 10 U.S.C. 2306b by striking "substantial" and inserting "significant". This rule makes conforming changes at FAR 17.105–1(b)(1) to state that the head of an agency may enter into a multi-year contract for supplies, if the use of such a contract will result in significant savings of the total estimated costs of carrying out the program through annual contracts. This change applies to the DoD, NASA, and the Coast Guard.

This final rule is not required to be published for public comment, because it addresses an internal decision by the contracting officer to enter into a multi-year contract for supplies if certain objects are met. These requirements affect only the internal operating procedures of the Government.

Item VIII—New Designated Country—Ukraine and Moldova (FAR Case 2016–009)

This final rule amends the FAR to add Ukraine and Moldova as new designated countries under the World Trade Organization Government Procurement Agreement (WTO GPA). This final rule has no significant impact on the Government and contractors, including small business entities.

Item IX—Contractors Performing Private Security Functions (FAR Case 2014–018)

This final rule amends FAR 25.302 and the clause at 52.225–26, both entitled "Contractors Performing Private Security Functions Outside the United States."

This rule removes the DoD-unique requirements, which have been incorporated in the Defense Federal Acquisition Regulations Supplement (DFARS). This rule also adds the definition of "full cooperation" to FAR clause 52.225–26 in order to affirm that the contract clause does not foreclose any contractor rights arising in law, the FAR, or the terms of the contract when cooperating with any Government-authorized investigation into incidents reported pursuant to the clause.

This rule will not create any new reporting, recordkeeping, or other compliance requirements. The impact of this rule on small business is not expected to be significant.

Item X—Limitation on Allowable Government Contractor Employee Compensation Costs (FAR Case 2014–012)

This final rule converts the interim rule published in the **Federal Register** at 79 FR 35865 on June 24, 2014 to a final rule with minor changes including a table summarizing the employee compensation limits and applicability dates is added at 31.205–6(p); several paragraphs are reorganized; redundant text is removed; reference links are added for clarity.

This final rule amends the Federal Acquisition Regulation (FAR) to implement section 702 of the Bipartisan Budget Act of 2013. Section 702 revises the allowable compensation cost limit for contractor and subcontractor employees to be $487,000, as adjusted annually to reflect the change in the Employment Cost Index for all workers as calculated by the Bureau of Labor Statistics. Also, section 702 allows for the narrowly targeted exceptions to this allowable cost limit for scientists, engineers or other specialists, upon an agency determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and capabilities. Because most contracts awarded to small businesses use simplified acquisition procedures or are awarded on a competitive, fixed-price basis, the impact of this compensation limitation on small businesses will be minimal.

Item XI—Technical Amendments

Editorial changes are made at FAR 1.603–1, 4.1400, 22.805, 23.704, 26.103, and 52.234–1.

Dated: September 19, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Federal Acquisition Circular (FAC) 2005–91 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005–91 is effective September 30, 2016 except for items V, VI, VII, VIII, and IX, which are effective October 31, 2016.

Dated: September 20, 2016.

Claire M. Grady,

Director, Defense Procurement and Acquisition Policy.

Dated: September 20, 2016.

Jeffrey A. Koses,

Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration.

Dated: September 20, 2016.

William G. Roets,

Acting Assistant Administrator, Office of Procurement National Aeronautics and Space Administration.

[FR Doc. 2016–23193 Filed 9–29–16; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 4, 9, 12, and 52

[FAC 2005–91; FAR Case 2015–011; Item I; Docket No. 2015–0011, Sequence No. 1]

RIN 9000–AN05

Federal Acquisition Regulation; Prohibition on Contracting With Corporations With Delinquent Taxes or a Felony Conviction

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA have adopted as final, without changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement sections of the Consolidated and Further Continuing Appropriations Act, 2015, to prohibit the Federal Government from entering into a contract with any corporation having a delinquent Federal tax liability or a felony conviction under any Federal law, unless the agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

DATES: *Effective:* September 30, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia L. Davis, Procurement Analyst, at 202–219–0202 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2005–91, FAR Case 2015–011.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 80 FR 75903 on December 4, 2015, to implement sections 744 and 745 of Division E of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235) and section 523 of Division B of the same act. Three respondents submitted comments on the interim rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments are provided as follows:

A. Summary of Public Comments

There were no changes made in the final rule as a result of the three public comments.

B. Analysis of Public Comments

1. Need for the Rule

Comment: Two respondents expressed support for the interim rule. According to the respondents, this rule will facilitate more rigorous scrutiny of companies with a recent Federal conviction or unpaid Federal taxes and will help ensure that Federal contractors conduct themselves with the highest degree of integrity and honesty.

Response: Noted.

Comment: The other respondent said the rule is unnecessary, given the existing statutory and regulatory framework. This respondent noted that tax and criminal statutes already include penalties for tax delinquency and felony conviction, such as the Internal Revenue Code (title 26) and the Criminal Code (title 18). Furthermore, the respondent noted that the FAR already includes Federal tax delinquency and criminal malfeasance as causes for debarment. The respondent stated that agencies already reliably utilize suspension and debarment processes.

Response: This rule is necessary to implement the requirements of sections 744 and 745 of Division E, title VIII of the Consolidated and Further Continuing Resolution Appropriations Act, 2015, as well as section 523 of Division B, title V of the same act (affects Commerce, Justice, NASA, and some related agencies). These appropriations act restrictions, although having some overlap with existing laws, have specific provisions that are not identical to existing laws and regulations, and must be implemented in order to avoid misuse of appropriated funds.

2. Meaning of "Corporation"

Comment: One respondent requested clarification as to what entities are and are not corporations for the purposes of this rule. The respondent stated that the term "corporation" could encompass C corporations, S corporations, and limited liability corporations (LLCs), among others. The respondent is concerned that if the rule applies to LLCs and S corporations, through which tax liability falls at the individual rather than the corporate level, that failure of one shareholder to pay taxes could adversely affect all shareholders. Likewise, the respondent is concerned how the rule would be applied if a shareholder or member of the entity is convicted of a felony.

The respondent is also concerned about how this rule applies to a joint venture and teaming. First, can a corporation avoid disclosure of a felony conviction if it becomes a member of a joint venture? Second, if the joint venture is a corporate entity, are the underlying entities that make up the joint venture required to disclose tax delinquencies and felonies?

Response: No change is made. The term "corporation" is used throughout the FAR without definition. If a term is used in the FAR without definition, then it has the standard dictionary definition. A corporation is a legal entity that is separate and distinct from the entities that own, manage, or control it. It is organized and incorporated under the jurisdictional authority of a governmental body, such as a State or the District of Columbia. The law does not specify any particular type of corporation. The most common type of corporation in the U.S. is the subchapter C corporation—authorized under State law, and subject to tax under subchapter C of the Internal Revenue Code (IRC). Most publicly traded corporations are C corporations. The IRC and other governing statutes authorize specialized corporations including the subchapter S corporation (*e.g.*, per the IRC and State laws), professional corporation (PC) (*e.g.*, per State laws), and limited liability company (LLC) (*e.g.*, per State laws).

Section 744 applies to "any corporation that has any unpaid Federal tax liability . . ." Section 745 applies to "any corporation that was convicted of a felony criminal violation under any Federal law . . ." Any corporation, including pass-through entities such as the S corporation and the LLC, may have an unpaid Federal tax liability—there are Federal tax liabilities other than corporate income tax liability. While the S corporation and LLC may not incur Federal income tax liabilities as pass-through entities, they may incur Federal employment tax liabilities under subtitle C of 26 U.S.C. for payroll tax withholdings, social security and Medicare taxes; as well as various Federal excise tax liabilities, *e.g.*, under subtitle D of 26 U.S.C. on communications and air transportation facilities and services, coal, medical devices, group health plans, and failure to maintain minimum essential health insurance coverage; and under subtitle E of 26 U.S.C. on alcohol and tobacco, machine guns, some other firearms, and structured settlement factoring transactions.

The corporation is an artificial construct, a legally created entity that generally has the same rights and responsibilities as a natural person. Thus, the corporation is not automatically immune from being convicted of a felony criminal violation under any Federal law merely because it is an artificial entity. A corporation can commit crimes as it can be held criminally liable for the illegal act of its directors, officers, employees, agents, or shareholders under the legal doctrine of *respondeat superior.* A corporation cannot be jailed if convicted. Otherwise, it faces the same consequences as a natural person following conviction. Depending on the facts and circumstances, any corporation may be convicted of a felony criminal violation under any Federal law, separate and apart from any felony criminal conviction of any of its directors, officers, employees, agents, or shareholders. While the liabilities of the corporate entity are separate from the liabilities of its shareholders generally because they are separate legal entities, the shareholders may become liable for corporate liabilities under the legal doctrine of piercing the corporate veil. Under certain facts and circumstances, a court may pierce the corporate veil and ignore the legal separateness of the corporation and its shareholders, and hold the shareholders and other principals personally liable for what would otherwise be corporate liabilities.

Joint ventures and other teaming arrangements are temporary business arrangements where two or more parties agree to work together to achieve a specific task or objective, *e.g.*, usually a new project, business activity, or a contract. A joint venture or other teaming arrangement is not necessarily a corporation—it all depends upon the legal structure and arrangement chosen for the temporary relationship formed by the members of the teaming arrangement. FAR 9.601 defines two types of teaming arrangements: Two or more companies form a partnership or joint venture entity to act as a potential prime contractor—the joint venture teaming arrangement; or a potential prime contractor agrees with one or more companies to have them act as its subcontractors under a specified Government contract or acquisition program—the prime-subcontractor teaming arrangement. In either type of teaming arrangement, the parties to the arrangement may be existing or newly created entities, or a combination thereof. With respect to the prime-subcontractor teaming arrangement, the prime contractor is subject to the rule if it is a corporation. With respect to the joint venture teaming arrangement, the joint venture can take many legal forms, including as a C corporation, LLC, or partnership. If the prime contractor(s) in the joint venture teaming arrangement is a corporation, it is subject to the rule. Conversely, if the prime contractor(s) in the joint venture teaming arrangement is(are) not a corporation, it is not subject to the rule, *i.e.*, the legal form of the joint venture teaming arrangement will determine whether the joint venture prime contractor(s) is(are) subject to the rule. See FAR 4.102 for the signatories for the various prime contractor entity types. If the signatory for the prime contractor is a corporation, it is subject to the rule.

If the offeror or contractor is uncertain as to its legal status as a corporation, the offeror or contractor needs to consult with its legal counsel to determine whether it is a corporation subject to sections 744 and 745.

3. Finality of Felony Criminal Conviction

Comment: One respondent noted that the rule requires contractors to report assessed, unpaid Federal tax liability only when all judicial and administrative remedies have been exhausted or have lapsed. The respondent noted, however, that the rule requires a contractor to disclose conviction of a felony criminal violation under any Federal law within the preceding 24 months, but does not provide any consideration as to whether the contractor has appealed the decision and such an appeal is pending. The respondent recommends that the rule should require disclosure of convictions only after all judicial remedies have been exhausted.

Response: No change is made. The disclosure requirements of this rule are based on the statutory requirements of section 744 and 745. Section 745 applies to "any corporation that was convicted of a felony criminal violation under any Federal law within the preceding 24 months." Unlike section 744 which requires the exhaustion of all judicial and administrative remedies for any unpaid Federal tax liability, the plain text of section 745 does not require the exhaustion of all judicial and administrative remedies for a felony criminal violation conviction before it is applicable.

4. Response Time for Debarring Official

Comment: One respondent is concerned that the lack of requirement for a reasonable response time for a debarring official to make a decision under this rule will likely delay the procurement process. The respondent recommends that the debarment official should be required to make a determination within five business days of receiving the inquiry from a contracting officer. According to the respondent, after the five days expires, the determination should automatically default to no suspension or debarment.

Response: No change is made. Sections 744 and 745 do not require the suspending or debarring official to issue a determination to suspend or debar a corporation in accordance with the normal suspension and debarment process (see FAR subpart 9.4). If statutory text similar to the text of these sections is in an appropriations act, the funds appropriated by such an act are prohibited from being used to award to a corporation that has delinquent Federal taxes or has been convicted of a Federal felony unless the suspending or debarring official makes a positive determination that suspension or debarment is not necessary to protect the interests of the Government.

5. Out of Scope

Comment: Two respondents recommended that because this rule has a zero tolerance for tax delinquencies, the FAR Council should remove the $3,500 threshold for reporting of tax delinquencies at FAR 9.104–5(a)(2) and paragraph (a)(1)(i)(D) of the provision at 52.209–5, Certification Regarding Responsibility Matters. The respondents also recommended expanding the certification provision at FAR 52.209–12 to include reporting of State and local tax delinquencies.

Response: These recommendations are outside the scope of this rule, which is to implement sections 744 and 745 of division E and section 523 of division B of the Consolidated and Further Continuing Resolution Appropriations Act, 2015. The certification at FAR 52.209–5(a)(1)(i)(D) with regard to delinquent Federal taxes was inserted in the FAR under FAR Case 2006–011 at the request of the Senate Permanent Subcommittee on Investigations. The certification in FAR 52.209–5 covers delinquent Federal taxes in excess of $3,500 within the past three years, is required in all solicitations when the contract value is expected to exceed the simplified acquisition threshold, and is used along with other factors in the determination of contractor responsibility. The representations in this final rule are based on an annual appropriations act funding restriction, and are required to be included in all solicitations when awards are made with such restricted appropriated funds. There is no *de minimis* amount of delinquent Federal taxes which does not need to be reported. These requirements are only in effect with respect to the affected appropriated funds when the funding restrictions are included in the specific annual appropriations act. The law does not restrict the award with appropriated funds to entities with regard to State and local tax delinquencies. Thus, there are no representations required as to the status of State and local tax delinquencies. 41 U.S.C. 1304, as implemented at FAR 1.107, prohibits the inclusion of non-statutory certifications unless justified in writing to the Administrator for Federal Procurement Policy.

III. Applicability to Acquisitions Not Greater Than the Simplified Acquisition Threshold and Commercial Items (Including Commercially Available Off-the-Shelf (COTS) Items)

The FAR Council and the Administrator for Federal Procurement Policy have determined that it would not be in the best interest of the Federal Government to exempt acquisitions with estimated value not greater than the simplified acquisition threshold and contracts for the acquisition of commercial items (including COTS items) from the application of these appropriations act restrictions.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This rule implements sections 744 and 745 of Division E of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235) (and similar provisions in subsequent appropriations acts) to prohibit using any of the funds made available under that or any other act to enter a contract with any corporation with any delinquent Federal tax liability or a felony conviction, unless the agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

The rule also implements section 523 of Division B of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235) (and similar provisions in subsequent appropriations acts). This section prohibits award of any contract in an amount greater than $5,000,000, unless the offeror affirmatively certifies that it has filed all Federal tax returns required during the three years preceding the certification; has not been convicted of a criminal offense under the Internal Revenue Code of 1986; and has not, more than 90 days prior to certification, been notified of any unpaid Federal tax assessment for which the liability remains unsatisfied, unless the assessment is the subject of an installment agreement or offer in compromise that has been approved by the Internal Revenue Service and is not in default, or the assessment is the subject of a non-frivolous administrative or judicial proceeding.

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 80 FR 75903 on December 4, 2015, to implement sections 744 and 745 of Division E of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235) and section 523 of Division B of the same act. Three respondents submitted comments on the interim rule. No comments were received from the public relative to the initial regulatory flexibility analysis.

Based on current data with regard to active registrants in the System for Award Management (SAM), the rule will apply to approximately 65,000 small business concerns, which are required to complete the annual representations and certifications at least once per year in order to keep their registration in SAM current.

The information collection requirement imposed by this rule is minimal—a brief representation, and in some cases also a certification, each estimated to require an average of 6 minutes to complete.

DoD, GSA, and NASA were unable to identify any significant alternatives that would reduce the impact on small businesses and still meet the objectives of the statute. However, other than the potential for not receiving award if the small entity is delinquent in payment of Federal taxes or has been convicted of a felony, there is no significant economic impact on small entities because the information collection burden imposed by the rule is minimal.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies. The rule contains information collection requirements. OMB has cleared this information collection requirement under OMB Control Number 9000–0193, titled: Prohibition on Contracting with Corporations with Delinquent Taxes or a Felony Conviction.

List of Subjects in 48 CFR Parts 1, 4, 9, 12, and 52

Government procurement.

Dated: September 19, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR parts 1, 4, 9, 12, and 52, which published in the **Federal Register** at 80 FR 75903 on December 4, 2015, is adopted as a final rule without change.

[FR Doc. 2016–23194 Filed 9–29–16; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 22, and 52

[FAC 2005–91; FAR Case 2015–036; Item II; Docket No. 2015–0036, Sequence No. 1]

RIN 9000–AN14

Federal Acquisition Regulation; Updating Federal Contractor Reporting of Veterans' Employment

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are adopting as final, without change, an interim rule amending the Federal Acquisition Regulation (FAR) to implement a final rule issued by the Department of Labor's (DOL) Veterans' Employment and Training Service (VETS) that replaced the VETS–100 and VETS–100A Federal Contractor Veterans' Employment Report forms with the VETS–4212, Federal Contractor Veterans' Employment Report form.

DATES: *Effective:* September 30, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202–969–7207 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2005–91, FAR Case 2015–036.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 80 FR 75908 on December 4, 2015, to implement a final rule issued by VETS of the DOL that was published in the **Federal Register** at 79 FR 57463 on September 25, 2014. The VETS of DOL rule rescinded the regulations at 41 CFR part 61–250 and revised the regulations at 41 CFR part 61–300, which implemented the reporting requirements under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), as amended and the Jobs for Veterans Act (JVA) (Pub. L. 107–288). VEVRAA requires Federal contractors and subcontractors to annually report on the total number of their employees who belong to the categories of veterans protected under VEVRAA, as amended by the JVA, and the total number of those protected veterans who were hired during the period covered by the report. No public comments were submitted on the interim rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) did not receive any comments on the interim rule; accordingly the Councils are finalizing the interim rule without change.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

> This rule is issued to adopt as final, without change, an interim rule published in the **Federal Register** at 80 FR 75908 on December 4, 2015, implementing changes to 41 CFR 61–250 and 61–300 which was published in the **Federal Register** at 79 FR 57463 on September 25, 2014, by the Veterans' Employment and Training Service (VETS) of the Department of Labor (DOL). The objective of the VETS rule is to revise the current regulations implementing 38 U.S.C. 4212. The VETS rule rescinded obsolete regulations at 41 CFR 61–250, changed the manner in which Federal Contractors report veterans' employment data, updated terminology, and revised the annual report, the report name, and methods of filing the report.
>
> No public comments were submitted in response to the initial regulatory flexibility analysis or the interim rule.
>
> VETS used data in the VETS–100/100A Reporting System regarding reports on veterans' employment filed in 2012 to estimate the number of small entities that would be subject to its rule. The VETS rule applies to any industry represented by a Federal contractor with a contract of $150,000 or more. Therefore, VETS used the Small Business Administration's "fewer than 500 employees" limit when making an across-the-board size standard classification for estimating purposes. VETS estimated that 15,000 Federal contractors will be subject to the reporting requirements of the rule and of that, VETS approximated that the number of small entities that would be subject to the rule would be 8,000 (approximately 53 percent of the total Federal contractors impacted by the rule).
>
> This FAR rule does not add any new reporting, recordkeeping, or other compliance burdens. The FAR rule makes contracting officers and contractors aware of the VETS reporting requirements.
>
> DoD, GSA, and NASA are not aware of any significant alternatives to the rule which would accomplish the stated objectives of implementing the VETS final rule, while minimizing impact on small entities. DoD, GSA, and NASA do not have the flexibility of making any changes to the VETS rule, which has already been published for public comment and has taken effect as a final rule. There is no significant impact on small entities imposed by the FAR rule.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C chapter 35) applies. The rule contains information collection requirements that are subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.* However, the applicable information collections are derived from the requirements of the 41 CFR part 61–300 regulations implementing the reporting requirements under VEVRAA; see detailed discussion in DOL's rule under the Paperwork Reduction Act section which was published in the **Federal Register** at 79 FR 57463 on September 25, 2014. OMB assigned OMB Control Numbers 1250–0004, OFCCP Recordkeeping and Reporting Requirements, 38 U.S.C. 4212, Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, and 1293–0005, Federal Contractor Veterans' Employment Report.

List of Subjects in 48 CFR Parts 1, 22, and 52

Government procurement.

Dated: September 19, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR parts 1, 22, and 52, which was published in the **Federal Register** at 80 FR 75908 on December 4, 2015, is adopted as a final rule without change.

[FR Doc. 2016–23195 Filed 9–29–16; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 22, and 52

[FAC 2005–91; FAR Case 2016–007; Item III; Docket No. 2016–0007; Sequence No. 1]

RIN 9000–AN10

Federal Acquisition Regulation: Non-Retaliation for Disclosure of Compensation Information

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.), entitled "Non-Retaliation for Disclosure of Compensation Information," and a final rule issued by the Department of Labor.

DATES: *Effective:* September 30, 2016.

Applicability Date: This rule applies to solicitations and contracts issued on or after the effective date of the FAR rule. Contracting officers are expected to work with their existing contractors and bilaterally modify their contracts, to the extent feasible, to include the amended clause at FAR 52.222–26, Equal Opportunity. See FAR 1.108(d).

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before November 29, 2016 to be considered in the formation of the final rule.

ADDRESSES: Submit comments identified by FAC 2005–91, FAR Case 2016–007, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by entering "FAR Case 2016–007". Select the link "Comment Now" that corresponds with "FAR Case 2016–007". Follow the instructions provided on the screen. Please include your name, company name (if any), and "FAR Case 2016–007" on your attached document.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Ms. Flowers, 1800 F Street NW., 2nd Floor, Washington, DC 20405–0001.

Instructions: Please submit comments only and cite "FAR Case 2016–007" in all correspondence related to this case. Comments received generally will be posted without change to *http://regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202–969–7207 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2005–91, FAR Case 2016–007.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are issuing an interim rule amending the FAR to implement Executive Order (E.O.) 13665, entitled "Non-Retaliation for Disclosure of Compensation Information." The E.O. was signed April 8, 2014, and was published in the **Federal Register** at 79 FR 20749, on April 11, 2014. This interim rule is also implementing the final rule issued by the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor (DOL) to implement E.O. 13665. The DOL final rule was published in the **Federal Register** at 80 FR 54934, on September 11, 2015, entitled "Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions." The DOL rule revises 41 CFR part 60–1.

E.O. 11246, originally issued September 24, 1965, establishes nondiscrimination and affirmative action obligations in employment for Federal contractors and subcontractors. It prohibits employment discrimination because of race, color, religion, sex, sexual orientation, gender identity, or national origin. E.O. 13665 amends E.O. 11246 to provide for a uniform policy for the Federal Government to prohibit Federal contractors from discriminating against employees and job applicants who inquire about, discuss, or disclose their own compensation or the compensation of other employees or applicants. Also, the E.O. indicates that it promotes economy and efficiency in Federal Government procurement and supports enforcement of nondiscrimination and equal employment opportunity.

II. Discussion and Analysis

A. The DOL regulation implements E.O. 13665 by revising the equal opportunity clause to prohibit contractors from discharging, or in any manner discriminating against, any employee or applicant for employment because the employee or applicant inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant.

B. The FAR implements E.O. 11246 in FAR subpart 22.8, FAR clause 52.222–26, Equal Opportunity, and related clauses. This interim rule adds the new discrimination prohibition and incorporates the definitions "compensation," "compensation information," and "essential job functions" from the DOL final rule (41 CFR 60–1.3) within FAR subpart 22.8 and the clauses that are prescribed in FAR subpart 22.8 as follows:

1. *22.802, General.* Inserts the new discrimination prohibition.

2. *52.222–26, Equal Opportunity.* Inserts definitions for the terms "compensation," "compensation information," and "essential job functions," and 52.222–26(c)(5), which prohibits contractors from discharging, or in any manner discriminating against, any employee or applicant for employment because the employee or applicant inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. FAR 52.222–26(c)(5) also requires the contractor to incorporate the new discrimination prohibition into existing employee manuals or handbooks and to post it.

C. Conforming changes were made in the FAR clauses 52.212–5, 52.213–4, and 52.244–6.

III. Executive Orders 12866 and 13563

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This interim rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* However, an initial regulatory flexibility analysis (IRFA) has been prepared consistent with 5 U.S.C. 603. The analysis is summarized as follows:

This interim rule is necessary to implement E.O. 13665, Non-Retaliation for Disclosure of Compensation Information (amending E.O. 11246, Equal Opportunity in Federal Employment) as implemented by the final rule issued by the DoL at 41 CFR part 60–1, published in the **Federal Register** at 80 FR 54934, on September 11, 2015.

The objective of this rule is to provide for a uniform policy for the Federal Government to prohibit Federal contractors from discriminating against employees and job applicants who inquire about, discuss, or disclose their own compensation or the compensation of other employees or applicants.

The rule will apply to all entities, both small and other than small. Based on the most current data available in the System for Award Management (SAM), there are 328,552 small contractor firms with fewer than 500 employees and 315,902 small contractor firms with less than $35.5 million in revenue. Thus, the total number of small contractor firms that may be impacted by the rule range from 315,902 to 328,552.

Recordkeeping and reporting requirements of the rule involve regulatory familiarization and administrative costs associated with incorporating revised language into policies, instructions, notices to employees, and subcontracts. In implementing the additional prohibition, the rule requires that contractors and subcontractors disseminate the nondiscrimination provision, using language prescribed by the Director of the Office of Federal Contract Compliance Programs (OFCCP), including incorporating the nondiscrimination provision into existing employee manuals and handbooks and posting it electronically or in conspicuous places available to employees and applicants. An analysis of estimated costs of the regulatory changes was performed in the DOL final rule published in the **Federal Register** at 80 FR 54934, on September 11, 2015. DoL estimated the total cost of their final rule at $85.00 per company.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

DoD, GSA, and NASA are not aware of any significant alternatives to the rule that would accomplish the stated objectives of the E.O. and the DOL implementing regulations.

It is necessary for the rule to apply to small entities, because E.O. 11246, as amended, applies when a contractor has contracts or subcontracts with the Government in any 12-month period which have an aggregate total value (or can reasonably be expected to have an aggregate total value) exceeding $10,000 that are not completely exempted. Every effort has been made to minimize the burdens imposed on small entities.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (FAR Case 2016–007), in correspondence.

V. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C chapter 35) does apply; however, the information collection authorization is under the DOL final rule issued by the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor (DOL), which was published in the **Federal Register** at 80 FR 54934, on September 11, 2015, entitled "Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions," and is assigned OMB Control Number 1250–0008, Prohibitions Against Pay Secrecy Policies and Actions. This information collection expires December 31, 2018. The other information collection requirements cited at 1.106 that apply to FAR clause 52.225–26, assigned OMB control numbers 1250–0001 and 1250–0003, cover the general recordkeeping provisions of the laws administered by OFCCP.

VI. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. It is important that the FAR is immediately revised to include the requirements of E.O. 13665, entitled "Non-Retaliation for Disclosure of Compensation Information" and the Department of Labor implementing regulation published in the **Federal Register** at 80 FR 54934, on September 11, 2015 that requires the Federal Government to establish a uniform policy that prohibits Federal contractors from discriminating against employees and job applicants who inquire about, discuss, or disclose their own compensation or the compensation of other employees or applicants. This action is necessary because DOL's final rule became effective on January 11, 2016, and section 6 of the E.O. expressly states that the order "shall apply to contracts entered into on or after the effective date of rules promulgated by the Department of Labor." Issuance of an interim rule allows for the requirements to be included in solicitations and contracts immediately and puts contractors on clear notice of legal responsibilities that are already in effect. If the FAR rule is not issued as an interim rule, this new requirement will not be incorporated into contracts, and contractors will be put at unnecessary risk of non-compliance with the E.O. and labor rule. More importantly, this may unnecessarily delay action by contractors in providing the important protections for contractor employees that the E.O. and labor rule are designed to provide. However, pursuant to 41 U.S.C. 1707 and FAR 1.501–3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 1, 22, and 52

Government procurement.

Dated: September 19, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 22, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 22, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

■ 2. Amend section 1.106 in the table by removing from FAR segment "52.222–26" the OMB control number "1250–0003" and adding "1250–0001, 1250–0003, and 1250–0008" in its place.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 3. Amend section 22.802 by revising paragraph (a) to read as follows:

22.802 General.

(a) Executive Order 11246, as amended, sets forth the Equal Opportunity clause and requires that all agencies—

(1) Include this clause in all nonexempt contracts and subcontracts (see 22.807); and

(2) Act to ensure compliance with the clause and the regulations of the Secretary of Labor—

(i) To promote the full realization of equal employment opportunity for all persons, regardless of race, color, religion, sex, sexual orientation, gender identity, or national origin; and

(ii) To prohibit contractors from discharging, or in any other manner discriminating against, any employee or applicant for employment because the employee or applicant inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This prohibition against discrimination does not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.

* * * * *

■ 4. Amend section 22.809 by revising the introductory text to read as follows:

22.809 Enforcement.

Upon written notification to the contracting officer, the Deputy Assistant Secretary may direct one or more of the following actions, as well as administrative sanctions and penalties, be taken against contractors found to be in violation of E.O. 11246, the regulations of the Secretary of Labor, or the applicable contract clauses:

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Amend section 52.212–5 by—

■ a. Revising the date of the clause and paragraphs (b)(28) and (e)(1)(v); and

■ b. In Alternate II, revising the date of the alternate and paragraph (e)(1)(ii)(E).

The revisions read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (Sept 2016)

* * * * *

(b) * * *

____(28) 52.222–26, Equal Opportunity (Sept 2016) (E.O. 11246).

* * * * *

(e)(1) * * *

(v) 52.222–26, Equal Opportunity (Sept 2016) (E.O. 11246).

* * * * *

Alternate II (Sept 2016). * * *

* * * * *

(e)(1) * * *

(ii) * * *

(E) 52.222–26, Equal Opportunity (Sept 2016) (E.O. 11246).

* * * * *

■ 6. Amend section 52.213–4 by revising the date of the clause and paragraphs (a)(1)(iii) and (a)(2)(viii) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions–Simplified Acquisitions (Other than Commercial Items) (Sept 2016)

(a) * * *

(1) * * *

(iii) 52.222–26, Equal Opportunity (Sept 2016) (E.O. 11246).

* * * * *

(2) * * *

(viii) 52.244–6, Subcontracts for Commercial Items (Sept 2016).

* * * * *

■ 7. Amend section 52.222–26 by—

■ a. Revising the date of the clause;

■ b. Adding to paragraph (a), in alphabetical order, the definitions "Compensation", "Compensation information", and "Essential job functions";

■ c. Redesignating paragraphs (c)(5) through (11) as paragraphs (c)(6) through (12), respectively;

■ d. Adding new paragraph (c)(5);

■ e. Removing from newly designated paragraph (c)(12) "contracting officer" and adding "Director of OFCCP" in its place; and

■ f. Removing from paragraph (d) "41 CFR 60–1.1." and adding "41 CFR part 60–1." in its place.

The revision and additions read as follows:

52.222–26 Equal Opportunity.

* * * * *

Equal Opportunity (Sept 2016)

(a) * * *

Compensation means any payments made to, or on behalf of, an employee or offered to an applicant as remuneration for employment, including but not limited to salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and retirement.

Compensation information means the amount and type of compensation provided to employees or offered to applicants, including, but not limited to, the desire of the Contractor to attract and retain a particular employee for the value the employee is perceived to add to the Contractor's profit or productivity; the availability of employees with like skills in the marketplace; market research about the worth of similar jobs in the relevant marketplace; job analysis, descriptions, and evaluations; salary and pay structures; salary surveys; labor union agreements; and Contractor decisions, statements and policies related to setting or altering employee compensation.

Essential job functions means the fundamental job duties of the employment position an individual holds. A job function may be considered essential if—

(1) The access to compensation information is necessary in order to perform that function or another routinely assigned business task; or

(2) The function or duties of the position include protecting and maintaining the privacy of employee personnel records, including compensation information.

* * * * *

(c) * * *

(5)(i) The Contractor shall not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This prohibition against discrimination does not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the Contractor's legal duty to furnish information.

(ii) The Contractor shall disseminate the prohibition on discrimination in paragraph (c)(5)(i) of this clause, using language prescribed by the Director of the Office of Federal Contract Compliance Programs (OFCCP), to employees and applicants by—

(A) Incorporation into existing employee manuals or handbooks; and

(B) Electronic posting or by posting a copy of the provision in conspicuous places available to employees and applicants for employment.

* * * * *

■ 8. Amend section 52.244–6 by revising the date of the clause and paragraph (c)(1)(vi) to read as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (Sept 2016)

* * * * *

(c)(1) * * *

(vi) 52.222–26, Equal Opportunity (Sept 2016) (E.O. 11246).

* * * * *

[FR Doc. 2016–23196 Filed 9–29–16; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 6, 18, 19, and 52

[FAC 2005–91; FAR Case 2015–032; Item IV; Docket No. 2015–0032; Sequence No. 1]

RIN 9000–AN13

Federal Acquisition Regulation; Sole Source Contracts for Women-Owned Small Businesses

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA have adopted as final, with a minor edit, an interim rule amending the Federal Acquisition Regulation (FAR) to implement regulatory changes made by the Small Business Administration (SBA) that provide for authority to award sole source contracts to economically disadvantaged women-owned small business concerns and to women-owned small business concerns eligible under the Women-Owned Small Business (WOSB) Program.

DATES: *Effective:* September 30, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Mahruba Uddowla, Procurement Analyst, at 703–605–2868 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2005–91, FAR Case 2015–032.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 80 FR 81888 on December 31, 2015, to implement regulatory changes that the SBA has made in its final rule published in the **Federal Register** at 80 FR 55019, on September 14, 2015, concerning sole source award authority under the WOSB Program. SBA's final rule implements the statutory requirements of paragraph (a)(3) of section 825 of the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015, Public Law 113–291, granting contracting officers the authority to award sole source contracts to economically disadvantaged women-owned small business (EDWOSB) concerns and to WOSB concerns eligible under the WOSB Program. Four respondents submitted comments on the interim rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. All four respondents expressed support of the interim rule. Therefore, no further change to the interim rule is required as a result of the public comments, but there is a minor edit to 19.1505(a)(1).

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule adopts as final the amendments to the FAR clauses at 52.219–29, Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-owned Small Business Concerns, and 52.219–30, Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program, in order to implement paragraph (a)(3) of section 825 of the NDAA for FY 2015. The Federal Acquisition Regulatory Council, pursuant to the authority granted in 41 U.S.C. 1905 and 1906, and the Administrator, Office of Federal Procurement Policy, pursuant to the authority granted in 41 U.S.C 1907, have determined that the application of this statutory authority to contracts at or below the simplified acquisition threshold and to contracts for commercial items and commercially available off-the-shelf items, is in the best interests of the Federal Government.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

> This rule implements paragraph (a)(3) of section 825 of the Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, Public Law 113–291, (Fiscal Year 2015 NDAA). Section 825 of the Fiscal Year 2015 NDAA included language granting contracting officers the authority to award sole source contracts to Women-Owned Small Businesses (WOSBs) and Economically Disadvantaged Women-Owned Small Businesses (EDWOSBs) under the WOSB Program. The purpose of this rule is to finalize the procedures whereby Federal agencies may award sole source contracts to WOSBs and EDWOSBs eligible under the WOSB Program. The rule provides an additional tool for Federal agencies to ensure that WOSBs have an equal opportunity to participate in Federal contracting and ensures consistency among SBA's socioeconomic small business contracting programs.

The interim rule, published at 80 FR 81888, on December 31, 2015, put the WOSB Program on a level playing field with other SBA Government contracting programs with sole source authority and provided an additional, needed tool for agencies to meet the statutorily mandated goal of 5 percent of the total value of all prime contract and subcontract awards for WOSBs.

There were no significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis provided in the interim rule.

This rule may have a positive economic impact on WOSB concerns. The Dynamic Small Business Supplemental Search (DSBS) lists approximately 41,500 firms as either WOSBs or EDWOSBs under the WOSB Program. An analysis of the Federal Procurement Data System from April 1, 2011 (the implementation date of the WOSB Program), through September 1, 2015, revealed that there were approximately 17,353 women-owned small business concerns that received obligated funds from Federal contract awards, task or delivery orders, and modifications to existing contracts, in an industry where a WOSB or EDWOSB sole source is authorized, and where the contract is valued at or below the thresholds for sole source contracts to WOSBs or EDWOSBs. Of those 17,353 women-owned small business concerns, 328 EDWOSBs and 974 WOSBs were eligible to participate in the WOSB Program (*i.e.,* received set-asides under the WOSB Program), and could have received sole source awards. This rule could affect a smaller number of EDWOSBs and WOSBs than those eligible under the WOSB Program since the sole source authority can only be used where a contracting officer conducts market research in an industry where a WOSB or EDWOSB set-aside is authorized, and cannot identify two or more eligible EDWOSB or WOSB concerns that can perform at a fair and reasonable price, but identifies one WOSB or EDWOSB that can perform. In addition, the sole source authority for WOSBs and EDWOSBs is limited to contracts valued at $6.5 million or less for manufacturing contracts and $4 million or less for all other contracts.

This rule does not impose any new reporting, recordkeeping or other compliance requirements for small businesses. This rule does not duplicate, overlap, or conflict with any other Federal rules.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VI. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 2, 4, 6, 18, 19, and 52

Government procurement.

Dated: September 19, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Interim Rule Adopted as Final With Change

■ Accordingly, the interim rule amending 48 CFR parts 2, 4, 6, 18, 19, and 52 which was published in the **Federal Register** at 80 FR 81888, on December 31, 2015, is adopted as a final rule with the following change:

PART 19—SMALL BUSINESS PROGRAMS

■ 1. The authority citation for 48 CFR part 19 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

19.1505 [Amended]

■ 2. Amend section 19.1505 by removing from paragraph (a)(1) "Program." and adding "Program; and" in its place.

[FR Doc. 2016–23197 Filed 9–29–16; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 9, 12, 19, 52, and 53

[FAC 2005–91; FAR Case 2015–022; Item V; Docket No. 2015–0022, Sequence No. 1]

RIN 9000–AN00

Federal Acquisition Regulation; Unique Identification of Entities Receiving Federal Awards

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to redesignate the terminology for unique identification of entities receiving Federal awards. The change to the FAR removes the proprietary standard or number.

DATES: *Effective:* October 31, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202–969–7207 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2005–91, FAR Case 2015–022.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 80 FR 72035 on November 18, 2015, to redesignate the terminology for unique identification of entities receiving Federal awards. The change to the FAR eliminates references to the proprietary Data Universal Numbering System (DUNS®) number, and provides appropriate references to the Web site where information on the unique entity identifier used for Federal contractors will be located. This final rule also establishes definitions of "unique entity identifier", and "electronic funds transfer (EFT) indicator". Ten respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. All ten respondents agreed with the rule. No changes were made to the rule as a result of those comments. A discussion of the comments is provided as follows:

A. Analysis of Public Comments

1. Alternatives to and Considerations for the Evaluation of a Nonproprietary Entity Identifier

Comment: Six respondents provided an alternative to the current entity identifier (*e.g.,* Legal Entity Identifier (LEI), Contractor and Government Entity (CAGE) code) and four respondents provided additional considerations for the evaluation of alternatives for the entity identifier.

Response: The scope of this rule is limited to removing the proprietary standard or number. The Office of Management and Budget (OMB) and the Department of Treasury, in collaboration with the General Services Administration and the Award Committee for E-Government, are establishing a process for considering alternatives to existing entity identifiers, including soliciting information about viable options from and reaching out about nonproprietary alternatives to all sectors, including private companies, nonprofits, and Federal Government providers. The analysis of the alternatives for the entity identifier and the analysis of considerations for the evaluation of alternatives for the entity identifier are beyond the scope of the case. However, the FAR Council will share these recommendations with the agencies conducting the analysis and implementing the changes.

2. Challenges to Statements Made in the Proposed Rule **Federal Register** Preamble

Comment: One respondent believed that the statement that the "current requirement limits competition by using a proprietary number and organization to meet the identification need as well as the need for other business information associated with that number" incorrectly suggests that the business information is only accessible through usage of the DUNS number. This respondent also challenged the assertion that the Government is not currently in a position to move away from use of the DUNS number in the short term. This respondent recommended that Government agencies consider expanding their acquisitions of business information services through competitive procurements.

Response: There is nothing in the FAR linking business information services to the use of the DUNS number. Agencies are free to procure business information services as deemed appropriate. Regarding the short term ability of the Government to move away from the use of the DUNS number, the Government is in the process of determining requirements. The unique entity identifier provides multiple pieces of business information and serves multiple functions. Analysis will be conducted to ensure the replacement satisfies the full range of information needed. The Government is establishing a process for considering alternatives to existing entity identifiers, including soliciting information about viable options from and reaching out about nonproprietary alternatives to all sectors, including private companies, nonprofits, and Federal government providers. The analysis of alternatives is anticipated to be completed in fiscal year 2017. The scope of this rule is limited to removing the proprietary standard or number hence removing the impediment in anticipation of the change. The Government is interested in reducing cost and that is the reason we are pursuing this case.

Recommendations regarding business information services are beyond the scope of the case.

B. Other Changes

Conforming changes were made to the following forms: Standard Forms 294, 330, and 1447, and Optional Form 307. These form changes will be made to be "Previous Edition Usable" in order to avoid Government agencies and Federal contractors having to make unnecessary system changes to accommodate nonsubstantive changes to forms.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

> The rule removes a proprietary standard or number for the unique identification of entities receiving Federal awards. The current requirement limits competition by using a proprietary number and organization to meet the identification needs.
>
> Unique identification of such entities is critical to ensure Federal dollars are awarded to responsible parties, awardees are paid in a timely manner, and awards are appropriately recorded and reported. This is currently accomplished in the FAR by using the proprietary Data Universal Numbering System (DUNS®) number from Dun and Bradstreet. This rule eliminates references to the proprietary standard or number, and provides appropriate references to the Web site where information on the unique entity identifier used for Federal contractors will be designated. Although the Government does not intend to move away from use of the DUNS number in the short term, elimination of regulatory references to a proprietary entity identifier will provide opportunities for future competition that can reduce costs to taxpayers.
>
> No public comments were submitted in response to the initial regulatory flexibility analysis.
>
> The final rule is internal to the Government and does not directly impose any requirements on the vendor community. However, the rule may affect certain entities if those entities have arranged certain of their business systems to utilize, accept, or otherwise recognize the existing unique identifier (DUNS number) and should that unique identifier be changed at some point to another identifier. As of June 2015, there were 380,092 unique and active DUNS numbers designated in the System for Award Management and attributed to Government contracting.
>
> There is no change to recordkeeping as a result of this rule.
>
> There are no known significant alternative approaches to the rule that would meet the requirements.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 2, 4, 9, 12, 19, 52, and 53

Government procurement.

Dated: September 19, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 4, 9, 12, 19, 52, and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 4, 9, 12, 19, 52, and 53 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101, in paragraph (b)(2) by—

■ a. Removing the definitions "Data Universal Numbering System (DUNS) number" and "Data Universal Numbering System +4 (DUNS+4) number";

■ b. Adding, in alphabetical order, the definition "Electronic Funds Transfer (EFT) indicator";

■ c. Revising paragraph (1) of the definition "Registered in the System for Award Management (SAM) database"; and

■ d. Adding, in alphabetical order, the definition, "Unique entity identifier".

The revisions and additions read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Electronic Funds Transfer (EFT) indicator means a four-character suffix to the unique entity identifier. The suffix is assigned at the discretion of the commercial, nonprofit, or Government entity to establish additional System for Award Management records for identifying alternative EFT accounts (see subpart 32.11) for the same entity.

* * * * *

Registered in the System for Award Management (SAM) database * * *

(1) The Contractor has entered all mandatory information, including the unique entity identifier and the Electronic Funds Transfer indicator (if applicable), the Commercial and Government Entity (CAGE) code, as well as data required by the Federal Funding Accountability and Transparency Act of 2006 (see subpart 4.14), into the SAM database;

* * * * *

Unique entity identifier means a number or other identifier used to identify a specific commercial, nonprofit, or Government entity. See *www.sam.gov* for the designated entity for establishing unique entity identifiers.

* * * * *

PART 4—ADMINISTRATIVE MATTERS

■ 3. Amend section 4.601 by removing the definition "Generic DUNS number" and adding, in alphabetical order, the definition "Generic entity identifier" to read as follows:

4.601 Definitions.

* * * * *

Generic entity identifier means a number or other identifier assigned to a category of vendors and not specific to any individual or entity.

* * * * *

■ 4. Amend section 4.605 by revising paragraph (b), the heading of paragraph (c), and paragraphs (c)(1) and (2) introductory text; and removing from paragraph (c)(2)(i)(C) "DUNS number" and adding "unique entity identifier" in its place.

The revisions read as follows:

4.605 Procedures.

* * * * *

(b) *Unique entity identifier.* The contracting officer shall identify and report a unique entity identifier for the successful offeror on a contract action. The unique entity identifier shall correspond to the successful offeror's name and address as stated in the offer and resultant contract, and as registered in the System for Award Management database in accordance with the provision at 52.204–7, System for Award Management. The contracting officer shall ask the offeror to provide its unique entity identifier by using either the provision at 52.204–6, Unique Entity Identifier, the provision at 52.204–7, System for Award Management, or the provision at 52.212–1, Instructions to Offerors—Commercial Items. (For a discussion of the Commercial and Government Entity (CAGE) Code, which is a different identifier, see subpart 4.18.)

(c) *Generic entity identifier.* (1) The use of a generic entity identifier should be limited, and only used in the situations described in paragraph (c)(2) of this section. Use of a generic entity identifier does not supersede the requirements of provisions 52.204–6, Unique Entity Identifier or 52.204–7, System for Award Management (if present in the solicitation) for the contractor to have a unique entity identifier assigned.

(2) Authorized generic entity identifiers, maintained by the Integrated Award Environment (IAE) program office (*http://www.gsa.gov/portal/content/105036*), may be used to report contracts in lieu of the contractor's actual unique entity identifier only for—

* * * * *

■ 5. Amend section 4.607 by—

■ a. Removing from paragraph (b) "Data Universal Numbering System Number" and adding "Unique Entity Identifier" in its place; and

■ b. Revising paragraph (c) to read as follows.

4.607 Solicitation provisions and contract clause.

* * * * *

(c) Insert the clause at 52.204–12, Unique Entity Identifier Maintenance, in solicitations and resulting contracts that contain the provision at 52.204–6, Unique Entity Identifier.

■ 6. Amend section 4.1103 by—

■ a. Removing from paragraph (a)(1) "must register;" and adding "shall register;" in its place;

■ b. Removing from the introductory text of paragraph (a)(2) "DUNS number or, if applicable, the DUNS+4 number," and adding "unique entity identifier" in its place;

■ c. Adding to the end of paragraph (a)(2)(i) "or"; and

■ d. Revising paragraphs (a)(3) and (d) to read as follows:

4.1103 Procedures.

(a) * * *

(3) Need not verify registration before placing an order or call if the contract or agreement includes the provision at 52.204–7, System for Award Management, or the clause at 52.212–4, Contract Terms and Conditions—Commercial Items, or a similar agency clause, except when use of the Governmentwide commercial purchase card is contemplated as a method of payment. (See 32.1108(b)(2)).

* * * * *

(d) The contracting officer shall, on contractual documents transmitted to the payment office, provide the unique entity identifier and, if applicable, the Electronic Funds Transfer indicator, in accordance with agency procedures.

4.1402 [Amended]

■ 7. Amend section 4.1402 by removing from paragraph (b), last sentence, "DUNS number" and adding "entity identifier" in its place.

4.1705 [Amended]

■ 8. Amend section 4.1705 by removing from paragraphs (a) and (b) "DUNS number" and adding "entity identifier" in their places.

■ 9. Amend section 4.1800 by revising paragraph (b) to read as follows.

4.1800 Scope of subpart.

* * * * *

(b) For information on the unique entity identifier, which is a different identifier, see 4.605 and the provisions at 52.204–6, Unique Entity Identifier, and 52.204–7, System for Award Management.

■ 10. Amend section 4.1802 by revising paragraph (a)(1) and removing from paragraph (b) "DUNS Number" and adding "unique entity identifier" in its place.

The revision reads as follows:

4.1802 Policy.

(a) * * * (1) Offerors shall provide the contracting officer the CAGE code assigned to that offeror's location prior to the award of a contract action above the micro-purchase threshold, when there is a requirement to be registered in the System for Award Management (SAM) or a requirement to have a unique entity identifier in the solicitation.

* * * * *

4.1804 [Amended]

■ 11. Amend section 4.1804 by removing from paragraph (a)(1) "Data Universal Numbering System Number" and adding "Unique Entity Identifier" in its place.

PART 9—CONTRACTOR QUALIFICATIONS

9.404 [Amended]

■ 12. Amend section 9.404 by revising paragraph (b)(6) to read as follows:

9.404 System for Award Management Exclusions.

* * * * *

(b) * * *

(6) Unique Entity Identifier;

* * * * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

12.301 [Amended]

■ 13. Amend section 12.301 by removing from paragraphs (d)(1) and (2) "DUNS Number" and adding "unique entity identifier" in their places.

PART 19—SMALL BUSINESS PROGRAMS

19.704 [Amended]

■ 14. Amend section 19.704 by removing from paragraphs (a)(10)(v) and (vi) "DUNS number" and adding "unique entity identifier" in their places.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 15. Revise section 52.204–6 to read as follows:

52.204–6 Unique Entity Identifier.

As prescribed in 4.607(b), insert the following provision:

Unique Entity Identifier (Oct 2016)

(a) *Definitions.* As used in this provision—

Electronic Funds Transfer (EFT) indicator means a four-character suffix to the unique entity identifier. The suffix is assigned at the discretion of the commercial, nonprofit, or Government entity to establish additional System for Award Management records for identifying alternative EFT accounts (see subpart 32.11) for the same entity.

Unique entity identifier means a number or other identifier used to identify a specific commercial, nonprofit, or Government entity. See *www.sam.gov* for the designated entity for establishing unique entity identifiers.

(b) The Offeror shall enter, in the block with its name and address on the cover page of its offer, the annotation "Unique Entity Identifier" followed by the unique entity identifier that identifies the Offeror's name and address exactly as stated in the offer. The Offeror also shall enter its EFT indicator, if applicable.

(c) If the Offeror does not have a unique entity identifier, it should contact the entity designated at *www.sam.gov* for establishment of the unique entity identifier directly to obtain one. The Offeror should be prepared to provide the following information:

(1) Company legal business name.

(2) Tradestyle, doing business, or other name by which your entity is commonly recognized.

(3) Company physical street address, city, state and Zip Code.

(4) Company mailing address, city, state and Zip Code (if separate from physical).

(5) Company telephone number.

(6) Date the company was started.

(7) Number of employees at your location.

(8) Chief executive officer/key manager.

(9) Line of business (industry).

(10) Company headquarters name and address (reporting relationship within your entity).

(End of provision)

■ 16. Amend section 52.204–7 by—

■ a. Revising the provision heading and the date of the provision;

■ b. Amending paragraph (a) by—

■ 1. Removing the definitions "Data Universal Numbering System (DUNS) number" and "Data Universal Numbering System +4 (DUNS+4) number";

■ 2. Adding, in alphabetical order, the definition "Electronic Funds Transfer (EFT) indicator";

■ 3. Revising paragraph (1) of the definition "Registered in the System for Award Management (SAM) database"; and

■ 4. Adding, in alphabetical order, the definition "Unique entity identifier";

■ c. Removing from paragraph (b)(1) "the offeror" and adding "the Offeror" in its place; and

■ d. Revising paragraphs (b)(2) and (c).

The revisions and additions read as follows:

52.204–7 System for Award Management.

* * * * *

System for Award Management

(a) *Definitions.* As used in this provision—

* * * * *

Electronic Funds Transfer (EFT) indicator means a four-character suffix to the unique entity identifier. The suffix is assigned at the discretion of the commercial, nonprofit, or Government entity to establish additional System for Award Management records for identifying alternative EFT accounts (see subpart 32.11) for the same entity.

Registered in the System for Award Management (SAM) database means that—

(1) The Offeror has entered all mandatory information, including the unique entity identifier and the EFT indicator, if applicable, the Commercial and Government Entity (CAGE) code, as well as data required by the Federal Funding Accountability and Transparency Act of 2006 (see subpart 4.14) into the SAM database;

* * * * *

Unique entity identifier means a number or other identifier used to identify a specific commercial, nonprofit, or Government entity. See *www.sam.gov* for the designated entity for establishing unique entity identifiers.

(b) * * *

(2) The Offeror shall enter, in the block with its name and address on the cover page of its offer, the annotation "Unique Entity Identifier" followed by the unique entity identifier that identifies the Offeror's name and address exactly as stated in the offer. The Offeror also shall enter its EFT indicator, if applicable. The unique entity identifier will be used by the Contracting Officer to verify that the Offeror is registered in the SAM database.

(c) If the Offeror does not have a unique entity identifier, it should contact the entity designated at *www.sam.gov* for establishment of the unique entity identifier directly to obtain one. The Offeror should be prepared to provide the following information:

(1) Company legal business name.

(2) Tradestyle, doing business, or other name by which your entity is commonly recognized.

(3) Company physical street address, city, state, and Zip Code.

(4) Company mailing address, city, state and Zip Code (if separate from physical).

(5) Company telephone number.

(6) Date the company was started.

(7) Number of employees at your location.

(8) Chief executive officer/key manager.

(9) Line of business (industry).

(10) Company headquarters name and address (reporting relationship within your entity).

* * * * *

■ 17. Amend section 52.204–10 by—

■ a. Revising the date of the clause; and

■ b. Removing from paragraph (d)(2)(i) "identifier (DUNS Number)" and adding "entity identifier" in its place.

The revision reads as follows:

52.204–10 Reporting Executive Compensation and First-Tier Subcontract Awards.

* * * * *

Reporting Executive Compensation and First-Tier Subcontract Awards (Oct 2016)

* * * * *

■ 18. Revise section 52.204–12 to read as follows:

52.204–12 Unique Entity Identifier Maintenance.

As prescribed in 4.607(c), insert the following clause:

Unique Entity Identifier Maintenance (Oct 2016)

(a) *Definition. Unique entity identifier,* as used in this clause, means a number or other identifier used to identify a specific commercial, nonprofit, or Government entity. See *www.sam.gov* for the designated entity for establishing unique entity identifiers.

(b) The Contractor shall ensure that the unique entity identifier is maintained with the entity designated at the System for Award Management (SAM) for establishment of the unique entity identifier throughout the life of the contract. The Contractor shall communicate any change to the unique entity identifier to the Contracting Officer within 30 days after the change, so an appropriate modification can be issued to update the data on the contract. A change in the unique entity identifier does not necessarily require a novation be accomplished.

(End of clause)

■ 19. Amend section 52.204–13 by—
■ a. Revising the date of the clause;
■ b. Amending paragraph (a) by—
■ 1. Removing the definitions "Data Universal Numbering System (DUNS) number" and "Data Universal Numbering System +4 (DUNS+4) number";
■ 2. Adding, in alphabetical order, the definition "Electronic Funds Transfer (EFT) indicator";
■ 3. Revising paragraph (1) of the definition "Registered in the System for Award Management (SAM) database"; and
■ 4. Adding, in alphabetical order, the definition "Unique entity identifier"; and
■ c. Revising paragraph (c)(3);

The revisions and additions read as follows:

52.204–13 System for Award Management Maintenance.

* * * * *

System for Award Management Maintenance (Oct 2016)

(a) *Definitions.* * * *

Electronic Funds Transfer (EFT) indicator means a four-character suffix to the unique entity identifier. The suffix is assigned at the discretion of the commercial, nonprofit, or Government entity to establish additional System for Award Management (SAM) records for identifying alternative EFT accounts (see subpart 32.11) for the same entity.

Registered in the System for Award Management (SAM) database means that—

(1) The Contractor has entered all mandatory information, including the unique entity identifier and the EFT indicator (if applicable), the Commercial and Government Entity (CAGE) code, as well as data required by the Federal Funding Accountability and Transparency Act of 2006 (see subpart 4.14), into the SAM database;

* * * * *

Unique entity identifier means a number or other identifier used to identify a specific commercial, nonprofit, or Government entity. See *www.sam.gov* for the designated entity for establishing unique entity identifiers.

* * * * *

(c) * * *

(3) The Contractor shall ensure that the unique entity identifier is maintained with the entity designated at *www.sam.gov* for establishment of the unique entity identifier throughout the life of the contract. The Contractor shall communicate any change to the unique entity identifier to the Contracting Officer within 30 days after the change, so an appropriate modification can be issued to update the data on the contract. A change in the unique entity identifier does not necessarily require a novation be accomplished.

* * * * *

■ 20. Amend section 52.204–14 by—
■ a. Revising the date of the clause; and
■ b. Removing from paragraph (f)(1)(i) "DUNS number" and adding "unique entity identifier" in its place.

The revision reads as follows:

52.204–14 Service Contract Reporting Requirements.

* * * * *

Service Contract Reporting Requirements (Oct 2016)

* * * * *

■ 21. Amend section 52.204–15 by—
■ a. Revising the date of the clause; and
■ b. Removing from paragraph (f)(1)(i) "DUNS number" and adding "unique entity identifier" in its place.

The revision reads as follows:

52.204–15 Service Contract Reporting Requirements for Indefinite-Delivery Contracts.

* * * * *

Service Contract Reporting Requirements for Indefinite-Delivery Contracts (Oct 2016)

* * * * *

■ 22. Amend section 52.212–1 by revising the date of the provision and paragraph (j) to read as follows:

52.212–1 Instructions to Offerors—Commercial Items.

* * * * *

Instructions to Offerors—Commercial Items (Oct 2016)

* * * * *

(j) *Unique entity identifier.* (Applies to all offers exceeding $3,500, and offers of $3,500 or less if the solicitation requires the Contractor to be registered in the System for Award Management (SAM) database.) The Offeror shall enter, in the block with its name and address on the cover page of its offer, the annotation "Unique Entity Identifier" followed by the unique entity identifier that identifies the Offeror's name and address. The Offeror also shall enter its Electronic Funds Transfer (EFT) indicator, if applicable. The EFT indicator is a four-character suffix to the unique entity identifier. The suffix is assigned at the discretion of the Offeror to establish additional SAM records for identifying alternative EFT accounts (see subpart 32.11) for the same entity. If the Offeror does not have a unique entity identifier, it should contact the entity designated at *www.sam.gov* for unique entity identifier establishment directly to obtain one. The Offeror should indicate that it is an offeror for a Government contract when contacting the entity designated at *www.sam.gov* for establishing the unique entity identifier.

* * * * *

■ 23. Amend section 52.212–3 by—
■ a. Revising the date of the provision; and
■ b. Removing from the introductory text of paragraph (p) "DUNS Number" and adding "unique entity identifier" in its place.

The revision reads as follows:

52.212—3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (Oct 2016)

* * * * *

■ 24. Amend section 52.212–5 by revising the date of the clause and paragraphs (b)(4), (b)(6), (b)(7), and (b)(17)(i) to read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (Oct 2016)

* * * * *

(b) * * *

____ (4) 52.204–10, Reporting Executive Compensation and First-Tier Subcontract Awards (Oct 2016) (Pub. L. 109–282) (31 U.S.C. 6101 note).

* * * * *

____ (6) 52.204–14, Service Contract Reporting Requirements (Oct 2016) (Pub. L. 111–117, section 743 of Div. C).

____ (7) 52.204–15, Service Contract Reporting Requirements for Indefinite-Delivery Contracts (Oct 2016) (Pub. L. 111–117, section 743 of Div. C).

* * * * *

____ (17)(i) 52.219–9, Small Business Subcontracting Plan (Oct 2016) (15 U.S.C. 637(d)(4)).

* * * * *

■ 25. Amend section 52.213–4 by revising the date of the clause and paragraph (b)(1)(i) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (Oct 2016)

* * * * *

(b) * * *

(1) * * *

(i) 52.204–10, Reporting Executive Compensation and First-Tier Subcontract Awards (Oct 2016) (Pub. L. 109–282) (31

U.S.C. 6101 note) (Applies to contracts valued at $30,000 or more).

* * * * *

■ 26. Amend section 52.219–9 by—

■ a. Revising the section heading;

■ b. Revising the date of the clause;

■ c. Removing from paragraph (d)(10)(vi) "DUNS number," and adding "unique entity identifier," in its place.

The revisions read as follows:

52.219–9 Small Business Subcontracting Plan.

* * * * *

Small Business Subcontracting Plan (Oct 2016)

* * * * *

PART 53—FORMS

53.214 [Amended]

■ 27. Amend section 53.214 by removing from paragraph (d) "SF 1447 (Rev. 2/2012)" and adding "SF 1447 (Rev. 8/2016)" in its place.

53.215–1 [Amended]

■ 28. Amend section 53.215–1 by removing from paragraph (e) "OF 307 (9/97)" and adding "OF 307 (Rev. 8/2016)" in its place.

53.219 [Amended]

■ 29. Amend section 53.219 by removing from the paragraph "(Rev. 10/2015)" and adding "(Rev. 8/2016)" in its place.

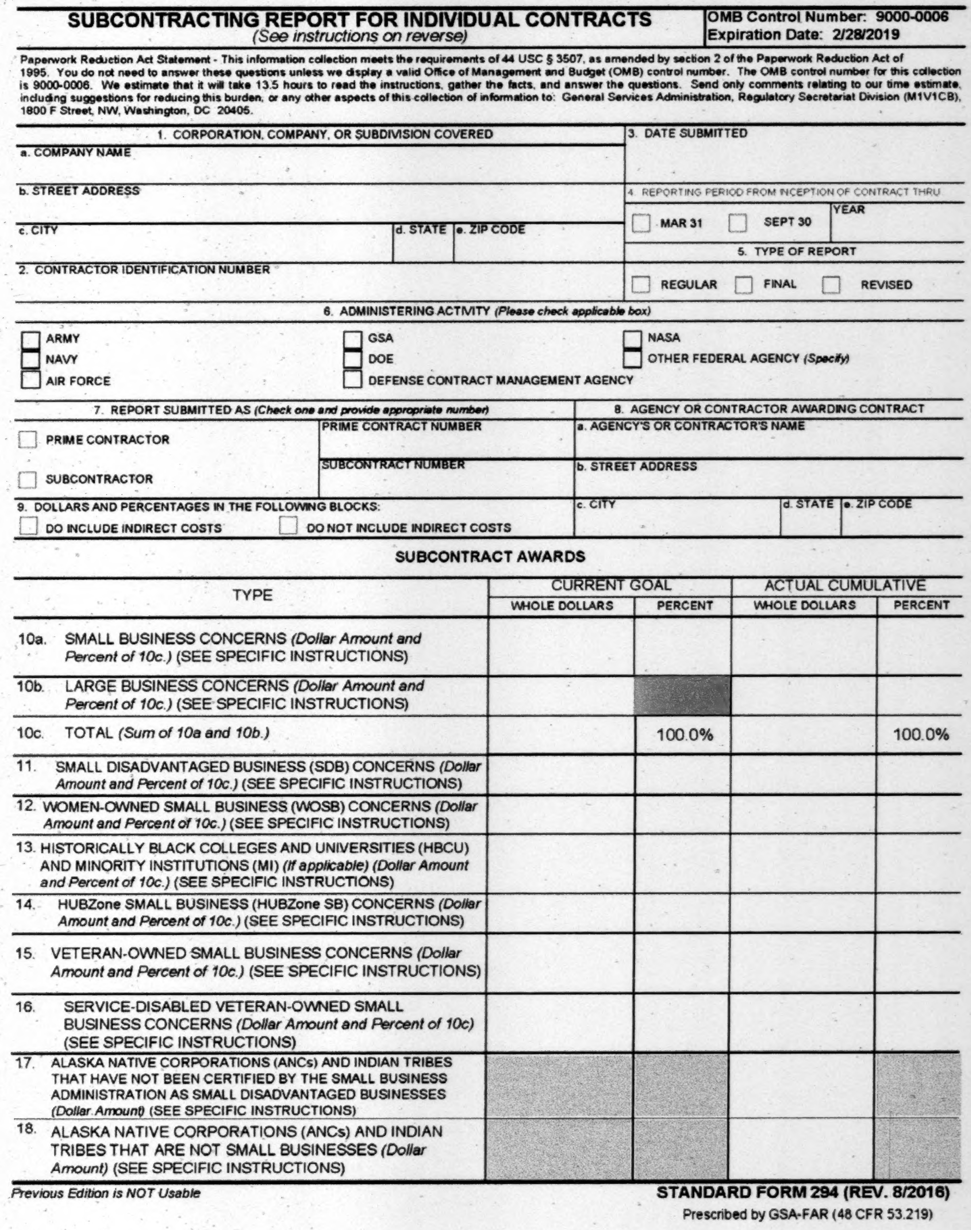
53.236–2 [Amended]

■ 30. Amend section 53.236–2 by removing from paragraph (b) "SF 330 (Rev. 3/2013)" and adding "SF 330 (Rev. 8/2016)" in its place.

■ 31. Revise section 53.301–294 to read as follows:

53.301–294 Subcontracting Report for Individual Contracts.

BILLING CODE 6820–EP–P



SUBCONTRACTING REPORT FOR INDIVIDUAL CONTRACTS

(See instructions on reverse)

OMB Control Number: 9000-0006
Expiration Date: 2/28/2019

Paperwork Reduction Act Statement - This information collection meets the requirements of 44 USC § 3507, as amended by section 2 of the Paperwork Reduction Act of 1995. You do not need to answer these questions unless we display a valid Office of Management and Budget (OMB) control number. The OMB control number for this collection is 9000-0006. We estimate that it will take 13.5 hours to read the instructions, gather the facts, and answer the questions. Send only comments relating to our time estimate, including suggestions for reducing this burden, or any other aspects of this collection of information to: General Services Administration, Regulatory Secretariat Division (M1V1CB), 1800 F Street, NW, Washington, DC 20405.

1. CORPORATION, COMPANY, OR SUBDIVISION COVERED
a. COMPANY NAME
b. STREET ADDRESS
c. CITY
d. STATE
e. ZIP CODE
2. CONTRACTOR IDENTIFICATION NUMBER
3. DATE SUBMITTED
4. REPORTING PERIOD FROM INCEPTION OF CONTRACT THRU
☐ MAR 31 ☐ SEPT 30 YEAR
5. TYPE OF REPORT
☐ REGULAR ☐ FINAL ☐ REVISED

6. ADMINISTERING ACTIVITY *(Please check applicable box)*
☐ ARMY
☐ NAVY
☐ AIR FORCE
☐ GSA
☐ DOE
☐ DEFENSE CONTRACT MANAGEMENT AGENCY
☐ NASA
☐ OTHER FEDERAL AGENCY *(Specify)*

7. REPORT SUBMITTED AS *(Check one and provide appropriate number)*
☐ PRIME CONTRACTOR PRIME CONTRACT NUMBER
☐ SUBCONTRACTOR SUBCONTRACT NUMBER

8. AGENCY OR CONTRACTOR AWARDING CONTRACT
a. AGENCY'S OR CONTRACTOR'S NAME
b. STREET ADDRESS
c. CITY
d. STATE
e. ZIP CODE

9. DOLLARS AND PERCENTAGES IN THE FOLLOWING BLOCKS:
☐ DO INCLUDE INDIRECT COSTS ☐ DO NOT INCLUDE INDIRECT COSTS

SUBCONTRACT AWARDS

TYPE	CURRENT GOAL		ACTUAL CUMULATIVE	
	WHOLE DOLLARS	PERCENT	WHOLE DOLLARS	PERCENT
10a. SMALL BUSINESS CONCERNS *(Dollar Amount and Percent of 10c.)* (SEE SPECIFIC INSTRUCTIONS)				
10b. LARGE BUSINESS CONCERNS *(Dollar Amount and Percent of 10c.)* (SEE SPECIFIC INSTRUCTIONS)		▨		
10c. TOTAL *(Sum of 10a and 10b.)*		100.0%		100.0%
11. SMALL DISADVANTAGED BUSINESS (SDB) CONCERNS *(Dollar Amount and Percent of 10c.)* (SEE SPECIFIC INSTRUCTIONS)				
12. WOMEN-OWNED SMALL BUSINESS (WOSB) CONCERNS *(Dollar Amount and Percent of 10c.)* (SEE SPECIFIC INSTRUCTIONS)				
13. HISTORICALLY BLACK COLLEGES AND UNIVERSITIES (HBCU) AND MINORITY INSTITUTIONS (MI) *(If applicable) (Dollar Amount and Percent of 10c.)* (SEE SPECIFIC INSTRUCTIONS)				
14. HUBZone SMALL BUSINESS (HUBZone SB) CONCERNS *(Dollar Amount and Percent of 10c.)* (SEE SPECIFIC INSTRUCTIONS)				
15. VETERAN-OWNED SMALL BUSINESS CONCERNS *(Dollar Amount and Percent of 10c.)* (SEE SPECIFIC INSTRUCTIONS)				
16. SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESS CONCERNS *(Dollar Amount and Percent of 10c)* (SEE SPECIFIC INSTRUCTIONS)				
17. ALASKA NATIVE CORPORATIONS (ANCs) AND INDIAN TRIBES THAT HAVE NOT BEEN CERTIFIED BY THE SMALL BUSINESS ADMINISTRATION AS SMALL DISADVANTAGED BUSINESSES *(Dollar Amount)* (SEE SPECIFIC INSTRUCTIONS)	▨	▨		▨
18. ALASKA NATIVE CORPORATIONS (ANCs) AND INDIAN TRIBES THAT ARE NOT SMALL BUSINESSES *(Dollar Amount)* (SEE SPECIFIC INSTRUCTIONS)	▨	▨		▨

Previous Edition is NOT Usable

STANDARD FORM 294 (REV. 8/2016)
Prescribed by GSA-FAR (48 CFR 53.219)

19. REMARKS

20a. NAME OF INDIVIDUAL ADMINISTERING SUBCONTRACTING PLAN	20b. TELEPHONE NUMBER AREA CODE	 NUMBER

STANDARD FORM 294 (REV. 8/2016) **PAGE 2**

GENERAL INSTRUCTIONS

1. This report is not required for small businesses.

2. This report is not required for commercial items for which a commercial plan has been approved, nor from large businesses in the Department of Defense (DOD) Test Program for Negotiation of Comprehensive Subcontracting plans. The Summary Subcontract Report (SSR) is required for contractors operating under one of these two conditions and should be submitted to the Government in accordance with the instructions on that form.

3. This form collects subcontract award data from prime contractors/subcontractors that : (a) hold one or more contracts over $700,000 (over $1,500,000 for construction of a public facility); and (b) are required to report subcontracts awarded to Small Business (SB), Small Disadvantaged Business (SDB), Women-Owned Small Business (WOSB), HUBZone Small Business (HUBZone SB), Veteran-Owned Small Business (VOSB) and Service-Disabled Veteran-Owned Small Business concerns under a subcontracting plan. For the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA), and the Coast Guard, this form also collects subcontract award data for Historically Black Colleges and Universities (HBCUs) and Minority Institutions (MIs).

4. This report is required for each contract containing a subcontracting plan and must be submitted to the administrative contracting officer (ACO) or contracting officer if no ACO is assigned, semi-annually, during contract performance for the periods ended March 31st and September 30th. A separate report is required for each contract at contract completion. Reports are due 30 days after the close of each reporting period unless otherwise directed by the contracting officer. Reports are required when due, regardless of whether there has been any subcontracting activity since the inception of the contract or since the previous report.

5. Only subcontracts involving performance in the United States or its outlying areas should be included in this report with the exception of subcontracts under a contract awarded by the State Department or any other agency that has statutory or regulatory authority to require subcontracting plans for subcontracts performed outside the United States and its outlying areas.

6. Purchases from a corporation, company, or subdivision that is an affiliate of the prime/subcontractor are not included in this report.

7. Subcontract award data reported on this form by prime contractors/subcontractors shall be limited to awards made to their immediate subcontractors. Credit cannot be taken for awards made to lower tier subcontractors unless you have been designated to receive an SB and SDB credit from an Alaska Native Corporation (ANC) or Indian tribe.

8. FAR 19.703 sets forth the eligibility requirements for participating in the subcontracting program.

9. Actual achievements must be reported on the same basis as the goals set forth in the contract. For example, if goals in the plan do not include indirect and overhead items, the achievements shown on this report should not include them either.

SPECIFIC INSTRUCTIONS

BLOCK 2: For the Contractor Identification Number, enter the unique entity identifier that identifies the specific contractor establishment. If there is no unique entity identifier that identifies the exact name and address entered in Block 1, contact the entity designated at SAM for establishment of the unique entity identifier.

BLOCK 4: Check only one. Note that all subcontract award data reported on this form represents activity since the inception of the contract through the date indicated on this block.

BLOCK 5: Check whether this report is a "Regular," "Final," and/or "Revised" report. A "Final" report should be checked only if the contractor has completed the contract or subcontract reported in Block 7. A "Revised" report is a change to a report previously submitted for the same period.

BLOCK 6: Identify the department or agency administering the majority of subcontracting plans.

BLOCK 7: Indicate whether the reporting contractor is submitting this report as a prime contractor or subcontractor and the prime contract or subcontract number.

BLOCK 8: Enter the name and address of the Federal department or agency awarding the contract or the prime contractor awarding the subcontract.

BLOCK 9: Check the appropriate block to indicate whether indirect costs are included in the dollar amounts in blocks 10a through 16. To ensure comparability between the goal and actual columns, the contractor may include indirect costs in the actual column only if the subcontracting plan included indirect costs in the goal.

BLOCKS 10a through 18: Under "Current Goal," enter the dollar and percent goals in each category (SB, SDB, WOSB, VOSB, service-disabled VOSB, and HUBZone SB) from the subcontracting plan approved for this contract. (If the original goals agreed upon at contract award have been revised as a result of contract modifications, enter the original goals in Block 19. The amounts entered in Blocks 10a through 16 should reflect the revised goals.) There are no goals for Blocks 17 and 18. Under "Actual Cumulative," enter actual subcontract achievements (dollars and percent) from the inception of the contract through the date of the report shown in Block 4. In cases where indirect costs are included, the amounts should include both direct awards and an appropriate prorated portion of indirect awards. However, the dollar amounts reported under "Actual Cumulative" must be for the same period of time as the dollar amounts shown under "Current Goal." For a contract with options, the current goal should represent the aggregate goal since the inception of the contract. For example, if the contractor is submitting the report during Option 2 of a multiple year contract, the current goal would be the cumulative goal for the base period plus the goal for Option 1 and the goal for Option 2.

BLOCK 10a: Report all subcontracts awarded to SBs including subcontracts to SDBs, WOSB, VOSB, service-disabled VOSB, and HUBZone SBs. For DOD, NASA, and Coast Guard contracts, include subcontracting awards to HBCUs and MIs. Include subcontracts awarded to ANCs and Indian tribes that are not small businesses and that are not certified by the SBA as SDBs where you have been designated to receive their SB and SDB credit. Where your company and other companies have been designated by an ANC or Indian tribe to receive SB and SDB credit for a subcontract awarded to the ANC or Indian tribe, report only the portion of the total amount of the subcontract that has been designated to your company.

BLOCK 10b: Report all subcontracts awarded to large businesses (LBs) and any other-than-small businesses. Do not include subcontracts awarded to ANCs and Indian tribes that have been reported in 10a above.

BLOCK 10c: Report on this line the total of all subcontracts awarded under this contract (the sum of lines 10a and 10b).

BLOCKS 11 - 16: Each of these items is a subcategory of Block 10a. Note that in some cases the same dollars may be reported in more than one block (e.g., SDBs owned by women or veterans).

BLOCK 11: Report all subcontracts awarded to SDBs (including WOSB, VOSB, service-disabled VOSBs, and HUBZone SB SDBs). Include subcontracts awarded to ANCs and Indian tribes that have not been certified by SBA as SDBs where you have been designated to receive their SDB credit. Where your company and other companies have been designated by an ANC or Indian tribe to receive their SDB credit for a subcontract awarded to the ANC or Indian tribe, report only the portion of the total amount of the subcontract that has been designated to your company. For DoD, NASA, and Coast Guard contracts, include subcontracting awards to HBCUs and MIs.

BLOCK 12: Report all subcontracts awarded to WOSBs (including SDBs, VOSBs (including service-disabled VOSBs), and HUBZone SBs that are also WOSBs).

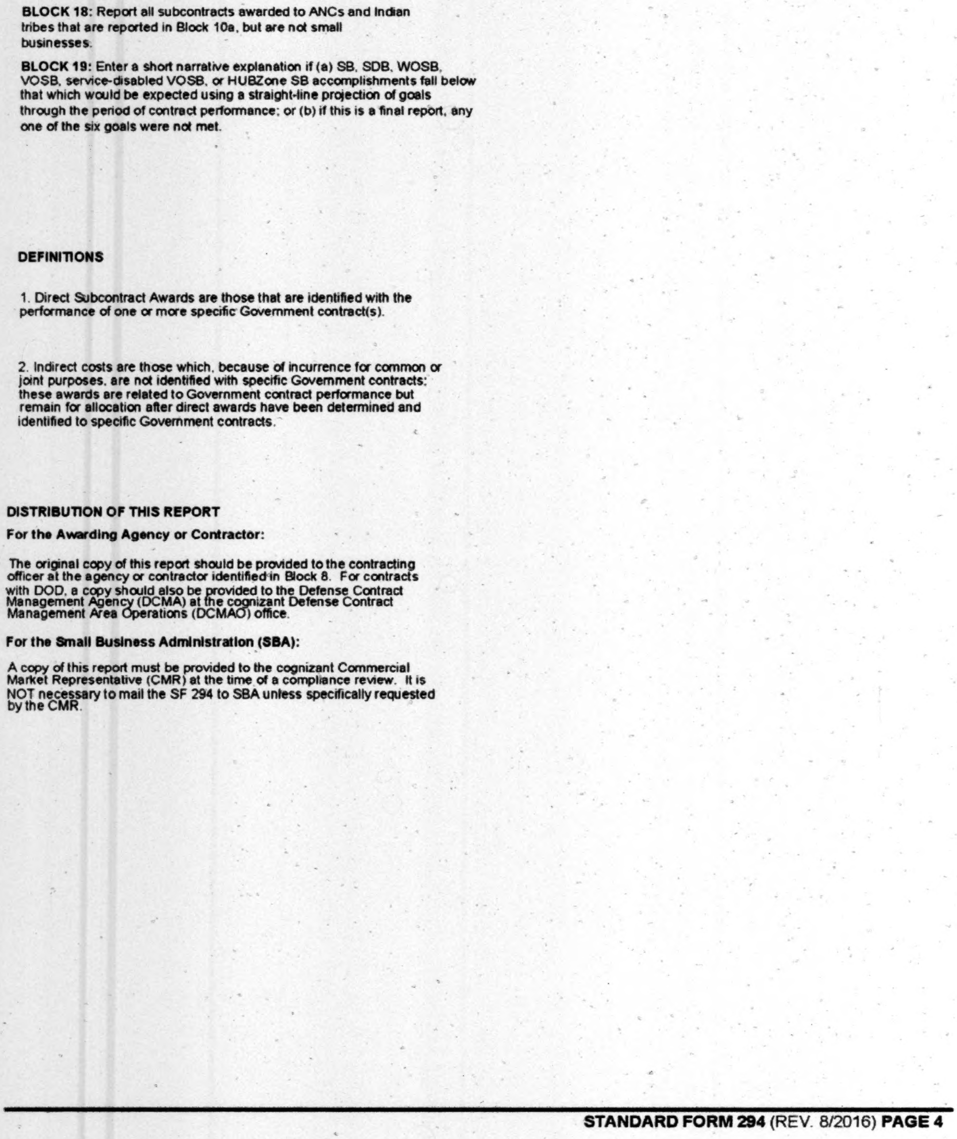
BLOCK 13: (For contracts with DoD, NASA, and Coast Guard): Report all subcontracts with HBCUs/MIs. Complete the column under "Current Goal" only when the subcontracting plan establishes a goal.

BLOCK 14: Report all subcontracts awarded to HUBZone SBs (including WOSBs, VOSBs (including service-disabled VOSBs), and SDBs that are also HUBZone SBs).

BLOCK 15: Report all subcontracts awarded to VOSBs including service-disabled VOSBs (and including SDBs, WOSBs, and HUBZone SBs that are also VOSBs).

BLOCK 16: Report all subcontracts awarded to service-disabled VOSBs (including SDBs, WOSBs, and HUBZone SBs that are also service-disabled VOSBs).

BLOCK 17: Report all subcontracts awarded to ANCs and Indian tribes that are reported in Block 11, but have not been certified by SBA as SDBs.



BLOCK 18: Report all subcontracts awarded to ANCs and Indian tribes that are reported in Block 10a, but are not small businesses.

BLOCK 19: Enter a short narrative explanation if (a) SB, SDB, WOSB, VOSB, service-disabled VOSB, or HUBZone SB accomplishments fall below that which would be expected using a straight-line projection of goals through the period of contract performance; or (b) if this is a final report, any one of the six goals were not met.

DEFINITIONS

1. Direct Subcontract Awards are those that are identified with the performance of one or more specific Government contract(s).

2. Indirect costs are those which, because of incurrence for common or joint purposes, are not identified with specific Government contracts; these awards are related to Government contract performance but remain for allocation after direct awards have been determined and identified to specific Government contracts.

DISTRIBUTION OF THIS REPORT

For the Awarding Agency or Contractor:

The original copy of this report should be provided to the contracting officer at the agency or contractor identified in Block 8. For contracts with DOD, a copy should also be provided to the Defense Contract Management Agency (DCMA) at the cognizant Defense Contract Management Area Operations (DCMAO) office.

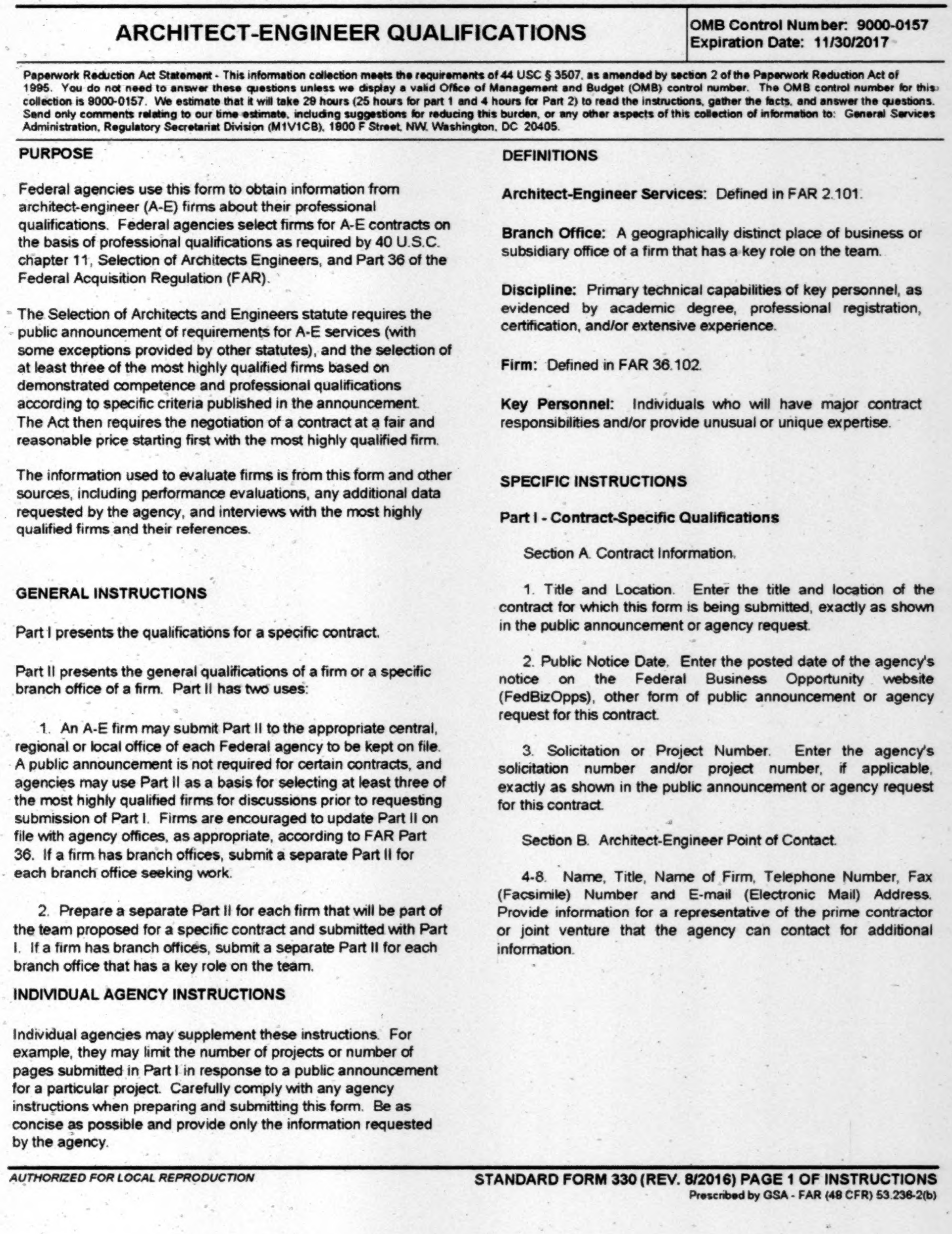
For the Small Business Administration (SBA):

A copy of this report must be provided to the cognizant Commercial Market Representative (CMR) at the time of a compliance review. It is NOT necessary to mail the SF 294 to SBA unless specifically requested by the CMR.

STANDARD FORM 294 (REV. 8/2016) **PAGE 4**

■ 32. Revise section 53.301–330 to read as follows:

53.301–330 Architect-Engineer Qualifications.



ARCHITECT-ENGINEER QUALIFICATIONS

OMB Control Number: 9000-0157
Expiration Date: 11/30/2017

Paperwork Reduction Act Statement - This information collection meets the requirements of 44 USC § 3507, as amended by section 2 of the Paperwork Reduction Act of 1995. You do not need to answer these questions unless we display a valid Office of Management and Budget (OMB) control number. The OMB control number for this collection is 9000-0157. We estimate that it will take 29 hours (25 hours for part 1 and 4 hours for Part 2) to read the instructions, gather the facts, and answer the questions. Send only comments relating to our time estimate, including suggestions for reducing this burden, or any other aspects of this collection of information to: General Services Administration, Regulatory Secretariat Division (M1V1CB), 1800 F Street, NW, Washington, DC 20405.

PURPOSE

Federal agencies use this form to obtain information from architect-engineer (A-E) firms about their professional qualifications. Federal agencies select firms for A-E contracts on the basis of professional qualifications as required by 40 U.S.C. chapter 11, Selection of Architects Engineers, and Part 36 of the Federal Acquisition Regulation (FAR).

The Selection of Architects and Engineers statute requires the public announcement of requirements for A-E services (with some exceptions provided by other statutes), and the selection of at least three of the most highly qualified firms based on demonstrated competence and professional qualifications according to specific criteria published in the announcement. The Act then requires the negotiation of a contract at a fair and reasonable price starting first with the most highly qualified firm.

The information used to evaluate firms is from this form and other sources, including performance evaluations, any additional data requested by the agency, and interviews with the most highly qualified firms and their references.

GENERAL INSTRUCTIONS

Part I presents the qualifications for a specific contract.

Part II presents the general qualifications of a firm or a specific branch office of a firm. Part II has two uses:

1. An A-E firm may submit Part II to the appropriate central, regional or local office of each Federal agency to be kept on file. A public announcement is not required for certain contracts, and agencies may use Part II as a basis for selecting at least three of the most highly qualified firms for discussions prior to requesting submission of Part I. Firms are encouraged to update Part II on file with agency offices, as appropriate, according to FAR Part 36. If a firm has branch offices, submit a separate Part II for each branch office seeking work.

2. Prepare a separate Part II for each firm that will be part of the team proposed for a specific contract and submitted with Part I. If a firm has branch offices, submit a separate Part II for each branch office that has a key role on the team.

INDIVIDUAL AGENCY INSTRUCTIONS

Individual agencies may supplement these instructions. For example, they may limit the number of projects or number of pages submitted in Part I in response to a public announcement for a particular project. Carefully comply with any agency instructions when preparing and submitting this form. Be as concise as possible and provide only the information requested by the agency.

DEFINITIONS

Architect-Engineer Services: Defined in FAR 2.101.

Branch Office: A geographically distinct place of business or subsidiary office of a firm that has a key role on the team.

Discipline: Primary technical capabilities of key personnel, as evidenced by academic degree, professional registration, certification, and/or extensive experience.

Firm: Defined in FAR 36.102.

Key Personnel: Individuals who will have major contract responsibilities and/or provide unusual or unique expertise.

SPECIFIC INSTRUCTIONS

Part I - Contract-Specific Qualifications

Section A. Contract Information.

1. Title and Location. Enter the title and location of the contract for which this form is being submitted, exactly as shown in the public announcement or agency request.

2. Public Notice Date. Enter the posted date of the agency's notice on the Federal Business Opportunity website (FedBizOpps), other form of public announcement or agency request for this contract.

3. Solicitation or Project Number. Enter the agency's solicitation number and/or project number, if applicable, exactly as shown in the public announcement or agency request for this contract.

Section B. Architect-Engineer Point of Contact.

4-8. Name, Title, Name of Firm, Telephone Number, Fax (Facsimile) Number and E-mail (Electronic Mail) Address. Provide information for a representative of the prime contractor or joint venture that the agency can contact for additional information.

AUTHORIZED FOR LOCAL REPRODUCTION

STANDARD FORM 330 (REV. 8/2016) PAGE 1 OF INSTRUCTIONS
Prescribed by GSA - FAR (48 CFR) 53.236-2(b)

Section C. Proposed Team.

9-11. Firm Name, Address, and Role in This Contract. Provide the contractual relationship, name, full mailing address, and a brief description of the role of each firm that will be involved in performance of this contract. List the prime contractor or joint venture partners first. If a firm has branch offices, indicate each individual branch office that will have a key role on the team. The named subcontractors and outside associates or consultants must be used, and any change must be approved by the contracting officer. (See FAR Part 52 Clause "Subcontractors and Outside Associates and Consultants (Architect-Engineer Services)"). Attach an additional sheet in the same format as Section C if needed.

Section D. Organizational Chart of Proposed Team.

As an attachment after Section C, present an organizational chart of the proposed team showing the names and roles of all key personnel listed in Section E and the firm they are associated with as listed in Section C.

Section E. Resumes of Key Personnel Proposed for this Contract.

Complete this section for each key person who will participate in this contract. Group by firm, with personnel of the prime contractor or joint venture partner firms first. The following blocks must be completed for each resume:

12. Name. Self-explanatory.

13. Role in this contract. Self-explanatory.

14. Years Experience. Total years of relevant experience (block 14a), and years of relevant experience with current firm, but not necessarily the same branch office (block 14b).

15. Firm Name and Location. Name, city and state of the firm where the person currently works, which must correspond with one of the firms (or branch office of a firm, if appropriate) listed in Section C.

16. Education. Provide information on the highest relevant academic degree(s) received. Indicate the area(s) of specialization for each degree.

17. Current Professional Registration. Provide information on current relevant professional registration(s) in a State or possession of the United States, Puerto Rico, or the District of Columbia according to FAR Part 36.

18. Other Professional Qualifications. Provide information on any other professional qualifications relating to this contract, such as education, professional registration, publications, organizational memberships, certifications, training, awards, and foreign language capabilities.

19. Relevant Projects. Provide information on up to five projects in which the person had a significant role that demonstrates the person's capability relevant to her/his proposed role in this contract. These projects do not necessarily have to be any of the projects presented in Section F for the project team if the person was not involved in any of those projects or the person worked on other projects that were more relevant than the team projects in Section F. Use the check box provided to indicate if the project was performed with any office of the current firm. If any of the professional services or construction projects are not complete, leave Year Completed blank and indicate the status in Brief Description and Specific Role (block (3)).

Section F. Example Projects Which Best Illustrate Proposed Team's Qualifications for this Contract.

Select projects where multiple team members worked together, if possible, that demonstrate the team's capability to perform work similar to that required for this contract. Complete one Section F for each project. Present ten projects, unless otherwise specified by the agency. Complete the following blocks for each project:

20. Example Project Key Number. Start with "1" for the first project and number consecutively.

21. Title and Location. Title and location of project or contract. For an indefinite delivery contract, the location is the geographic scope of the contract.

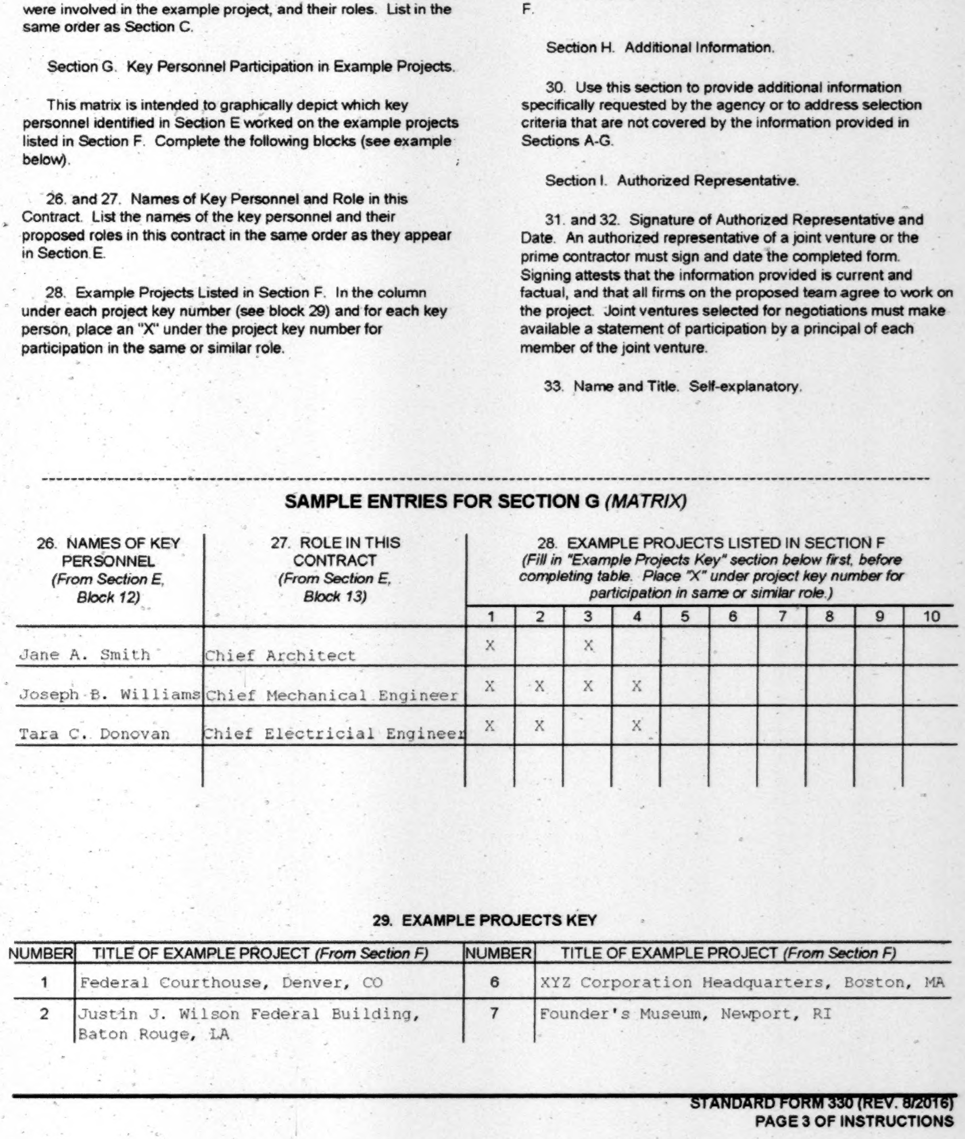
22. Year Completed. Enter the year completed of the professional services (such as planning, engineering study, design, or surveying), and/or the year completed of construction, if applicable. If any of the professional services or the construction projects are not complete, leave Year Completed blank and indicate the status in Brief Description of Project and Relevance to this Contract (block 24).

23a. Project Owner. Project owner or user, such as a government agency or installation, an institution, a corporation or private individual.

23b. Point of Contact Name. Provide name of a person associated with the project owner or the organization which contracted for the professional services, who is very familiar with the project and the firm's (or firms') performance.

23c. Point of Contact Telephone Number. Self-explanatory.

24. Brief Description of Project and Relevance to this Contract. Indicate scope, size, cost, principal elements and special features of the project. Discuss the relevance of the example project to this contract. Enter any other information requested by the agency for each example project.



25. Firms from Section C Involved with this Project. Indicate which firms (or branch offices, if appropriate) on the project team were involved in the example project, and their roles. List in the same order as Section C.

Section G. Key Personnel Participation in Example Projects.

This matrix is intended to graphically depict which key personnel identified in Section E worked on the example projects listed in Section F. Complete the following blocks (see example below).

26. and 27. Names of Key Personnel and Role in this Contract. List the names of the key personnel and their proposed roles in this contract in the same order as they appear in Section E.

28. Example Projects Listed in Section F. In the column under each project key number (see block 29) and for each key person, place an "X" under the project key number for participation in the same or similar role.

29. Example Projects Key. List the key numbers and titles of the example projects in the same order as they appear in Section F.

Section H. Additional Information.

30. Use this section to provide additional information specifically requested by the agency or to address selection criteria that are not covered by the information provided in Sections A-G.

Section I. Authorized Representative.

31. and 32. Signature of Authorized Representative and Date. An authorized representative of a joint venture or the prime contractor must sign and date the completed form. Signing attests that the information provided is current and factual, and that all firms on the proposed team agree to work on the project. Joint ventures selected for negotiations must make available a statement of participation by a principal of each member of the joint venture.

33. Name and Title. Self-explanatory.

SAMPLE ENTRIES FOR SECTION G *(MATRIX)*

26. NAMES OF KEY PERSONNEL *(From Section E, Block 12)*	27. ROLE IN THIS CONTRACT *(From Section E, Block 13)*	28. EXAMPLE PROJECTS LISTED IN SECTION F *(Fill in "Example Projects Key" section below first, before completing table. Place "X" under project key number for participation in same or similar role.)*									
		1	2	3	4	5	6	7	8	9	10
Jane A. Smith	Chief Architect	X		X							
Joseph B. Williams	Chief Mechanical Engineer	X	X	X	X						
Tara C. Donovan	Chief Electricial Engineer	X	X		X						

29. EXAMPLE PROJECTS KEY

NUMBER	TITLE OF EXAMPLE PROJECT *(From Section F)*	NUMBER	TITLE OF EXAMPLE PROJECT *(From Section F)*
1	Federal Courthouse, Denver, CO	6	XYZ Corporation Headquarters, Boston, MA
2	Justin J. Wilson Federal Building, Baton Rouge, LA	7	Founder's Museum, Newport, RI

Part II - General Qualifications

See the "**General Instructions**" on page 1 for firms with branch offices. Prepare Part II for the specific branch office seeking work if the firm has branch offices.

1. Solicitation Number. If Part II is submitted for a specific contract, insert the agency's solicitation number and/or project number, if applicable, exactly as shown in the public announcement or agency request.

2a-2e. Firm (or Branch Office) Name and Address. Self-explanatory.

3. Year Established. Enter the year the firm (or branch office, if appropriate) was established under the current name.

4. Unique Entity Identifier. Insert the unique entity identifier issued by the entity designated at SAM. See FAR part 4.6.

5. Ownership.

a. Type. Enter the type of ownership or legal structure of the firm (sole proprietor, partnership, corporation, joint venture, etc.).

b. Small Business Status. Refer to the North American Industry Classification System (NAICS) code in the public announcement, and indicate if the firm is a small business according to the current size standard for that NAICS code (for example, Engineering Services (part of NAICS 541330), Architectural Services (NAICS 541310), Surveying and Mapping Services (NAICS 541370)). The small business categories and the internet website for the NAICS codes appear in FAR part 19. Contact the requesting agency for any questions. Contact your local U.S. Small Business Administration office for any questions regarding Business Status.

6a-6c. Point of Contact. Provide this information for a representative of the firm that the agency can contact for additional information. The representative must be empowered to speak on contractual and policy matters.

7. Name of Firm. Enter the name of the firm if Part II is prepared for a branch office.

8a-8c. Former Firm Names. Indicate any other previous names for the firm (or branch office) during the last six years. Insert the year that this corporate name change was effective and the associated unique entity identifier. This information is used to review past performance on Federal contracts.

9. Employees by Discipline. Use the relevant disciplines and associated function codes shown at the end of these instructions and list in the same numerical order. After the listed disciplines, write in any additional disciplines and leave the function code blank. List no more than 20 disciplines. Group remaining employees under "Other Employees" in column b. Each person can be counted only once according to his/her primary function. If Part II is prepared for a firm (including all branch offices), enter the number of employees by disciplines in column c(1). If Part II is prepared for a branch office, enter the number of employees by discipline in column c(2) and for the firm in column c(1).

10. Profile of Firm's Experience and Annual Average Revenue for Last 5 Years. Complete this block for the firm or branch office for which this Part II is prepared. Enter the experience categories which most accurately reflect the firm's technical capabilities and project experience. Use the relevant experience categories and associated profile codes shown at the end of these instructions, and list in the same numerical order. After the listed experience categories, write in any unlisted relevant project experience categories and leave the profile codes blank. For each type of experience, enter the appropriate revenue index number to reflect the professional services revenues received annually (averaged over the last 5 years) by the firm or branch office for performing that type of work. A particular project may be identified with one experience category or it may be broken into components, as best reflects the capabilities and types of work performed by the firm. However, do not double count the revenues received on a particular project.

11. Annual Average Professional Services Revenues of Firm for Last 3 Years. Complete this block for the firm or branch office for which this Part II is prepared. Enter the appropriate revenue index numbers to reflect the professional services revenues received annually (averaged over the last 3 years) by the firm or branch office. Indicate Federal work (performed directly for the Federal Government, either as the prime contractor or subcontractor), non-Federal work (all other domestic and foreign work, including Federally-assisted projects), and the total. If the firm has been in existence for less than 3 years, see the definition for "Annual Receipts" under FAR 19.101.

12. Authorized Representative. An authorized representative of the firm or branch office must sign and date the completed form. Signing attests that the information provided is current and factual. Provide the name and title of the authorized representative who signed the form.

List of Disciplines *(Function Codes)*

Code	Description	Code	Description
01	Acoustical Engineer	32	Hydraulic Engineer
02	Administrative	33	Hydrographic Surveyor
03	Aerial Photographer	34	Hydrologist
04	Aeronautical Engineer	35	Industrial Engineer
05	Archeologist	36	Industrial Hygienist
06	Architect	37	Interior Designer
07	Biologist	38	Land Surveyor
08	CADD Technician	39	Landscape Architect
09	Cartographer	40	Materials Engineer
10	Chemical Engineer	41	Materials Handling Engineer
11	Chemist	42	Mechanical Engineer
12	Civil Engineer	43	Mining Engineer
13	Communications Engineer	44	Oceanographer
14	Computer Programmer	45	Photo Interpreter
15	Construction Inspector	46	Photogrammetrist
16	Construction Manager	47	Planner: Urban/Regional
17	Corrosion Engineer	48	Project Manager
18	Cost Engineer/Estimator	49	Remote Sensing Specialist
19	Ecologist	50	Risk Assessor
20	Economist	51	Safety/Occupational Health Engineer
21	Electrical Engineer	52	Sanitary Engineer
22	Electronics Engineer	53	Scheduler
23	Environmental Engineer	54	Security Specialist
24	Environmental Scientist	55	Soils Engineer
25	Fire Protection Engineer	56	Specifications Writer
26	Forensic Engineer	57	Structural Engineer
27	Foundation/Geotechnical Engineer	58	Technician/Analyst
28	Geodetic Surveyor	59	Toxicologist
29	Geographic Information System Specialist	60	Transportation Engineer
30	Geologist	61	Value Engineer
31	Health Facility Planner	62	Water Resources Engineer

List of Experience Categories *(Profile Codes)*

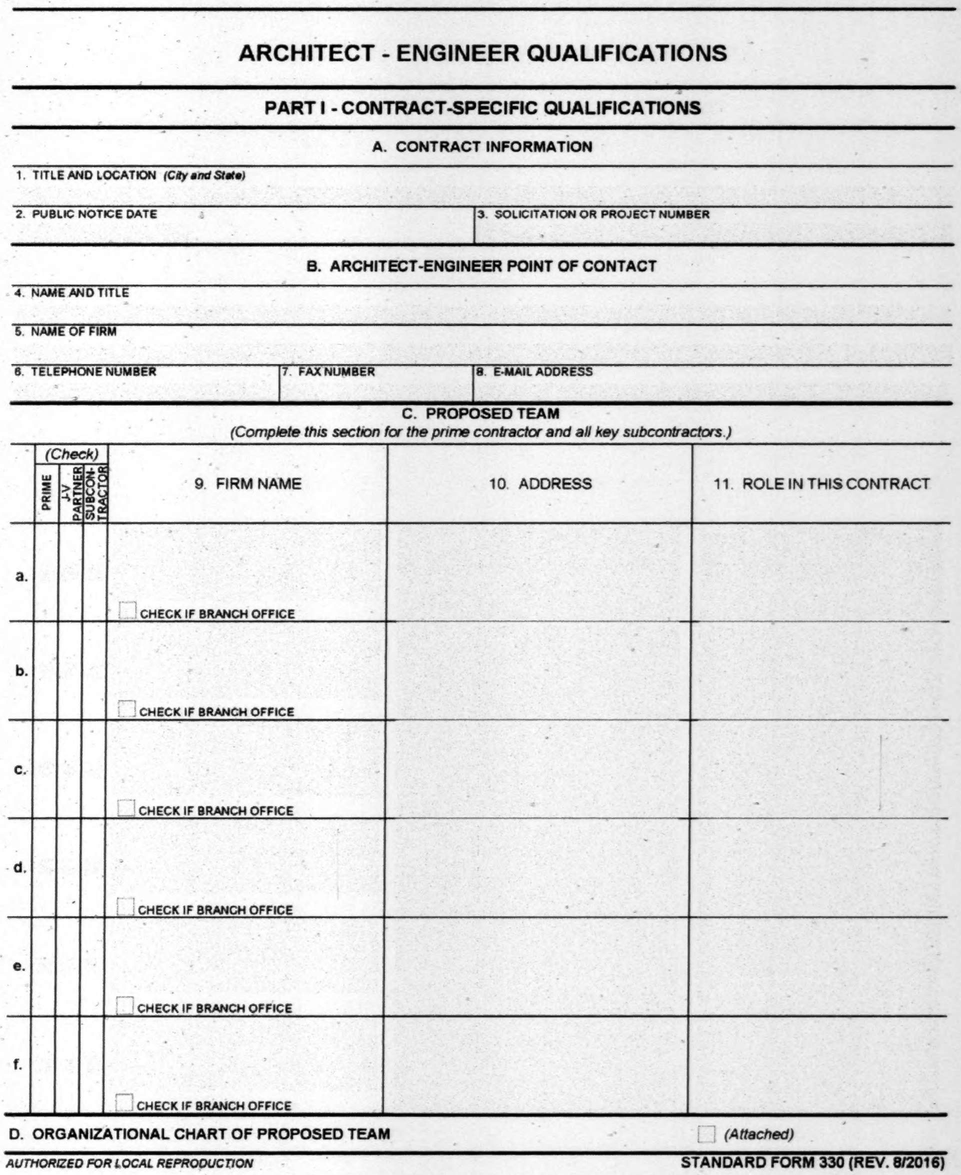
Code	Description
A01	Acoustics, Noise Abatement
A02	Aerial Photography; Airborne Data and Imagery Collection and Analysis
A03	Agricultural Development; Grain Storage; Farm Mechanization
A04	Air Pollution Control
A05	Airports; Navaids; Airport Lighting; Aircraft Fueling
A06	Airports; Terminals and Hangars; Freight Handling
A07	Arctic Facilities
A08	Animal Facilities
A09	Anti-Terrorism/Force Protection
A10	Asbestos Abatement
A11	Auditoriums & Theaters
A12	Automation; Controls; Instrumentation
B01	Barracks; Dormitories
B02	Bridges
C01	Cartography
C02	Cemeteries *(Planning & Relocation)*
C03	Charting: Nautical and Aeronautical
C04	Chemical Processing & Storage
C05	Child Care/Development Facilities
C06	Churches; Chapels
C07	Coastal Engineering
C08	Codes; Standards; Ordinances
C09	Cold Storage; Refrigeration and Fast Freeze
C10	Commercial Building *(low rise)* ; Shopping Centers
C11	Community Facilities
C12	Communications Systems; TV; Microwave
C13	Computer Facilities; Computer Service
C14	Conservation and Resource Management
C15	Construction Management
C16	Construction Surveying
C17	Corrosion Control; Cathodic Protection; Electrolysis
C18	Cost Estimating; Cost Engineering and Analysis; Parametric Costing; Forecasting
C19	Cryogenic Facilities
D01	Dams *(Concrete; Arch)*
D02	Dams *(Earth; Rock)*; Dikes; Levees
D03	Desalinization *(Process & Facilities)*
D04	Design-Build - Preparation of Requests for Proposals
D05	Digital Elevation and Terrain Model Development
D06	Digital Orthophotography
D07	Dining Halls; Clubs; Restaurants
D08	Dredging Studies and Design
E01	Ecological & Archeological Investigations
E02	Educational Facilities; Classrooms
E03	Electrical Studies and Design
E04	Electronics
E05	Elevators; Escalators; People-Movers
E06	Embassies and Chanceries
E07	Energy Conservation; New Energy Sources
E08	Engineering Economics
E09	Environmental Impact Studies, Assessments or Statements
E10	Environmental and Natural Resource Mapping
E11	Environmental Planning
E12	Environmental Remediation
E13	Environmental Testing and Analysis
F01	Fallout Shelters; Blast-Resistant Design
F02	Field Houses; Gyms; Stadiums
F03	Fire Protection
F04	Fisheries; Fish ladders
F05	Forensic Engineering
F06	Forestry & Forest products
G01	Garages; Vehicle Maintenance Facilities; Parking Decks
G02	Gas Systems (Propane; Natural, Etc.)
G03	Geodetic Surveying: Ground and Air-borne
G04	Geographic Information System Services: Development, Analysis, and Data Collection
G05	Geospatial Data Conversion: Scanning, Digitizing, Compilation, Attributing, Scribing, Drafting
G06	Graphic Design
H01	Harbors; Jetties; Piers, Ship Terminal Facilities
H02	Hazardous Materials Handling and Storage
H03	Hazardous, Toxic, Radioactive Waste Remediation
H04	Heating; Ventilating; Air Conditioning
H05	Health Systems Planning
H06	Highrise; Air-Rights-Type Buildings
H07	Highways; Streets; Airfield Paving; Parking Lots
H08	Historical Preservation
H09	Hospital & Medical Facilities
H10	Hotels; Motels
H11	Housing *(Residential, Multi-Family; Apartments; Condominiums)*
H12	Hydraulics & Pneumatics
H13	Hydrographic Surveying

List of Experience Categories *(Profile Codes continued)*

Code	Description
I01	Industrial Buildings; Manufacturing Plants
I02	Industrial Processes; Quality Control
I03	Industrial Waste Treatment
I04	Intelligent Transportation Systems
I05	Interior Design; Space Planning
I06	Irrigation; Drainage
J01	Judicial and Courtroom Facilities
L01	Laboratories; Medical Research Facilities
L02	Land Surveying
L03	Landscape Architecture
L04	Libraries; Museums; Galleries
L05	Lighting (Interior; Display; Theater, Etc.)
L06	Lighting (Exteriors; Streets; Memorials; Athletic Fields, Etc.)
M01	Mapping Location/Addressing Systems
M02	Materials Handling Systems; Conveyors; Sorters
M03	Metallurgy
M04	Microclimatology; Tropical Engineering
M05	Military Design Standards
M06	Mining & Mineralogy
M07	Missile Facilities (Silos; Fuels; Transport)
M08	Modular Systems Design; Pre-Fabricated Structures or Components
N01	Naval Architecture; Off-Shore Platforms
N02	Navigation Structures; Locks
N03	Nuclear Facilities; Nuclear Shielding
O01	Office Buildings; Industrial Parks
O02	Oceanographic Engineering
O03	Ordnance; Munitions; Special Weapons
P01	Petroleum Exploration; Refining
P02	Petroleum and Fuel (Storage and Distribution)
P03	Photogrammetry
P04	Pipelines (Cross-Country - Liquid & Gas)
P05	Planning (Community, Regional, Areawide and State)
P06	Planning (Site, Installation, and Project)
P07	Plumbing & Piping Design
P08	Prisons & Correctional Facilities
P09	Product, Machine Equipment Design
P10	Pneumatic Structures, Air-Support Buildings
P11	Postal Facilities
P12	Power Generation, Transmission, Distribution
P13	Public Safety Facilities
R01	Radar; Sonar; Radio & Radar Telescopes
R02	Radio Frequency Systems & Shieldings
R03	Railroad; Rapid Transit
R04	Recreation Facilities (Parks, Marinas, Etc.)
R05	Refrigeration Plants/Systems
R06	Rehabilitation (Buildings; Structures; Facilities)
R07	Remote Sensing
R08	Research Facilities
R09	Resources Recovery; Recycling
R10	Risk Analysis
R11	Rivers; Canals; Waterways; Flood Control
R12	Roofing
S01	Safety Engineering; Accident Studies; OSHA Studies
S02	Security Systems; Intruder & Smoke Detection
S03	Seismic Designs & Studies
S04	Sewage Collection, Treatment and Disposal
S05	Soils & Geologic Studies; Foundations
S06	Solar Energy Utilization
S07	Solid Wastes; Incineration; Landfill
S08	Special Environments; Clean Rooms, Etc.
S09	Structural Design; Special Structures
S10	Surveying; Platting; Mapping; Flood Plain Studies
S11	Sustainable Design
S12	Swimming Pools
S13	Storm Water Handling & Facilities
T01	Telephone Systems *(Rural; Mobile; Intercom, Etc.)*
T02	Testing & Inspection Services
T03	Traffic & Transportation Engineering
T04	Topographic Surveying and Mapping
T05	Towers *(Self-Supporting & Guyed Systems)*
T06	Tunnels & Subways

List of Experience Categories *(Profile Codes continued)*

Code	**Description**
U01	Unexploded Ordnance Remediation
U02	Urban Renewals; Community Development
U03	Utilities (Gas and Steam)
V01	Value Analysis; Life-Cycle Costing
W01	Warehouses & Depots
W02	Water Resources; Hydrology; Ground Water
W03	Water Supply; Treatment and Distribution
W04	Wind Tunnels; Research/Testing Facilities Design
Z01	Zoning; Land Use Studies



ARCHITECT - ENGINEER QUALIFICATIONS

PART I - CONTRACT-SPECIFIC QUALIFICATIONS

A. CONTRACT INFORMATION

1. TITLE AND LOCATION *(City and State)*

2. PUBLIC NOTICE DATE

3. SOLICITATION OR PROJECT NUMBER

B. ARCHITECT-ENGINEER POINT OF CONTACT

4. NAME AND TITLE

5. NAME OF FIRM

6. TELEPHONE NUMBER

7. FAX NUMBER

8. E-MAIL ADDRESS

C. PROPOSED TEAM

(Complete this section for the prime contractor and all key subcontractors.)

	(Check)			9. FIRM NAME	10. ADDRESS	11. ROLE IN THIS CONTRACT
	PRIME	J-V PARTNER	SUBCON-TRACTOR			
a.				☐ CHECK IF BRANCH OFFICE		
b.				☐ CHECK IF BRANCH OFFICE		
c.				☐ CHECK IF BRANCH OFFICE		
d.				☐ CHECK IF BRANCH OFFICE		
e.				☐ CHECK IF BRANCH OFFICE		
f.				☐ CHECK IF BRANCH OFFICE		

D. ORGANIZATIONAL CHART OF PROPOSED TEAM ☐ *(Attached)*

AUTHORIZED FOR LOCAL REPRODUCTION

STANDARD FORM 330 (REV. 8/2016)

E. RESUMES OF KEY PERSONNEL PROPOSED FOR THIS CONTRACT

(Complete one Section E for each key person.)

12. NAME	13. ROLE IN THIS CONTRACT	14. YEARS EXPERIENCE	
		a. TOTAL	b. WITH CURRENT FIRM

15. FIRM NAME AND LOCATION *(City and State)*

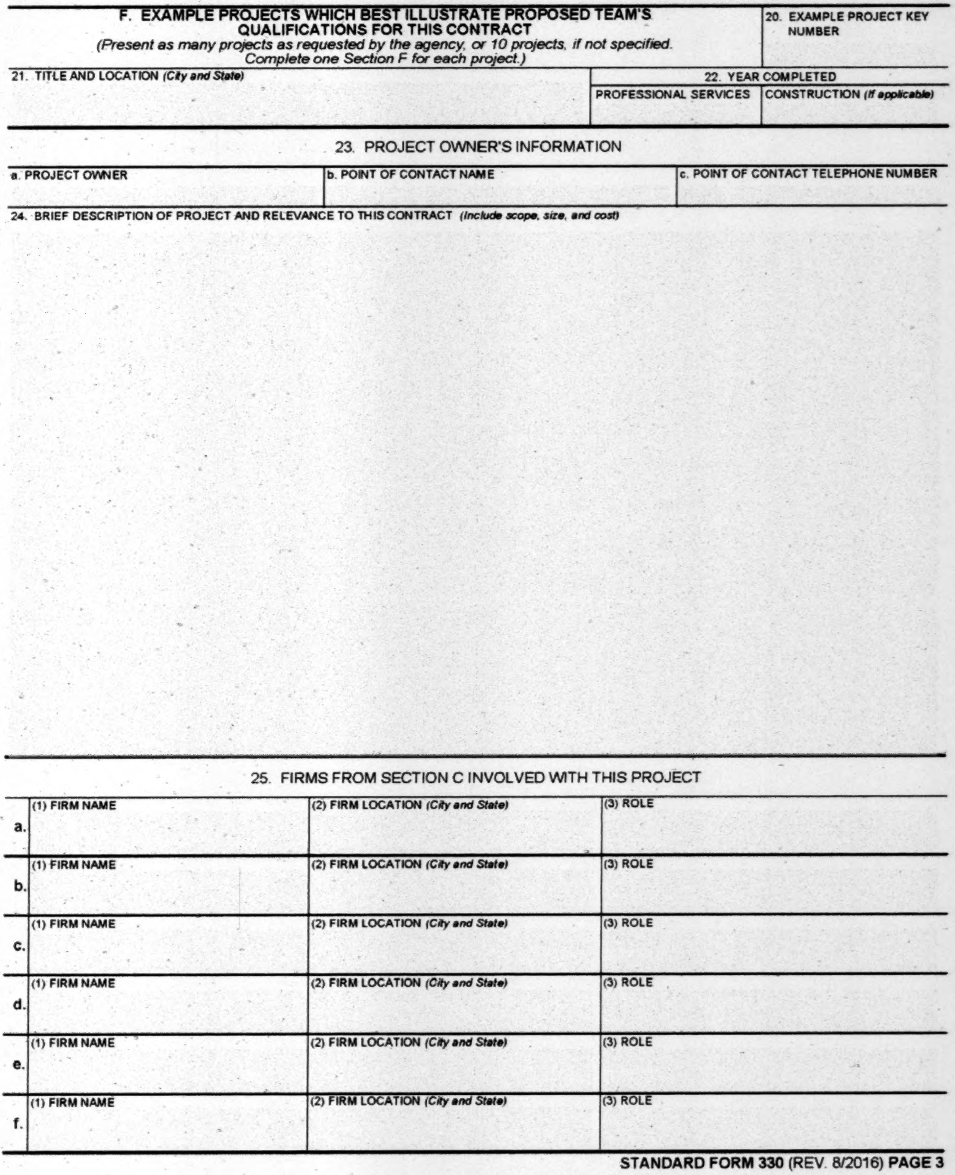
16. EDUCATION *(Degree and Specialization)*	17. CURRENT PROFESSIONAL REGISTRATION *(State and Discipline)*

18. OTHER PROFESSIONAL QUALIFICATIONS *(Publications, Organizations, Training, Awards, etc.)*

19. RELEVANT PROJECTS

	(1) TITLE AND LOCATION *(City and State)*	(2) YEAR COMPLETED	
		PROFESSIONAL SERVICES	CONSTRUCTION *(If applicable)*
a.	(3) BRIEF DESCRIPTION *(Brief scope, size, cost, etc.)* AND SPECIFIC ROLE	☐ Check if project performed with current firm	
	(1) TITLE AND LOCATION *(City and State)*	(2) YEAR COMPLETED	
		PROFESSIONAL SERVICES	CONSTRUCTION *(If applicable)*
b.	(3) BRIEF DESCRIPTION *(Brief scope, size, cost, etc.)* AND SPECIFIC ROLE	☐ Check if project performed with current firm	
	(1) TITLE AND LOCATION *(City and State)*	(2) YEAR COMPLETED	
		PROFESSIONAL SERVICES	CONSTRUCTION *(If applicable)*
c.	(3) BRIEF DESCRIPTION *(Brief scope, size, cost, etc.)* AND SPECIFIC ROLE	☐ Check if project performed with current firm	
	(1) TITLE AND LOCATION *(City and State)*	(2) YEAR COMPLETED	
		PROFESSIONAL SERVICES	CONSTRUCTION *(If applicable)*
d.	(3) BRIEF DESCRIPTION *(Brief scope, size, cost, etc.)* AND SPECIFIC ROLE	☐ Check if project performed with current firm	
	(1) TITLE AND LOCATION *(City and State)*	(2) YEAR COMPLETED	
		PROFESSIONAL SERVICES	CONSTRUCTION *(If applicable)*
e.	(3) BRIEF DESCRIPTION *(Brief scope, size, cost, etc.)* AND SPECIFIC ROLE	☐ Check if project performed with current firm	

STANDARD FORM 330 (REV. 8/2016) **PAGE 2**



F. EXAMPLE PROJECTS WHICH BEST ILLUSTRATE PROPOSED TEAM'S QUALIFICATIONS FOR THIS CONTRACT *(Present as many projects as requested by the agency, or 10 projects, if not specified. Complete one Section F for each project.)*	20. EXAMPLE PROJECT KEY NUMBER

21. TITLE AND LOCATION *(City and State)*	22. YEAR COMPLETED	
	PROFESSIONAL SERVICES	CONSTRUCTION *(If applicable)*

23. PROJECT OWNER'S INFORMATION

a. PROJECT OWNER	b. POINT OF CONTACT NAME	c. POINT OF CONTACT TELEPHONE NUMBER

24. BRIEF DESCRIPTION OF PROJECT AND RELEVANCE TO THIS CONTRACT *(Include scope, size, and cost)*

25. FIRMS FROM SECTION C INVOLVED WITH THIS PROJECT

a.	(1) FIRM NAME	(2) FIRM LOCATION *(City and State)*	(3) ROLE
b.	(1) FIRM NAME	(2) FIRM LOCATION *(City and State)*	(3) ROLE
c.	(1) FIRM NAME	(2) FIRM LOCATION *(City and State)*	(3) ROLE
d.	(1) FIRM NAME	(2) FIRM LOCATION *(City and State)*	(3) ROLE
e.	(1) FIRM NAME	(2) FIRM LOCATION *(City and State)*	(3) ROLE
f.	(1) FIRM NAME	(2) FIRM LOCATION *(City and State)*	(3) ROLE

STANDARD FORM 330 (REV. 8/2016) **PAGE 3**

G. KEY PERSONNEL PARTICIPATION IN EXAMPLE PROJECTS

26. NAMES OF KEY PERSONNEL *(From Section E, Block 12)*	27. ROLE IN THIS CONTRACT *(From Section E, Block 13)*	28. EXAMPLE PROJECTS LISTED IN SECTION F *(Fill in "Example Projects Key" section below before completing table. Place "X" under project key number for participation in same or similar role.)*									
		1	2	3	4	5	6	7	8	9	10

29. EXAMPLE PROJECTS KEY

NUMBER	TITLE OF EXAMPLE PROJECT *(From Section F)*	NUMBER	TITLE OF EXAMPLE PROJECT *(From Section F)*
1		6	
2		7	
3		8	
4		9	
5		10	

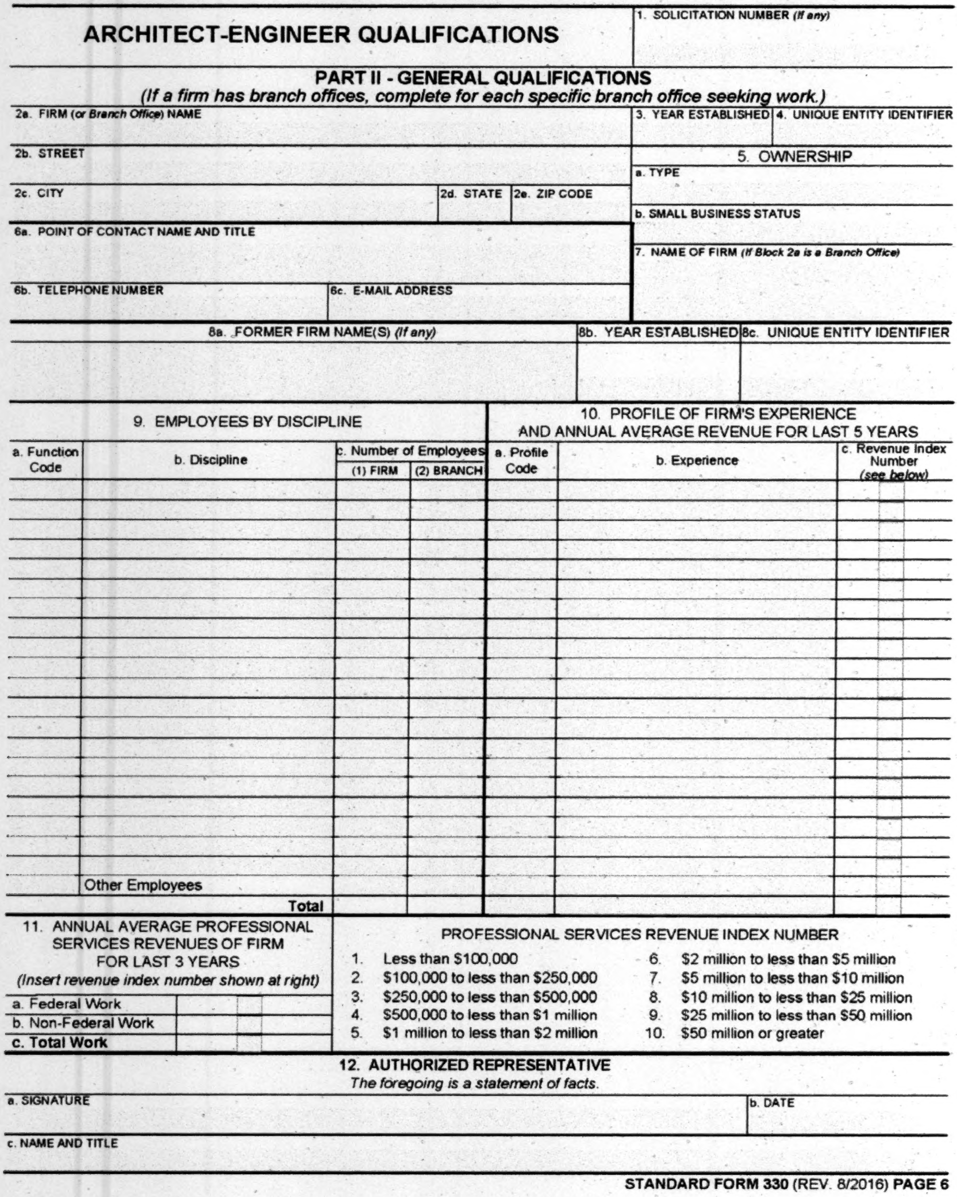
H. ADDITIONAL INFORMATION

30. PROVIDE ANY ADDITIONAL INFORMATION REQUESTED BY THE AGENCY. ATTACH ADDITIONAL SHEETS AS NEEDED.

I. AUTHORIZED REPRESENTATIVE

The foregoing is a statement of facts.

31. SIGNATURE	32. DATE
33. NAME AND TITLE	



ARCHITECT-ENGINEER QUALIFICATIONS

1. SOLICITATION NUMBER *(If any)*

PART II - GENERAL QUALIFICATIONS

(If a firm has branch offices, complete for each specific branch office seeking work.)

2a. FIRM (*or Branch Office*) NAME			3. YEAR ESTABLISHED	4. UNIQUE ENTITY IDENTIFIER
2b. STREET			5. OWNERSHIP	
2c. CITY	2d. STATE	2e. ZIP CODE	a. TYPE	
6a. POINT OF CONTACT NAME AND TITLE			b. SMALL BUSINESS STATUS	
6b. TELEPHONE NUMBER	6c. E-MAIL ADDRESS		7. NAME OF FIRM *(If Block 2a is a Branch Office)*	

8a. FORMER FIRM NAME(S) *(If any)*	8b. YEAR ESTABLISHED	8c. UNIQUE ENTITY IDENTIFIER

9. EMPLOYEES BY DISCIPLINE				10. PROFILE OF FIRM'S EXPERIENCE AND ANNUAL AVERAGE REVENUE FOR LAST 5 YEARS		
a. Function Code	b. Discipline	c. Number of Employees		a. Profile Code	b. Experience	c. Revenue Index Number *(see below)*
		(1) FIRM	(2) BRANCH			
	Other Employees					
	Total					

11. ANNUAL AVERAGE PROFESSIONAL SERVICES REVENUES OF FIRM FOR LAST 3 YEARS
(Insert revenue index number shown at right)

a. Federal Work	
b. Non-Federal Work	
c. Total Work	

PROFESSIONAL SERVICES REVENUE INDEX NUMBER

1. Less than $100,000
2. $100,000 to less than $250,000
3. $250,000 to less than $500,000
4. $500,000 to less than $1 million
5. $1 million to less than $2 million
6. $2 million to less than $5 million
7. $5 million to less than $10 million
8. $10 million to less than $25 million
9. $25 million to less than $50 million
10. $50 million or greater

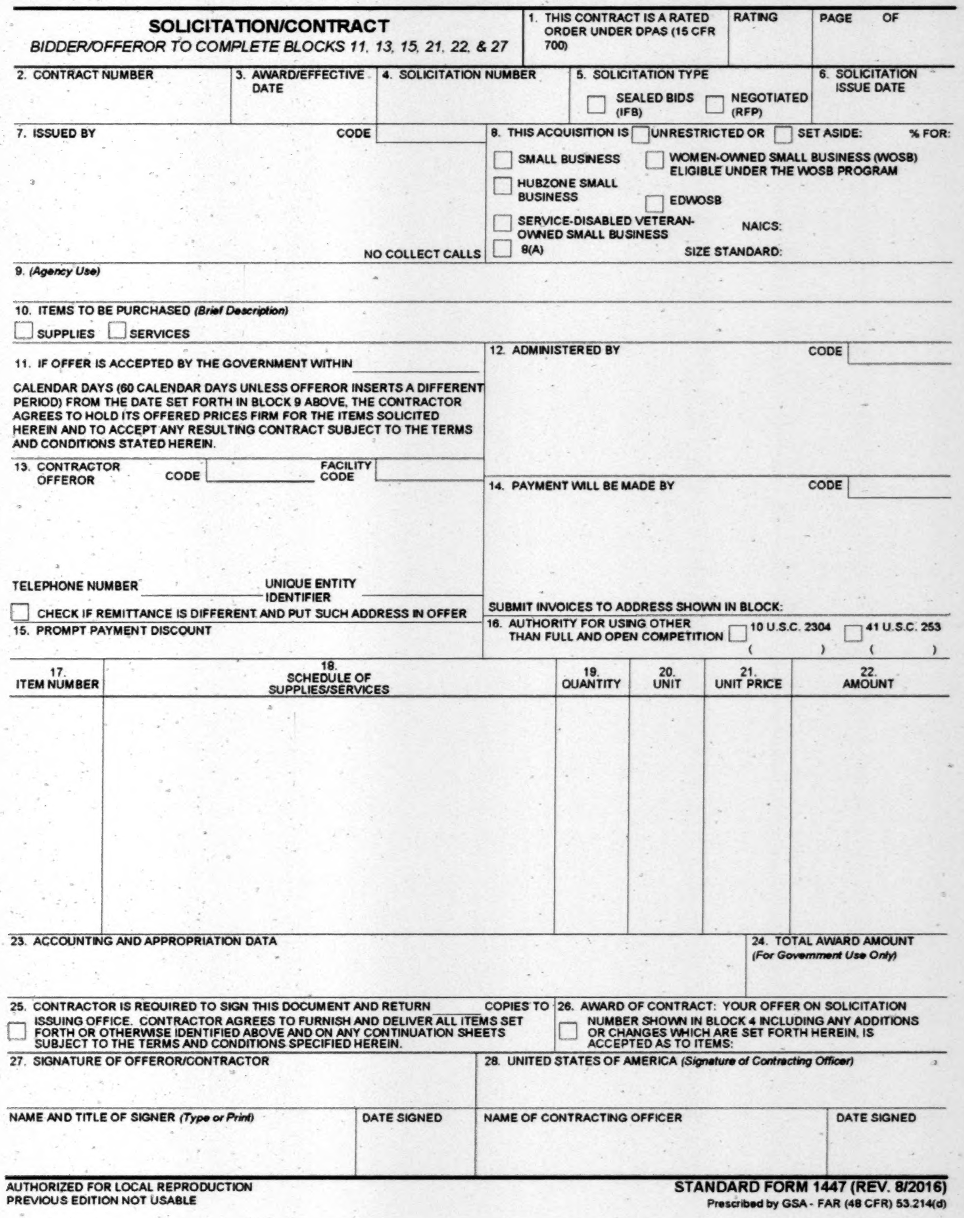
12. AUTHORIZED REPRESENTATIVE
The foregoing is a statement of facts.

a. SIGNATURE	b. DATE
c. NAME AND TITLE	

STANDARD FORM 330 (REV. 8/2016) **PAGE 6**

■ 33. Revise section 53.301–1447 to read as follows:

53.301–1447 Solicitation/Contract.



SOLICITATION/CONTRACT

BIDDER/OFFEROR TO COMPLETE BLOCKS 11, 13, 15, 21, 22, & 27

1. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700)

RATING

PAGE OF

2. CONTRACT NUMBER

3. AWARD/EFFECTIVE DATE

4. SOLICITATION NUMBER

5. SOLICITATION TYPE ☐ SEALED BIDS (IFB) ☐ NEGOTIATED (RFP)

6. SOLICITATION ISSUE DATE

7. ISSUED BY CODE

NO COLLECT CALLS

8. THIS ACQUISITION IS ☐ UNRESTRICTED OR ☐ SET ASIDE: % FOR:

☐ SMALL BUSINESS

☐ WOMEN-OWNED SMALL BUSINESS (WOSB) ELIGIBLE UNDER THE WOSB PROGRAM

☐ HUBZONE SMALL BUSINESS

☐ EDWOSB

☐ SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESS

NAICS:

☐ 8(A)

SIZE STANDARD:

9. *(Agency Use)*

10. ITEMS TO BE PURCHASED *(Brief Description)*

☐ SUPPLIES ☐ SERVICES

11. IF OFFER IS ACCEPTED BY THE GOVERNMENT WITHIN ______ CALENDAR DAYS (60 CALENDAR DAYS UNLESS OFFEROR INSERTS A DIFFERENT PERIOD) FROM THE DATE SET FORTH IN BLOCK 9 ABOVE, THE CONTRACTOR AGREES TO HOLD ITS OFFERED PRICES FIRM FOR THE ITEMS SOLICITED HEREIN AND TO ACCEPT ANY RESULTING CONTRACT SUBJECT TO THE TERMS AND CONDITIONS STATED HEREIN.

12. ADMINISTERED BY CODE

13. CONTRACTOR OFFEROR CODE FACILITY CODE

TELEPHONE NUMBER ______ UNIQUE ENTITY IDENTIFIER ______

☐ CHECK IF REMITTANCE IS DIFFERENT AND PUT SUCH ADDRESS IN OFFER

14. PAYMENT WILL BE MADE BY CODE

SUBMIT INVOICES TO ADDRESS SHOWN IN BLOCK:

15. PROMPT PAYMENT DISCOUNT

16. AUTHORITY FOR USING OTHER THAN FULL AND OPEN COMPETITION ☐ 10 U.S.C. 2304 ( ) ☐ 41 U.S.C. 253 ( )

17. ITEM NUMBER	18. SCHEDULE OF SUPPLIES/SERVICES	19. QUANTITY	20. UNIT	21. UNIT PRICE	22. AMOUNT

23. ACCOUNTING AND APPROPRIATION DATA

24. TOTAL AWARD AMOUNT *(For Government Use Only)*

☐ 25. CONTRACTOR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN ______ COPIES TO ISSUING OFFICE. CONTRACTOR AGREES TO FURNISH AND DELIVER ALL ITEMS SET FORTH OR OTHERWISE IDENTIFIED ABOVE AND ON ANY CONTINUATION SHEETS SUBJECT TO THE TERMS AND CONDITIONS SPECIFIED HEREIN.

☐ 26. AWARD OF CONTRACT: YOUR OFFER ON SOLICITATION NUMBER SHOWN IN BLOCK 4 INCLUDING ANY ADDITIONS OR CHANGES WHICH ARE SET FORTH HEREIN, IS ACCEPTED AS TO ITEMS:

27. SIGNATURE OF OFFEROR/CONTRACTOR

28. UNITED STATES OF AMERICA *(Signature of Contracting Officer)*

NAME AND TITLE OF SIGNER *(Type or Print)*

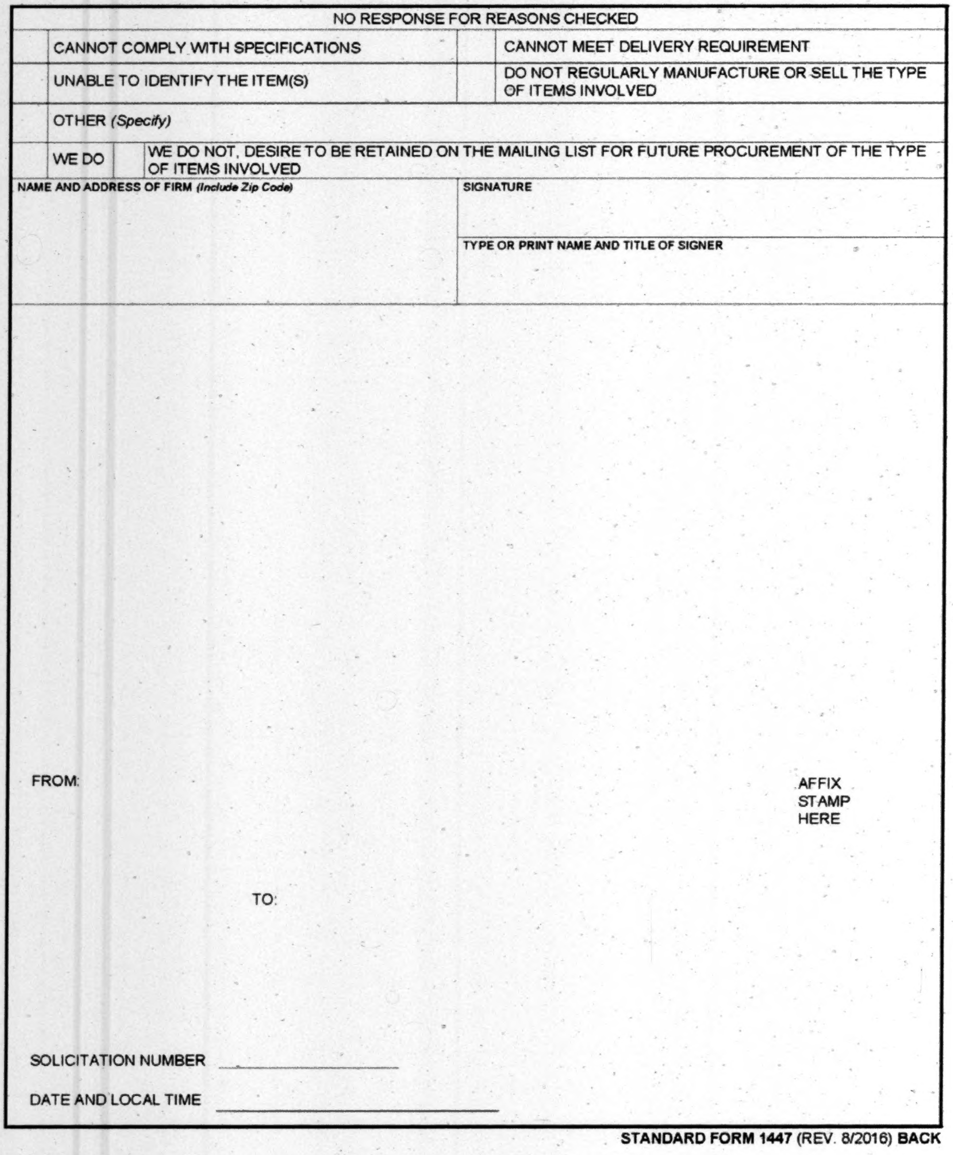
DATE SIGNED

NAME OF CONTRACTING OFFICER

DATE SIGNED

AUTHORIZED FOR LOCAL REPRODUCTION
PREVIOUS EDITION NOT USABLE

STANDARD FORM 1447 (REV. 8/2016)
Prescribed by GSA - FAR (48 CFR) 53.214(d)



NO RESPONSE FOR REASONS CHECKED	
☐ CANNOT COMPLY WITH SPECIFICATIONS	☐ CANNOT MEET DELIVERY REQUIREMENT
☐ UNABLE TO IDENTIFY THE ITEM(S)	☐ DO NOT REGULARLY MANUFACTURE OR SELL THE TYPE OF ITEMS INVOLVED
☐ OTHER *(Specify)*	
☐ WE DO ☐ WE DO NOT, DESIRE TO BE RETAINED ON THE MAILING LIST FOR FUTURE PROCUREMENT OF THE TYPE OF ITEMS INVOLVED	
NAME AND ADDRESS OF FIRM *(Include Zip Code)*	SIGNATURE
	TYPE OR PRINT NAME AND TITLE OF SIGNER

FROM:

AFFIX
STAMP
HERE

TO:

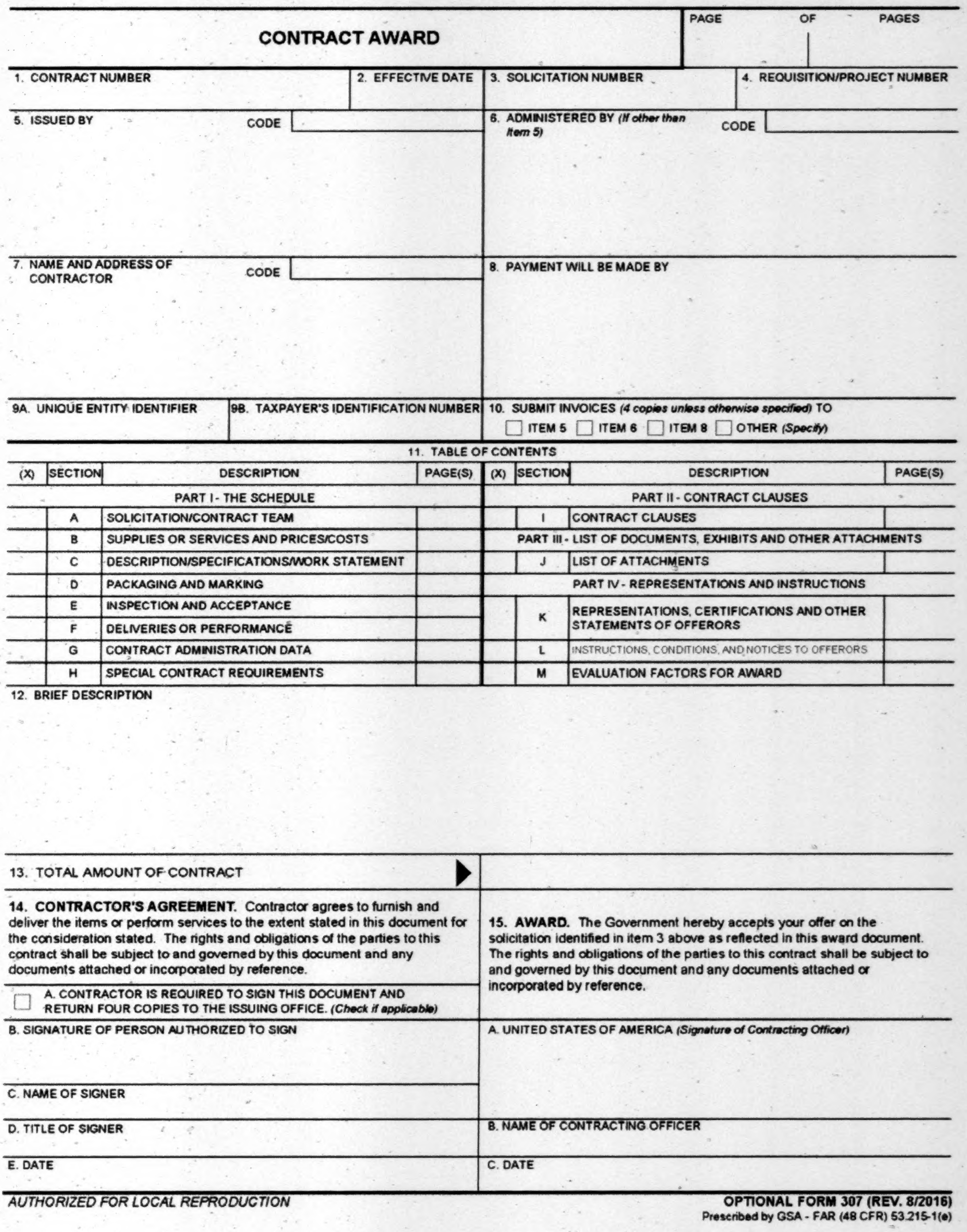
SOLICITATION NUMBER ____________________

DATE AND LOCAL TIME ______________________________

STANDARD FORM 1447 (REV. 8/2016) **BACK**

■ 34. Revise section 53.302–307 to read as follows:

53.302–307 Optional Form 307, Contract Award.



CONTRACT AWARD

PAGE OF PAGES

1. CONTRACT NUMBER
2. EFFECTIVE DATE
3. SOLICITATION NUMBER
4. REQUISITION/PROJECT NUMBER

5. ISSUED BY CODE
6. ADMINISTERED BY *(If other than Item 5)* CODE

7. NAME AND ADDRESS OF CONTRACTOR CODE
8. PAYMENT WILL BE MADE BY

9A. UNIQUE ENTITY IDENTIFIER
9B. TAXPAYER'S IDENTIFICATION NUMBER
10. SUBMIT INVOICES *(4 copies unless otherwise specified)* TO
☐ ITEM 5 ☐ ITEM 6 ☐ ITEM 8 ☐ OTHER *(Specify)*

11. TABLE OF CONTENTS

(X)	SECTION	DESCRIPTION	PAGE(S)	(X)	SECTION	DESCRIPTION	PAGE(S)
		PART I - THE SCHEDULE				PART II - CONTRACT CLAUSES	
	A	SOLICITATION/CONTRACT TEAM			I	CONTRACT CLAUSES	
	B	SUPPLIES OR SERVICES AND PRICES/COSTS				PART III - LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACHMENTS	
	C	DESCRIPTION/SPECIFICATIONS/WORK STATEMENT			J	LIST OF ATTACHMENTS	
	D	PACKAGING AND MARKING				PART IV - REPRESENTATIONS AND INSTRUCTIONS	
	E	INSPECTION AND ACCEPTANCE			K	REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS	
	F	DELIVERIES OR PERFORMANCE					
	G	CONTRACT ADMINISTRATION DATA			L	INSTRUCTIONS, CONDITIONS, AND NOTICES TO OFFERORS	
	H	SPECIAL CONTRACT REQUIREMENTS			M	EVALUATION FACTORS FOR AWARD	

12. BRIEF DESCRIPTION

13. TOTAL AMOUNT OF CONTRACT ▶

14. CONTRACTOR'S AGREEMENT. Contractor agrees to furnish and deliver the items or perform services to the extent stated in this document for the consideration stated. The rights and obligations of the parties to this contract shall be subject to and governed by this document and any documents attached or incorporated by reference.

☐ A. CONTRACTOR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN FOUR COPIES TO THE ISSUING OFFICE. *(Check if applicable)*

B. SIGNATURE OF PERSON AUTHORIZED TO SIGN

C. NAME OF SIGNER

D. TITLE OF SIGNER

E. DATE

15. AWARD. The Government hereby accepts your offer on the solicitation identified in item 3 above as reflected in this award document. The rights and obligations of the parties to this contract shall be subject to and governed by this document and any documents attached or incorporated by reference.

A. UNITED STATES OF AMERICA *(Signature of Contracting Officer)*

B. NAME OF CONTRACTING OFFICER

C. DATE

AUTHORIZED FOR LOCAL REPRODUCTION

OPTIONAL FORM 307 (REV. 8/2016)
Prescribed by GSA - FAR (48 CFR) 53.215-1(e)

[FR Doc. 2016–23198 Filed 9–29–16; 8:45 am]

BILLING CODE 6820–EP–C

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 5, 7, 8, 10, 12, 15, 16, 19, and 52

[FAC 2005–91; FAR Case 2014–015; Item VI; Docket No. 2014–0015, Sequence No. 1]

RIN 9000–AM92

Federal Acquisition Regulation; Consolidation and Bundling

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule to amend the Federal Acquisition Regulation (FAR) to implement sections of the Small Business Jobs Act of 2010 and regulatory changes made by the Small Business Administration, which provide for a Governmentwide policy on consolidation and bundling.

DATES: *Effective:* October 31, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Mahruba Uddowla, Procurement Analyst, at 703–605–2868, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–91, FAR Case 2014–015.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 80 FR 31561 on June 3, 2015, to revise the FAR to provide for a Governmentwide policy on consolidation and bundling. The proposed rule incorporated regulatory changes made by the Small Business Administration (SBA) in its final rule which published in the **Federal Register** at 78 FR 61113 on October 2, 2013, concerning contract consolidation and bundling.

SBA's final rule implements the statutory requirements related to bundling and consolidation as set forth in sections 1312 and 1313 of the Small Business Jobs Act of 2010 (Pub. L. 111–240), as well as section 1671 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112–239). Eight respondents submitted comments on the FAR proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes

This final rule makes the following significant changes from the proposed rule:

- FAR 2.101—Amends the definition of "Small Business Teaming Arrangement" to note the differences applicable to DoD because of the DoD Pilot Mentor-Protégé Program. A similar change is made at FAR 52.207–6.
- FAR 7.104(d)—Amends the conditions under which the small business specialist must notify the agency Office of Small and Disadvantaged Business Utilization or the Office of Small Business Programs to be consistent with 13 CFR 125.2(c)(4)(ii).
- FAR 7.105(b)(1)(iv)—The second sentence no longer mentions consolidation since SBA's implementing rule does not require the identification of incumbent contractors and contracts affected by the consolidation.
- FAR 7.107–1(b)—Adds an exception for acquisitions from a mandatory source to the requirements at FAR 7.107 for acquisitions involving consolidation, bundling, or substantial bundling.
- FAR 7.107–1—The coverage formerly at FAR 7.107–1 on necessary and justified bundling for consolidation and bundling has been separated and moved to 7.107–2 and 7.107–3, due to differences in the statutory and regulatory requirements.
- FAR 7.107–2(e)—Provides procedures for consolidation corresponding to those for bundling at FAR 7.107–3(c) (now at 7.107–3(f)), to address the determination that consolidation is necessary and justified when the expected benefits do not meet the quantifiable dollar thresholds for a substantial benefit but are critical to the agency's mission success.
- FAR 7.107–5(c)—Removes the phrase "(even if additional requirements have been added or some have been deleted)" and adds a subparagraph (4) which requires that the notice to SBA include a list of requirements that have been added or deleted for the follow-on bundled or consolidated procurement. The changes will facilitate a more accurate comparison of savings and benefits from the prior procurement.
- FAR 15.304(c)(3) and (4)—Excludes solicitations that are set aside for small business from the requirements relating to small business subcontracting-related evaluation factors for solicitations involving consolidation.

B. Analysis of Public Comments

1. General

a. Support for the Rule

Comment: One respondent expressed general support for the rule and that the proposed changes are positive which will provide much needed transparency and ensure that unnecessary and unjustified bundling do not become the contracting standard.

Response: Noted.

b. Experiences With Consolidation

Comment: Two respondents commented on their experience with consolidation and/or bundling; the adverse impact on small businesses' ability to compete in this environment; and expressed, had this rule been in effect, their experience very likely could have been different.

Response: Noted.

c. Need for Table of Thresholds

Comment: One respondent requested that a table of dollar thresholds may be useful to clarify the differences between consolidation and bundling.

Response: With regard to the use of a table to clarify the differing dollar thresholds associated with these terms, the preferred approach is to provide the guidance for processing a consolidated or bundled requirement in the area of the FAR where the respective subject matter is addressed. For example, the dollar threshold for triggering the Senior Procurement Executive's or Chief Acquisition Officer's determination of necessary and justified consolidation is discussed in the area of the FAR, 7.107–2, which addresses consolidation. Similarly, the dollar thresholds for substantial bundling and the attendant requirements for processing these acquisitions are provided at FAR 7.107–4. The FAR is arranged in this manner to allow contracting officers to quickly turn to the area of the FAR where the requisite guidance needed for their given situation is provided.

d. Mixing of Consolidation and Bundling

Comment: Three respondents commented that the rule appeared to incorrectly or unnecessarily use the terms consolidation and bundling synonymously, by applying the same requirements to both. The respondents identified the following areas in the rule where they believed that this occurred:

○ *FAR 7.103(u)(2).* This paragraph currently urges acquisition planners to avoid unnecessary and unjustified bundling that precludes participation of small business as prime contractors. The rule proposes that planners also avoid unnecessary and unjustified consolidation. One respondent believes that a consolidation that precludes participation of small business as the prime would automatically be bundling and as such, the rule is proposing an unnecessary change.

○ *FAR 7.104(d).* This paragraph currently requires coordination with the small business specialist when an acquisition meets the dollar thresholds for substantial bundling, unless the acquisition is set aside for small business. The small business specialist is required to notify the agency's small business office (*e.g.,* Office of Small and Disadvantaged Business Utilization) when the acquisition involves unjustified or unnecessary bundling or is not identified as bundling. The rule proposes to also require notification when the acquisition involves unjustified or unnecessary consolidation or is not identified as consolidation. It was pointed out that the coordination exemption for set-asides conflicts with the proposed notification requirement in cases where consolidation results in a small business set-aside because the small business specialist would not be coordinated with in such cases so they would not be able to provide the notification.

○ *FAR 7.105(b)(1)(iv).* The rule proposes to require that for consolidated contract requirements, the acquisition plan identify the incumbent contractors and contracts affected by the consolidation. The FAR currently only requires this for bundled contract requirements. One respondent stated the proposed additional burden could result in listing thousands of contracts for a strategic sourcing acquisition and that there is no statutory requirement for said identification.

○ *FAR 7.107–1.* This subsection provides guidance on how consolidation and bundling could be determined necessary and justified. One respondent asked why the same requirements have to be met for both consolidation and bundling.

○ *FAR 7.107–2(a).* One respondent asked why there is a requirement for coordination with the Office of Small and Disadvantaged Business Utilization (OSDBU) and/or a negative impact analysis on small businesses for consolidation if the consolidation results in a small business set-aside. The respondent believes that if the acquisition is not set aside then it would automatically be bundling and that bundling has the same justification process as consolidation.

○ *FAR 7.107–5.* One respondent pointed out that this subsection starts out talking about bundling then in paragraph (c) mixes in consolidated requirements, which the respondent believes is mixing two completely different situations that are not synonymous.

○ *FAR 15.304(c).* The rule proposes to require that there be evaluation factors related to a small business subcontracting plan for consolidated requirements. Currently, the FAR only requires this for bundling. Two respondents pointed out that if a consolidated requirement is set aside for small business, a small business subcontracting plan would not be required.

○ *FAR 19.202–1.* One respondent asked why the rule is proposing to apply the requirement for 30-day notification to incumbent small businesses for consolidated requirements. The respondent also stated that paragraph (e)(2)(v) is confusing because the requirements of that paragraph would not apply if consolidation results in a small business set-aside.

Response: The Councils reviewed the areas of the rule identified by the respondents to ensure that the appropriate requirements were being applied to consolidation. The final rule has been revised at—

- FAR 7.104(d) to remove "consolidation" in several places from the conditions under which the small business specialist must notify the agency Office of Small and Disadvantaged Business Utilization or the Office of Small Business Programs to be consistent with 13 CFR 125.2(c)(4)(ii); and
- FAR 7.105(b)(1)(iv) to no longer mention consolidation in the second sentence, since sections 1312 and 1313 of the Small Business Jobs Act and SBA's implementing regulations at 13 CFR 125.2 do not require the small business identification of incumbent contractors for consolidated requirements.

The final rule has also been revised at FAR 15.304(c) to clarify that consolidated requirements which are set aside for small business will not be required to use the small business subcontracting-related evaluation factors. While SBA's regulations at 13 CFR 125.2(d)(4) require small business subcontracting plan-related evaluation factors be used for all consolidated acquisitions, implementing this requirement in the FAR would be problematic. Because FAR 15.305(a)(5) requires that small business offerors get the highest rating for these factors, every offeror would receive the same rating for such factors in the scenario where a consolidated acquisition is set aside for small business, which would make use of such evaluation factors conflict with FAR 15.304(b)(2), which requires that evaluation factors support meaningful comparison and discrimination between and among competing proposals.

The final rule retains the proposed changes (with some further edits) to FAR 7.103(u)(2), 7.104(d), 7.107–1, 7.107–2, 7.107–5, and 19.202–1 as those changes are consistent with sections 1312 and 1313 of the Small Business Jobs Act and SBA's implementing regulations at 13 CFR 125.2. The Councils note that the rule does not have a requirement for a 30-day notification to incumbent small business contractors for consolidated requirements, as one respondent stated, nor does the rule automatically define a consolidated requirement that is not set aside for small business as bundling.

2. Applicability

a. AbilityOne

Comment: One respondent asked whether the requirements for consolidation are necessary for acquisition of services from the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (also known as the AbilityOne Commission), which is considered a mandatory source in accordance with FAR 8.002. The respondent requested the rule clarify how the mandatory sources relate to the consolidation requirements at FAR 7.107–2.

Response: For requirements that are on the Procurement List, the required source(s) to fulfill that work are already designated by the U.S. AbilityOne Commission. There would be no potential impact on small business participation or even on AbilityOne nonprofit agency participation if multiple Procurement List requirements are consolidated, because the sources will remain the same in accordance with those listed on the Procurement List. For that reason, it would not be necessary to engage in the market research or analysis required in FAR 7.107–1 and 7.107–2 if the potential consolidation only involves required sources of supply and services such as requirements on the Procurement List.

This same rationale applies to acquisitions from other mandatory sources. Therefore, the final rule has been revised at 7.107–1 to clarify that the consolidation and bundling requirements at 7.107 do not apply to acquisitions for which there are mandatory sources pursuant to FAR 8.002, "Priorities for use of mandatory Government sources," or FAR 8.003, "Use of other mandatory sources." The purpose of section 1313 of the Small Business Jobs Act was to limit the use of contract consolidation because of the anticipated negative impact of such an acquisition strategy on small business. However, requirements for which there is a mandatory source are not available to small business and as such, consolidation would result in no impact to small business, negative or positive. Further, neither 41 U.S.C. 8504 (the statutory authority behind the AbilityOne Program) nor 18 U.S.C. 4124(a) (another mandatory source—Federal Prison Industries) requires consolidation analyses for acquisitions done under their programs. Since application of the consolidation requirements would only create burden for the acquisition process and no benefit to small business, the Councils have determined, as a way of harmonizing different statutes, to exempt those consolidated contracts that can be met through one of the mandatory sources identified in FAR 8.002 or 8.003.

b. Blanket Purchase Agreements (BPAs)

Comment: One respondent recommended changes to multiple parts of the FAR in order to apply the bundling and consolidation analysis requirements to BPAs, especially Federal Supply Schedule (FSS) BPAs. The recommendation was based on the respondent's assumption that the Councils did not intend to exclude BPAs from bundling or consolidation analysis. The respondent requested that if the recommended changes were not made, that the final rule should address the applicability of bundling and consolidation requirements to BPAs.

Response: The statutory definition of "bundling of contract requirements" at paragraph (o) of 15 U.S.C. 632, Definitions, and of "consolidation of contract requirements" at 15 U.S.C. 657q, Consolidation of contract requirements, and SBA's implementing regulations at 13 CFR 125.1(c) and (e), only mention "contract" in terms of bundling and consolidation. BPAs are not contracts and therefore neither statute nor the implementing regulations apply the consolidation and bundling analysis requirements to them; however, orders under BPAs are treated as contracts in SBA's regulations at 13 CFR 125.1(d). The FAR definitions of "consolidation" and "bundling" apply to task or delivery orders, including those issued under BPAs.

c. 8(a)

Comment: One respondent requested that the requirement for a consolidation determination and findings (D&F) be waived for consolidation affecting or relating to sole source awards under the 8(a) program, due to concerns over potentially longer procurement lead times. Moreover, the respondent suggested that the requirement for a consolidation D&F contradicts FAR 6.302–5(b)(4) and the intent of paragraph 8(a) of the Small Business Act.

Response: Neither the statute nor SBA's final rule waived or exempted consolidations under or relating to the 8(a) Program; therefore, the new requirement is, in fact, applicable to all consolidations with an estimated total dollar value exceeding $2 million, even those where the new consolidated award will be made via sole source contract under the 8(a) Program.

3. Definitions

a. "Acquisition Planning Team" and "Planner"

Comment: One respondent requested definitions of "acquisition planning team" and "planner," in relation to the requirement at FAR 7.104 that small business is to be a discipline that is represented on the acquisition planning team.

Response: These are not new terms introduced to the FAR by this rule. "Planner" is currently defined at FAR 7.101 to mean the designated person or the office responsible for developing and maintaining a written plan, or for the planning function in those acquisitions not requiring a written plan.

"Acquisition planning" is defined in FAR 2.101. FAR 7.104 addresses the composition of the acquisition planning team, *i.e.*, the planner shall form a team consisting of all those who will be responsible for significant aspects of the acquisition, such as contracting, fiscal, legal, and technical personnel. This rule adds small business personnel to this list of functional experts that comprise the acquisition planning team.

b. "Bundling" and "Consolidation"

Comment: One respondent finds the definitions of "bundling" and "consolidation" useful to clearly set forth the requirements.

Response: Noted.

Comment: One respondent was concerned whether the statement in the definition of "bundling or bundled contract" that "this definition does not apply to contracts that will be awarded and performed entirely outside the United States" was intended to limit the applicability of the rule based on where the contract will be awarded and performed. The respondent further noted a potential inconsistency between that statement and the statement in the SBA regulations at 13 CFR 125.2(c) that the Small Business Act requires each Federal agency to foster the participation of small business concerns as prime contractors and subcontractors in the contracting opportunities of the Government, regardless of the place of performance of the contract. According to the respondent, the Court of Federal Claims has concluded that SBA's implementation of a provision of the Small Business Act via regulation must be viewed as controlling where there is an inconsistent FAR rule (C&G *Excavating. Inc.* v. *U.S.*, 32 Fed. Cl. 231 (Fed. Cl. 1994).

Response: This issue will be considered under FAR case 2016–002, Applicability of Small Business Regulations Outside the United States.

4. Acquisition Planning (FAR 7.104 and 7.105)

Comment: With regard to the clarification at FAR 7.104(a) that small business is to be a discipline that is represented in the acquisition planning team, one respondent stated that SBA will be working with at least a DD Form 2579 on most actions, so depending on the dollar amount is that sufficient? The respondent questioned the formality of the SBA involvement.

Response: The small business specialist on the acquisition planning team will probably be a representative of the agency small business office, not the SBA. The SBA will be working with, at a minimum, a DoD Form 2579, Small Business Coordination Record, or equivalent when reviewing acquisitions for consolidation or bundling. Currently, SBA's regulations at 13 CFR 125.2(c)(1)(v) require that an agency must notify the SBA within 30 days prior to the issuance of a solicitation for a bundled or consolidated contract and also requires that the DoD Form 2579 or equivalent must be sent to the SBA procurement center representative.

The formality of SBA's involvement is expanded upon by FAR 19.202–1(e)(1)(iii), which further requires agencies to provide a copy of the acquisition package to the SBA procurement center representation if the proposed requirement is for a bundled requirement. This acquisition package includes "all information relative to the justification of contract bundling, including the acquisition plan or strategy." This rule also requires this information for consolidation. If the acquisition involves substantial bundling, the agency must provide the requirements listed at FAR 7.107(e), moved in the final rule to 7.107–4.

Comment: One respondent commented that the thresholds proposed in FAR 7.104(d) for consultation with the cognizant small business specialist should be compared to current FAR or Defense Federal Acquisition Regulation Supplement (DFARS) thresholds for such review. The respondent was concerned that these thresholds would likely result in a much larger workload that should be coordinated with SBA.

Response: The requirements to coordinate with the small business specialist when a requirement meets the threshold for substantial bundling already exist in the current FAR at 7.104(d)(1). The thresholds currently listed in FAR 7.104(d)(2)(i) still exist and are the thresholds used to differentiate "bundling" from "substantial bundling". However, FAR 7.104 is being amended to remove the substantial bundling thresholds, which will be relocated in a new section, FAR 7.107–4 for clarity and consistency purposes. Therefore, there is no increase in workload for the small business specialists due to the threshold.

Comment: One respondent stated that most FAR/DFARS language speaks to acquisition planning and not strategies.

Response: Acquisition strategies are heavily considered in both the FAR and DFARS. As stated in the acquisition planning definition at FAR 2.101, acquisition planning includes developing the overall strategy for managing the acquisition. FAR 7.107–3(f)(2) in the final rule (formerly FAR 7.107(c)(2)) indicates that the acquisition strategy must provide for maximum practicable participation by small business concerns. FAR 7.107–4(b) in the final rule (formerly FAR 7.107(e)) goes further and describes additional elements for the acquisition strategy when there is substantial bundling.

5. Additional Requirements—Consolidation, Bundling, or Substantial Bundling (FAR 7.107)

a. General Requirements (FAR 7.107–1)

Comment: One respondent acknowledged numerous benefits to the rule and how it will standardize the management of requirements bundling across Government agencies. This standardized approach was noted to provide more visibility into Government contracting. The respondent additionally lauded FAR 7.107–1(b) for its identification of the possible benefits that may be attained from bundling or consolidation such as cost savings; price-reduction; quality improvements, etc. Furthermore, the respondent supported the thresholds in the rule for the Government to use to substantiate the benefits of bundling or consolidation including the threshold in FAR 7.107–1(e) requiring cost savings based on administrative or personnel costs must be at least 10 percent to prevent potential misleading justifications about administrative costs.

Response: Noted.

Comment: One respondent commented on the appropriateness of the Senior Procurement Executive (SPE) or Chief Acquisition Officer (CAO) making the determination of cost savings of consolidated requirements. Of particular concern, the respondent felt the determination should be the responsibility of the customer/requirements owner.

Response: Generally, FAR determinations that pertain to the acquisition process are made by acquisition professionals (*e.g.*, CAO, SPE, contracting officer, etc.). Paragraph (c)(2)(B) of 15 U.S.C. 657q, Consolidation of contract requirements, requires the determination of cost savings under a consolidated requirement be made by the SPE or CAO. The language used in the rule provides flexibility as to who would actually write or provide any supporting document as the SPE or CAO are only required to make the determination.

Comment: One respondent commented that Government agencies are required to meet 10 percent savings requirement for consolidation, even though they are potentially still setting aside for small businesses. If they cannot meet that savings objective then they cannot consolidate requirements and therefore cannot save the taxpayer money. This requirement will also cause the Government to expand its needed resources in order to ensure enough personnel to provide proper oversight of multiple orders.

Response: The Councils reviewed the comment and have included in FAR 7.107–2(e) the similar authority contained in the final rule for FAR 7.107–3(f), which allows specific senior officials under certain circumstances to determine that consolidation is necessary and justified, even though expected benefits do not meet the quantifiable dollar thresholds for a substantial benefit. Section 1313 provides that a SPE or CAO may determine that an acquisition strategy involving consolidation is necessary and justified if the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches identified that would involve a lesser degree of consolidation. In the preamble to the SBA final rule, SBA indicated (published in the **Federal Register** at 78 FR 61120) that since the Small Business Jobs Act does not define the terms "substantially exceed" or "benefits" for contractual consolidation, SBA used the definitions for those terms currently set forth in the bundling regulations in 13 CFR 125. Therefore, it is reasonable, in implementation of these thresholds in the FAR, to provide the same procedures set forth at 13 CFR 125.2(d)(2)(iii) with regard to the authority to make a determination that consolidation is necessary and justified even though the benefits do not meet the thresholds for substantial benefits, but in the aggregate are critical to the agency's mission success.

b. Consolidation (FAR 7.107–2)

Comment: One respondent discussed the consolidation of contract requirements specified at FAR 7.107–2 and expressed that the $2 million dollar threshold which would require a justification is adequate, without being overly burdensome. Additionally, the respondent commented that the review process and the impact analysis on small businesses when contract consolidation is being contemplated are preventive measures to ensure consolidation is justified.

Response: Noted.

c. Bundling (FAR 7.107–3)

Comment: One respondent recommended additional guidance to be provided to clarify the term "measurably substantial" when agencies are quantifying specific benefits to be achieved from bundling. FAR 7.107–3(b) requires an agency to quantify the specific benefits identified through market research and other techniques to explain how their impact would be measurably substantial (see 10.001(a)(2)(iv) and (a)(3)(vii)).

The respondent is also concerned that after market analysis and cost analysis is complete, if the benefits do not meet the thresholds for a substantial benefit, the military service acquisition executive, Deputy Secretary, or equivalent position may still determine that bundling is necessary and justified. The respondent is concerned that this section could convert itself to a catch-all for any acquisition that does not meet the requirements but the Agency still feels compelled to bundle.

Response: The SBA regulations at 13 CFR 125.2(d)(2)(ii) require the benefits to be measurably substantial in order for the bundling to be necessary and justified. This requirement is implemented at FAR 7.107–3(a).

Benefits of bundling are measurably substantial if individually, in combination, or in the aggregate the anticipated financial benefits are equivalent to—

(1) Ten percent of the estimated contract or order value (including options) if the value is $94 million or less; or

(2) Five percent of the estimated contract or order value (including options) or $9.4 million, whichever is greater, if the value exceeds $94 million.

The final rule now incorporates at FAR 7.107–3(d) the discussion of substantial benefits that was located at FAR 7.107–1(d). The benefits are measurably substantial when the agency can quantify the specific benefits identified through the use of market research and other techniques.

If the thresholds are not met, FAR 7.107–3(f) requires a high level determination, without power of delegation, that the expected benefits are critical for the agency's mission success, and that the acquisition strategy provides for maximum practicable participation by small business concerns. These protections are sufficient to ensure that agencies are not able to use this exception as a catch-all for acquisitions that do not meet the requirements.

d. Substantial Bundling (FAR 7.107–4)

Comment: One respondent found the separate definition and discussion on substantial bundling at FAR 7.107–4 to be helpful as it sets forth and distinguishes the requirements of substantial bundling from consolidation and bundling (FAR 7.107–2 and 7.107–3, respectively). The respondent further commented that the documentation requirements of specific benefits to be derived from substantial bundling are a positive protection for small businesses.

Response: Noted.

6. Notification (FAR 7.107–5)

a. Notification to Small Businesses

Comment: Two respondents commented on the requirements at FAR 7.107–5(a) to notify each small business performing a contract that it intends to bundle the requirement with one or more other requirements at least 30 days prior to the issuance of the solicitation for the bundled requirement. Both respondents considered that the 30 day time period was insufficient. One respondent stated that the Government must know this far in advance of 30 days. The other respondent noted that 30 days does not provide adequate time for the small business to coordinate with the designated SBA Procurement Center representative or designated contact. The respondent suggested at least 45 calendar days.

One respondent asked what the documentation requirements are for this in the contract file.

Response: This final rule implements the SBA regulations (see 13 CFR 125.2(d)(5)), which specify a time period of least 30 days prior to the issuance of the solicitation. Those regulations and FAR 7.107–5(a)(3) require documentation of the notification in the contract file. The contracting officer has discretion on how best to document the contract file.

b. Notification to the Public

Two respondents commented on the requirement at FAR 7.107–5(b) that the agency notify the public of the rationale for a bundled requirement, via the agency's Web site.

Comment: One respondent asked whether this reporting duty can be delegated to the chief acquisition executive/senior procurement executive or head of the contracting activity.

Response: The statute requires the head of the agency to post this information to the agency Web site, but does not prohibit redelegation. FAR 1.108(b) states that each authority is delegable unless specifically stated otherwise. Therefore, the actual posting can be delegated to an appropriate level within the agency.

Comment: Another respondent supported the proposed amendments to require publication on the Web site but noted that the requirement was only mandatory for any bundled requirements for which the agency has solicited offers or issued an award, whereas the agency is only encouraged to provide notification to FedBizOpps before the issuance of the solicitation. The respondent recommended that this presolicitation notification to the public should be mandatory.

Response: This FAR rule is implementing the SBA regulations at 13 CFR 125.2(d)(6) and the statute, which mandate publication of bundled requirements on agency Web sites on an annual basis. The SBA regulations only encourage providing such notification before issuance of the solicitation, and do not specify FedBizOpps or any particular Web site as the location of such posting.

c. Notification to SBA

Comment: One respondent commented that the requirement to notify SBA of each follow-on bundled or consolidated contract will provide more complete data regarding whether consolidation or bundling actually was a positive outcome for the agency. According to the respondent, including the historical data of the amount of savings and benefits that resulted from the consolidation or bundling and then comparing it to whether such benefits will continue in a follow-on contract will provide an excellent opportunity for analysis.

Response: Noted.

7. Provision (FAR 52.207–6)

Comment: One respondent requested information on the provision in the proposed rule to be included in each solicitation for any multiple-award contract above the substantial bundling threshold. The respondent had concerns that this rule appeared to indicate that the normal requirement is to set up multiple-award contracts only for large business and overlooks the process for set-aside contracts. This respondent suggested that the provision should provide for a higher evaluation of a large business teaming with a small business, or if it has a substantial small business subcontracting plan.

Response: The provision at FAR 52.207–6 is required by section 1312(a) of the Small Business Jobs Act of 2010 and the SBA regulations. The statute requires ''a provision soliciting bids from any responsible source, including responsible small business concerns and teams or joint ventures of small business concerns.''

C. Other Changes

At FAR 2.101 and in the clause at 52.207–6, the definition of ''Small Business Teaming Arrangement'' has been amended to add a subparagraph in paragraph (2) to explain that for DoD, a Small Business Teaming Arrangement may include two business concerns in a mentor-protégé relationship in the Department of Defense Pilot Mentor-Protégé Program (see section 831 of the National Defense Authorization Act for

Fiscal Year 1991 (Pub. L. 101–510; 10 U.S.C. 2302 note) only so long as both the mentor and the protégé are small. There is no exception to joint venture size affiliation for offers received from Small Business Teaming Arrangements under the Department of Defense Pilot Mentor-Protégé Program. In addition, a clarification is added in paragraph (3) of the definition, that this exception to affiliation applies in the case of a solicitation of offers for a bundled contract with a reserve (as stated at 13 CFR 121.103(b)(9)).

The definition of "Bundling" at FAR 2.101 has been amended for clarity and to remove the proposed reference to the description of substantial bundling in part 7. The definition of "Consolidation" has been amended to remove redundant terms. The phrase "contract requirements" is removed for clarity wherever it is associated with bundling and consolidation in the final rule, since bundling and consolidation apply to orders as well as contracts.

For consistency, the final rule amends the text at FAR 5.205(g) to reflect the specific text at FAR 7.107–5(b)(2), instead of paraphrasing.

The final rule contains a minor editorial correction to the cross-reference at FAR 7.107–3(b).

At FAR 7.107–3(f), the identification of officials authorized to make the determination in the Department of Defense that bundling is necessary and justified, even if the anticipated savings do not meet the specified thresholds, has been amended to more closely reflect the SBA regulation at 13 CFR 125.2(d)(2)(iii).

At FAR 7.107–4(a)(1), the final rule adds language which conforms to other proposed changes for subpart 7.1, which consists of spelling out "task order or delivery order" whenever talking about requirements associated with bundling or consolidation. The use of this distinct terminology is due to FAR subpart 7.1 already having a definition for "order" which does not accurately describe the orders to which bundling and consolidation requirements apply. Consequently, because there is no conflicting definition of "order" in FAR subparts 8.4 or 16.5, the final rule has been amended to remove the proposed use of the distinct terminology in those subparts.

The final rule contains a number of editorial changes such as the addition of cross-references in FAR 7.107–2, 7.107–3, and 7.107–6, removal of redundant text in 7.107–5(a), and the deletion of "significant" from 19.201(c)(5)(i) as there is no definition for "significant bundling".

III. Applicability to Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule creates provision FAR 52.207–6, Solicitation of Offers from Small Business Concerns and Small Business Teaming Arrangements or Joint Ventures (Multiple-Award Contracts), in order to implement paragraph (a) of section 1312 of the Small Business Jobs Act of 2010. This paragraph concerns 15 U.S.C. 644, Awards or Contracts, and therefore applies as a matter of law to COTS items. The Federal Acquisition Regulatory Council, pursuant to the authority granted in 41 U.S.C. 1906, List of laws inapplicable to procurements of commercial items, and the Administrator for Federal Procurement Policy, pursuant to the authority granted in 41 U.S.C. 1907, List of laws inapplicable to procurements of commercially available off-the-shelf items, have determined that it would not be in the best interest of the Federal Government to exempt solicitations for the acquisition of commercial items from the applicability of paragraph (a) of section 1312, entitled "Leadership and Oversight," of the Small Business Jobs Act, or to exempt solicitations for the acquisition of commercial items or for COTS from the applicability of paragraph (a) of section 1313, entitled "Consolidation of Contract Requirements". The FAR provision 52.207–6, Solicitation of Offers from Small Business Concerns and Small Business Teaming Arrangements or Joint Ventures (Multiple-Award Contracts), has been written so that the application of the provision is carefully tailored, consistent with the statute. The provision is a notice to offerors that imposes no burdens, but simply encourages small business concerns and small business teaming arrangements or joint ventures of small business concerns to submit offers on multiple-award contracts above the substantial bundling threshold of the Federal agency. Therefore, the potential benefits to small business entities outweigh any potential drawback of application to acquisitions of commercial items.

The consolidation requirements of section 1313 should apply to all contracts and subcontracts above the threshold(s) specified in the statute, including contracts and subcontracts for the acquisition of commercial items and COTS. The statute requires agencies to ensure increased consideration of small businesses in connection with the establishment of multiple award contracts and acquisitions that consolidate contracts. Not applying these requirements to the maximum extent possible would exclude a significant number of acquisitions which would not help to protect the interests of small businesses and boost their opportunities in the Federal marketplace. Not applying the consolidation requirements to the acquisition of commercial items or COTS would limit the full implementation of the Small Business Jobs Act of 2010. For all of these reasons, it is in the best interest of the Federal Government to apply the consolidation requirements to all contracts and subcontracts above the threshold(s) specified in the statute.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

> The final rule amends the FAR to provide uniform guidance on consolidation and bundling consistent with SBA's final rule which was published in the **Federal Register** at 78 FR 61113 on October 2, 2013, which implements Sections 1312 and 1313 of the Small Business Jobs Act of 2010 (Pub. L. 111–240) and section 1671 of Pub. L. 112–239.
>
> The rule requires the head of the agency to publish on the agency Web site a list and rationale for bundled contracts; requires solicitation for multiple-award contracts above the substantial bundling threshold to include a provision soliciting bids from any responsible source; requires agencies to publish bundling policy on agency Web site; provides for a definition of "consolidation;" and, prohibits an agency from carrying out consolidation of requirements over $2 million until certain actions are taken.
>
> The objective of this rule is to alleviate the adverse effects of contract bundling and consolidation on small business concerns competing for Federal contracts. This rule

provides a balance between the benefits of bundling and consolidation and the obstacles they create for small businesses.

There were no significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis provided in the proposed rule.

This rule may have a positive economic impact on any small business entity that wishes to participate in the Federal procurement arena. Analysis of the SAM database indicates there are currently approximately 307,846 small business registrants that can potentially benefit from the implementation of this rule. This rule does not impose any new reporting, recordkeeping or other compliance requirements.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VI. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 2, 5, 7, 8, 10, 12, 15, 16, 19, and 52

Government procurement.

Dated: September 19, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 5, 7, 8, 10, 12, 15, 16, 19, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 5, 7, 8, 10, 12, 15, 16, 19, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101, in paragraph (b)(2) by—

■ a. Removing the definition "Bundled contract";

■ b. Revising the definition "Bundling"; and

■ c. Adding, in alphabetical order, the definitions "Consolidation, or consolidated requirement" and "Small Business Teaming Arrangement".

The revision and additions read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Bundling—

(1) Means a subset of consolidation that combines two or more requirements for supplies or services, previously provided or performed under separate smaller contracts (see paragraph (2) of this definition), into a solicitation for a single contract, a multiple-award contract, or a task or delivery order that is likely to be unsuitable for award to a small business concern (even if it is suitable for award to a small business with a Small Business Teaming Arrangement) due to—

(i) The diversity, size, or specialized nature of the elements of the performance specified;

(ii) The aggregate dollar value of the anticipated award;

(iii) The geographical dispersion of the contract performance sites; or

(iv) Any combination of the factors described in paragraphs (1)(i), (ii), and (iii) of this definition.

(2) "Separate smaller contract" as used in this definition, means a contract that has been performed by one or more small business concerns or that was suitable for award to one or more small business concerns.

(3) This definition does not apply to a contract that will be awarded and performed entirely outside of the United States.

* * * * *

Consolidation or consolidated requirement—

(1) Means a solicitation for a single contract, a multiple-award contract, a task order, or a delivery order to satisfy—

(i) Two or more requirements of the Federal agency for supplies or services that have been provided to or performed for the Federal agency under two or more separate contracts, each of which was lower in cost than the total cost of the contract for which offers are solicited; or

(ii) Requirements of the Federal agency for construction projects to be performed at two or more discrete sites.

(2) *Separate contract* as used in this definition, means a contract that has been performed by any business, including small and other than small business concerns.

* * * * *

Small Business Teaming Arrangement—

(1) Means an arrangement where—

(i) Two or more small business concerns have formed a joint venture; or

(ii) A small business offeror agrees with one or more other small business concerns to have them act as its subcontractors under a specified Government contract. A Small Business Teaming Arrangement between the offeror and its small business subcontractor(s) exists through a written agreement between the parties that—

(A) Is specifically referred to as a "Small Business Teaming Arrangement"; and

(B) Sets forth the different responsibilities, roles, and percentages (or other allocations) of work as it relates to the acquisition;

(2)(i) For civilian agencies, may include two business concerns in a mentor-protégé relationship when both the mentor and the protégé are small or the protégé is small and the concerns have received an exception to affiliation pursuant to 13 CFR 121.103(h)(3)(ii) or (iii).

(ii) For DoD, may include two business concerns in a mentor-protégé relationship in the Department of Defense Pilot Mentor-Protégé Program (see section 831 of the National Defense Authorization Act for Fiscal Year 1991 (Pub. L. 101–510; 10 U.S.C. 2302 note)) when both the mentor and the protégé are small. There is no exception to joint venture size affiliation for offers received from teaming arrangements under the Department of Defense Pilot Mentor-Protégé Program; and

(3) See 13 CFR 121.103(b)(9) regarding the exception to affiliation for offers received from Small Business Teaming Arrangements in the case of a solicitation of offers for a bundled contract with a reserve.

* * * * *

PART 5—PUBLICIZING CONTRACT ACTIONS

■ 3. Amend section 5.205 by adding paragraph (g) to read as follows.

5.205 Special situations.

* * * * *

(g) *Notification to the public of rationale for bundled requirement.* The agency is encouraged to provide notification of the rationale for any bundled requirement to the GPE before issuing the solicitation of any bundled requirement (see 7.107–5(b)(2)).

PART 7—ACQUISITION PLANNING

■ 4. Amend section 7.103 by revising paragraph (u)(2) to read as follows:

7.103 Agency-head responsibilities.

* * * * *

(u) * * *

(2) Avoid unnecessary and unjustified consolidation or bundling (see 7.107) (15 U.S.C. 631(j) and 15 U.S.C. 657q).

* * * * *

■ 5. Amend section 7.104 by removing from paragraph (a) "contracting," and adding "contracting, small business," in its place; and revising paragraph (d) to read as follows:

7.104 General procedures.

* * * * *

(d) The planner shall coordinate the acquisition plan or strategy with the cognizant small business specialist when the strategy contemplates an acquisition meeting the thresholds in 7.107–4 for substantial bundling unless the contract or task order or delivery order is entirely reserved or set-aside for small business under part 19. The small business specialist shall notify the agency Office of Small and Disadvantaged Business Utilization or the Office of Small Business Programs if the strategy involves—

(1) Bundling that is unnecessary or unjustified; or

(2) Bundled or consolidated requirements not identified as such by the agency (see 7.107).

* * * * *

■ 6. Amend section 7.105 by revising paragraph (b)(1) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) *Plan of action*—(1) *Sources.* (i) Indicate the prospective sources of supplies or services that can meet the need.

(ii) Consider required sources of supplies or services (see part 8) and sources identifiable through databases including the Governmentwide database of contracts and other procurement instruments intended for use by multiple agencies available at *https://www.contractdirectory.gov/contractdirectory/*.

(iii) Include consideration of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns (see part 19).

(iv) Consider the impact of any consolidation or bundling that might affect participation of small businesses in the acquisition (see 7.107) (15 U.S.C. 644(e) and 15 U.S.C. 657q). When the proposed acquisition strategy involves bundling, identify the incumbent contractors and contracts affected by the bundling.

(v) Address the extent and results of the market research and indicate their impact on the various elements of the plan (see part 10).

* * * * *

■ 7. Revise section 7.107 to read as follows:

7.107 Additional requirements for acquisitions involving consolidation, bundling, or substantial bundling.

■ 8. Add sections 7.107–1 through 7.107–6 to read as follows:

7.107–1 General.

(a) If the requirement is considered both consolidated and bundled, the agency shall follow the guidance regarding bundling in 7.107–3 and 7.107–4.

(b) The requirements of this section 7.107 do not apply—

(1) If a cost comparison analysis will be performed in accordance with OMB Circular A–76 (except 7.107–4 still applies);

(2) To orders placed under single-agency task-order contracts or delivery-order contracts, when the requirement was considered in determining that the consolidation or bundling of the underlying contract was necessary and justified; or

(3) To requirements for which there is a mandatory source (see 8.002 or 8.003), including supplies and services that are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled or the Schedule of Products issued by Federal Prison Industries, Inc. This exception does not apply—

(i) When the requiring agency obtains a waiver in accordance with 8.604 or an exception in accordance with 8.605 or 8.706; or

(ii) When optional acquisitions of supplies and services permitted under 8.713 are included.

7.107–2 Consolidation.

(a) Consolidation may provide substantial benefits to the Government. However, because of the potential impact on small business participation, before conducting an acquisition that is a consolidation of requirements with an estimated total dollar value exceeding $2 million, the senior procurement executive or chief acquisition officer shall make a written determination that the consolidation is necessary and justified in accordance with 15 U.S.C. 657q, after ensuring that—

(1) Market research has been conducted;

(2) Any alternative contracting approaches that would involve a lesser degree of consolidation have been identified;

(3) The determination is coordinated with the agency's Office of Small Disadvantaged Business Utilization or the Office of Small Business Programs;

(4) Any negative impact by the acquisition strategy on contracting with small business concerns has been identified; and

(5) Steps are taken to include small business concerns in the acquisition strategy.

(b) The senior procurement executive or chief acquisition officer may determine that the consolidation is necessary and justified if the benefits of the acquisition would substantially exceed the benefits that would be derived from each of the alternative contracting approaches identified under paragraph (a)(2) of this subsection, including benefits that are quantifiable in dollar amounts as well as any other specifically identified benefits.

(c) Such benefits may include cost savings or price reduction and, regardless of whether quantifiable in dollar amounts—

(1) Quality improvements that will save time or improve or enhance performance or efficiency;

(2) Reduction in acquisition cycle times;

(3) Better terms and conditions; or

(4) Any other benefit.

(d) *Benefits.* (1) Benefits that are quantifiable in dollar amounts are substantial if individually, in combination, or in the aggregate the anticipated financial benefits are equivalent to—

(i) Ten percent of the estimated contract or order value (including options) if the value is $94 million or less; or

(ii) Five percent of the estimated contract or order value (including options) or $9.4 million, whichever is greater, if the value exceeds $94 million.

(2) Benefits that are not quantifiable in dollar amounts shall be specifically identified and otherwise quantified to the extent feasible.

(3) Reduction of administrative or personnel costs alone is not sufficient justification for consolidation unless the cost savings are expected to be at least 10 percent of the estimated contract or order value (including options) of the consolidated requirements, as determined by the senior procurement executive or chief acquisition officer (15 U.S.C. 657q(c)(2)(B)).

(e)(1) Notwithstanding paragraphs (a) through (d) of this subsection, the approving authority identified in paragraph (e)(2) of this subsection may determine that consolidation is necessary and justified when—

(i) The expected benefits do not meet the thresholds for a substantial benefit at paragraph (d)(1) of this subsection but are critical to the agency's mission success; and

(ii) The procurement strategy provides for maximum practicable participation by small business.

(2) The approving authority is—

(i) For the Department of Defense, the senior procurement executive; or

(ii) For the civilian agencies, the Deputy Secretary or equivalent.

(f) If a determination is made that consolidation is necessary and justified, the contracting officer shall include it in the acquisition strategy documentation and provide it to the Small Business Administration (SBA) upon request.

7.107–3 Bundling.

(a) Bundling may provide substantial benefits to the Government. However, because of the potential impact on small business participation, before conducting an acquisition strategy that involves bundling, the agency shall make a written determination that the bundling is necessary and justified in accordance with 15 U.S.C. 644(e). A bundled requirement is considered necessary and justified if the agency would obtain measurably substantial benefits as compared to meeting its agency's requirements through separate smaller contracts or orders.

(b) The agency shall quantify the specific benefits identified through the use of market research and other techniques to explain how their impact would be measurably substantial (see 10.001(a)(2)(iv) and (a)(3)(vii)).

(c) Such benefits may include, but are not limited to—

(1) Cost savings;

(2) Price reduction;

(3) Quality improvements that will save time or improve or enhance performance or efficiency;

(4) Reduction in acquisition cycle times, or

(5) Better terms and conditions.

(d) Benefits are measurably substantial if individually, in combination, or in the aggregate the anticipated financial benefits are equivalent to—

(1) Ten percent of the estimated contract or order value (including options) if the value is $94 million or less; or

(2) Five percent of the estimated contract or order value (including options) or $9.4 million, whichever is greater, if the value exceeds $94 million.

(e) Reduction of administrative or personnel costs alone is not sufficient justification for bundling unless the cost savings are expected to be at least ten percent of the estimated contract or order value (including options) of the bundled requirements.

(f)(1) Notwithstanding paragraphs (a) through (e) of this subsection, the approving authority identified in paragraph (f)(2) of this subsection may determine that bundling is necessary and justified when—

(i) The expected benefits do not meet the thresholds for a substantial benefit but are critical to the agency's mission success; and

(ii) The acquisition strategy provides for maximum practicable participation by small business concerns.

(2) The approving authority, without power of delegation, is—

(i) For the Department of Defense, the senior procurement executive; or

(ii) For the civilian agencies is the Deputy Secretary or equivalent.

(g) In assessing whether cost savings and/or price reduction would be achieved through bundling, the agency and SBA shall—

(1) Compare the price that has been charged by small businesses for the work that they have performed; or

(2) Where previous prices are not available, compare the price, based on market research, that could have been or could be charged by small businesses for the work previously performed by other than a small business.

(h) If a determination is made that bundling is necessary and justified, the contracting officer shall include it in the acquisition strategy documentation and provide it to SBA upon request.

7.107–4 Substantial bundling.

(a)(1) Substantial bundling is any bundling that results in a contract task or delivery order with an estimated value of—

(i) $8 million or more for the Department of Defense;

(ii) $6 million or more for the National Aeronautics and Space Administration, the General Services Administration, and the Department of Energy; or

(iii) $2.5 million or more for all other agencies.

(2) These thresholds apply to the cumulative estimated dollar value (including options) of—

(i) Multiple-award contracts;

(ii) Task orders or delivery orders issued against a GSA Schedule contract; or

(iii) Task orders or delivery orders issued against a task-order or delivery-order contract awarded by another agency.

(b) In addition to addressing the requirements for bundling (see 7.107–3), when the proposed acquisition strategy involves substantial bundling, the agency shall document in its strategy—

(1) The specific benefits anticipated to be derived from substantial bundling;

(2) An assessment of the specific impediments to participation by small business concerns as contractors that result from substantial bundling;

(3) Actions designed to maximize small business participation as contractors, including provisions that encourage small business teaming;

(4) Actions designed to maximize small business participation as subcontractors (including suppliers) at any tier under the contract, or order, that may be awarded to meet the requirements;

(5) The determination that the anticipated benefits of the proposed bundled contract or order justify its use; and

(6) Alternative strategies that would reduce or minimize the scope of the bundling, and the rationale for not choosing those alternatives.

7.107–5 Notifications.

(a) *Notifications to current small business contractors of agency's intent to bundle.* (1) The contracting officer shall notify each small business performing a contract that it intends to bundle the requirement at least 30 days prior to the issuance of the solicitation for the bundled requirement.

(2) The notification shall provide the name, phone number and address of the applicable SBA procurement center representative (PCR), or if an SBA PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located.

(3) This notification shall be documented in the contract file.

(b) *Notification to public of rationale for bundled requirement.* (1) The agency shall publish on its Web site a list and rationale for any bundled requirement for which the agency solicited offers or issued an award. The notification shall be made within 30 days of the agency's data certification regarding the validity and verification of data entered in the Federal Procurement Data System to the Office of Federal Procurement Policy (see 4.604).

(2) In addition, the agency is encouraged to provide notification of the rationale for any bundled requirement to the GPE, before issuance of the solicitation (see 5.201).

(c) *Notification to SBA of follow-on bundled or consolidated requirements.* For each follow-on bundled or consolidated requirement, the contracting officer shall obtain the following from the requiring activity and notify the SBA PCR no later than 30 days prior to issuance of the solicitation:

(1) The amount of savings and benefits achieved under the prior consolidation or bundling.

(2) Whether such savings and benefits will continue to be realized if the contract remains consolidated or bundled.

(3) Whether such savings and benefits would be greater if the procurement requirements were divided into separate solicitations suitable for award to small business concerns.

(4) List of requirements that have been added or deleted for the follow-on.

(d) *Public notification of bundling policy.* In accordance with 15 U.S.C. 644(q)(2)(A)(ii), agencies shall publish the Governmentwide policy regarding contract bundling, including regarding the solicitation of teaming and joint ventures, on their agency Web site.

7.107–6 Solicitation provision.

The contracting officer shall insert the provision at 52.207–6, Solicitation of Offers from Small Business Concerns and Small Business Teaming Arrangements or Joint Ventures (Multiple-Award Contracts), in solicitations for multiple-award contracts above the substantial bundling threshold of the agency (see 7.107–4(a)).

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 9. Amend section 8.404 by revising paragraph (c)(2) to read as follows:

8.404 Use of Federal Supply Schedules.

* * * * *

(c) * * *

(2) Shall comply with all FAR requirements for a consolidated or bundled contract when the order meets the definition at 2.101(b) of "consolidation" or "bundling"; and

* * * * *

PART 10—MARKET RESEARCH

■ 10. Amend section 10.001 by—

■ a. Revising the introductory text of paragraph (a);

■ b. Revising paragraphs (a)(2)(iv) and (a)(2)(vi)(B);

■ c. Removing from the end of paragraph (a)(3)(v) "efficiency; and" and adding "efficiency;" in its place;

■ d. Redesignating paragraphs (a)(3)(vi) and (vii) as paragraphs (a)(3)(vii) and (viii), respectively;

■ e. Adding a new paragraph (a)(3)(vi);

■ f. Revising the newly designated paragraph (a)(3)(vii); and

■ g. Revising paragraph (c).

The revisions and addition reads as follows:

10.001 Policy.

(a) Agencies shall—

* * * * *

(2) * * *

(iv) Before soliciting offers for acquisitions that could lead to consolidation or bundling (15 U.S.C. 644(e)(2)(A) and 15 U.S.C. 657q);

* * * * *

(vi) * * *

(B) Disaster relief to include debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities (see 26.205); and

(3) * * *

(vi) Determine whether consolidation is necessary and justified (see 7.107–2) (15 U.S.C. 657q);

(vii) Determine whether bundling is necessary and justified (see 7.107–3) (15 U.S.C. 644(e)(2)(A)); and

* * * * *

(c) If an agency contemplates consolidation or bundling, the agency—

(1) When performing market research, should consult with the agency small business specialist and the local Small Business Administration procurement center representative (PCR). If a PCR is not assigned, see 19.402(a); and

(2) Shall notify any affected incumbent small business concerns of the Government's intention to bundle the requirement and how small business concerns may contact the appropriate Small Business Administration procurement center representative (see 7.107–5(a)).

* * * * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 11. Amend section 12.301 by redesignating paragraphs (d)(4) through (8) as paragraphs (d)(5) through (9), respectively; and adding a new paragraph (d)(4) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(d) * * *

(4) Insert the provision at 52.207–6, Solicitation of Offers from Small Business Concerns and Small Business Teaming Arrangements or Joint Ventures (Multiple-Award Contracts), as prescribed at 7.107–6.

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

■ 12. Amend section 15.304 by revising paragraphs (c)(3)(ii) and (c)(4) to read as follows:

15.304 Evaluation factors and significant subfactors.

* * * * *

(c) * * *

(3) * * *

(ii) For solicitations that are not set aside for small business concerns, involving consolidation or bundling, that offer a significant opportunity for subcontracting, the contracting officer shall include a factor to evaluate past performance indicating the extent to which the offeror attained applicable goals for small business participation under contracts that required subcontracting plans (15 U.S.C. 637(d)(4)(G)(ii)).

* * * * *

(4) For solicitations, that are not set aside for small business concerns, involving consolidation or bundling, that offer a significant opportunity for subcontracting, the contracting officer shall include proposed small business subcontracting participation in the subcontracting plan as an evaluation factor (15 U.S.C. 637(d)(4)(G)(i)).

* * * * *

PART 16—TYPES OF CONTRACTS

■ 13. Amend section 16.505 by revising paragraph (a)(8)(iii) to read as follows:

16.505 Ordering.

(a) * * *

(8) * * *

(iii) Shall comply with all FAR requirements for a consolidated or bundled contract when the order meets the definition at 2.101(b) of "consolidation" or "bundling".

* * * * *

■ 14. Amend section 16.506 by adding paragraph (i) to read as follows:

16.506 Solicitation provisions and contract clauses.

* * * * *

(i) See 7.107–6 for use of 52.207–6, Solicitation of Offers from Small Business Concerns and Small Business Teaming Arrangement or Joint Ventures (Multiple-Award Contracts) in solicitations for multiple-award contracts above the substantial bundling threshold of the agency.

PART 19—SMALL BUSINESS PROGRAMS

■ 15. Amend section 19.201 by revising paragraphs (c)(5)(i), (c)(11)(ii), and (c)(11)(iii) to read as follows:

19.201 General policy.

* * * * *

(c) * * *

(5) * * *

(i) Identify proposed solicitations that involve bundling and work with the agency acquisition officials and SBA to revise the acquisition strategies for such proposed solicitations to increase the probability of participation by small businesses as prime contractors through Small Business Teaming Arrangements;

* * * * *

(11) * * *

(ii) Adequacy of consolidated or bundled contract documentation and justifications; and

(iii) Actions taken to mitigate the effects of necessary and justified consolidation or bundling on small businesses.

* * * * *

■ 16. Amend section 19.202–1 by revising paragraph (e)(1)(iii), the introductory text of paragraph (e)(2), and paragraphs (e)(2)(v), (e)(3), and (e)(4) to read as follows:

19.202–1 Encouraging small business participation in acquisitions.

* * * * *

(e)(1) * * *

(iii) The proposed acquisition is for a consolidated or bundled requirement. (See 7.107–5(a) for mandatory 30-day notice requirement to incumbent small business concerns.) The contracting officer shall provide all information relative to the justification for the consolidation or bundling, including the acquisition plan or strategy, and if the acquisition involves substantial bundling, the information identified in 7.107–4. The contracting officer shall also provide the same information to the agency Office of Small and Disadvantaged Business Utilization.

(2) Provide a statement explaining why the—

* * * * *

(v) Consolidation or bundling is necessary and justified.

(3) Process the 30-day notification concurrently with other processing steps required prior to the issuance of the solicitation.

(4) If the contracting officer rejects the SBA procurement center representative's recommendation made in accordance with 19.402(c)(2), document the basis for the rejection and notify the SBA procurement center representative in accordance with 19.505.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 17. Add section 52.207–6 to read as follows:

52.207–6 Solicitation of Offers from Small Business Concerns and Small Business Teaming Arrangements or Joint Ventures (Multiple-Award Contracts).

As prescribed in 7.107–6, insert the following provision:

Solicitation of Offers From Small Business Concerns and Small Business Teaming Arrangements or Joint Ventures (Multiple-Award Contracts) (Oct 2016)

(a) *Definition.* "Small Business Teaming Arrangement," as used in this provision—

(1) Means an arrangement where—

(i) Two or more small business concerns have formed a joint venture; or

(ii) A small business offeror agrees with one or more other small business concerns to have them act as its subcontractors under a specified Government contract. A Small Business Teaming Arrangement between the offeror and its small business subcontractor(s) exists through a written agreement between the parties that—

(A) Is specifically referred to as a "Small Business Teaming Arrangement"; and

(B) Sets forth the different responsibilities, roles, and percentages (or other allocations) of work as it relates to the acquisition;

(2)(i) For civilian agencies, may include two business concerns in a mentor-protégé relationship when both the mentor and the protégé are small or the protégé is small and the concerns have received an exception to affiliation pursuant to 13 CFR 121.103(h)(3)(ii) or (iii).

(ii) For DoD, may include two business concerns in a mentor-protégé relationship in the Department of Defense Pilot Mentor-Protégé Program (see section 831 of the National Defense Authorization Act for Fiscal Year 1991 (Pub. L. 101–510; 10 U.S.C. 2302 note)) when both the mentor and the protégé are small. There is no exception to joint venture size affiliation for offers received from teaming arrangements under the Department of Defense Pilot Mentor-Protégé Program; and

(3) See 13 CFR 121.103(b)(9) regarding the exception to affiliation for offers received from Small Business Teaming Arrangements in the case of a solicitation of offers for a bundled contract with a reserve.

(b) The Government is soliciting and will consider offers from any responsible source, including responsible small business concerns and offers from Small Business Teaming Arrangements or joint ventures of small business concerns.

(End of provision)

[FR Doc. 2016–23199 Filed 9–29–16; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 17

[FAC 2005–91; FAR Case 2016–006; Item VII; Docket No. 2016–0006, Sequence No. 1]

RIN 9000–AN24

Federal Acquisition Regulation; Amendment Relating to Multi-Year Contract Authority for Acquisition of Property

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016, to require that "significant" savings would be achieved by entering into a multi-year contract.

DATES: *Effective:* October 31, 2016.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–91, FAR Case 2016–006.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are amending FAR subpart 17.1 to implement section 811 of the NDAA for FY 2016 (Pub. L. 114–92). Section 811 amended subsection (a)(1) of 10 U.S.C. 2306b by striking "substantial" and inserting "significant." This rule makes conforming changes at FAR 17.105–1(b)(1) to state that the head of an agency may enter into a multi-year contract for supplies, if the use of such a contract will result in significant savings of the total estimated costs of carrying out the program through annual contracts. This change applies to the DoD, NASA, and the Coast Guard.

II. Publication of This Final Rule for Public Comment Is Not Required by Statute

Publication of proposed regulations, 41 U.S.C. 1707, is the statute which applies to the publication of the Federal

Acquisition Regulation. Paragraph (a)(1) of the statute requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because it addresses an internal decision by the head of agency to enter into a multi-year contract for supplies if certain criteria are met. These requirements affect only the internal operating procedures of the Government.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant FAR revision within the meaning of FAR 1.501–1 and 41 U.S.C. 1707 does not require publication for public comment.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. Chapter 35).

List of Subject in 48 CFR Part 17

Government procurement.

Dated: September 19, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR part 17 as set forth below:

PART 17—SPECIAL CONTRACTING METHODS

■ 1. The authority citation for 48 CFR part 17 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

17.105–1 [Amended]

■ 2. Amend section 17.105–1 by removing from paragraph (b)(1) "substantial" and adding "significant" in its place.

[FR Doc. 2016–23201 Filed 9–29–16; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 22, 25, and 52

[FAC 2005–91; FAR Case 2016–009; Item VIII; Docket No. 2016–0009, Sequence No. 1]

RIN 9000–AN25

Federal Acquisition Regulation; New Designated Countries—Ukraine and Moldova

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to add Ukraine and Moldova as new designated countries under the World Trade Organization Government Procurement Agreement (WTO GPA).

DATES: *Effective:* October 31, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia L. Davis, Procurement Analyst, at 202–219–0202 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2005–91, FAR Case 2016–009.

SUPPLEMENTARY INFORMATION:

I. Background

Ukraine and Moldova recently became parties to the WTO GPA on May 18, 2016, and July 14, 2016, respectively. The Trade Agreements Act (19 U.S.C. 2501 *et seq.*) provides the authority for the President to waive the Buy American statute and other discriminatory provisions for eligible products from countries that have signed an international trade agreement with the United States (such as the WTO GPA). The President has delegated this authority to the U.S. Trade Representative.

The U.S. Trade Representative has determined that Ukraine and Moldova will provide appropriate reciprocal competitive Government procurement opportunities to United States products and services. The U.S. Trade Representative published notices in the **Federal Register** waiving the Buy American statute and other discriminatory provisions for eligible products from Ukraine at 81 FR 31292 on May 18, 2016, and Moldova at 81 FR 50045 on July 29, 2016.

II. Discussion and Analysis

Therefore, this rule adds Ukraine and Moldova to the list of WTO GPA countries wherever it appears in the FAR, whether as a separate definition, part of the definition of "designated country" or "Recovery Act designated country," or as part of the list of countries exempt from the prohibition of acquisition of products produced by forced or indentured child labor (FAR 22.1503, 25.003, 52.222–19, 52.225–5, 52.225–11, and 52.225–23).

Conforming changes are made to FAR 52.212–5, Contract Terms and Conditions Required to Implement Statute or Executive Orders—Commercial Items, and 52.213–4, Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

III. Publication of This Final Rule for Public Comment Is Not Required by Statute

"Publication of proposed regulations," 41 U.S.C. 1707, is the statute that applies to the publication of the Federal Acquisition Regulation. Paragraph (a)(1) of the statute requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because it has no significant cost or administrative impact on contractors or offerors. It is just updating the lists of designated countries, in order to conform to the determinations by the U.S. Trade Representative.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant FAR revision within the meaning of FAR 1.501–1 and 41 U.S.C. 1707 and does not require publication for public comment.

VI. Paperwork Reduction Act

The Paperwork Reduction Act does apply, because the rule affects the response of an offeror that is offering a product of Ukraine or Moldova to the information collection requirements in the provisions at FAR 52.212–3(g)(5), 52.225–6, and 52.225–11. The offeror no longer needs to list a product from Ukraine or Moldova under "other end products," because Ukraine and Moldova are now designated countries. These information collection requirements are currently approved under OMB Control Numbers 9000–0025, titled: Trade Agreements Certificate; 9000–0136, titled: Commercial Item Acquisitions; and 9000–0141, Buy American—Construction, respectively. The impact, however, is negligible.

List of Subjects in 48 CFR Parts 22, 25, and 52

Government procurement.

Dated: September 19, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 22, 25, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 22, 25, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.1503 [Amended]

■ 2. Amend section 22.1503 by removing from paragraph (b)(4) "Malta," and "Taiwan," and adding "Malta, Moldova," and "Taiwan, Ukraine," in their places, respectively.

PART 25—FOREIGN ACQUISITION

25.003 [Amended]

■ 3. Amend section 25.003 by—

■ a. Removing from the definition "Designated country", paragraph (1), the words "Malta," and "Matsu" (Chinese Taipei))" and adding "Malta, Moldova," and "Matsu (Chinese Taipei)"), Ukraine," in their places, respectively; and

■ b. Removing from the definition "World Trade Organization Government Procurement Agreement (WTO GPA) country" "Malta," and "Taiwan," and adding the words "Malta, Moldova," and "Taiwan, Ukraine," in their places, respectively.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 52.212–5 by revising the date of the clause and paragraphs (b)(26) and (49) to read as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (Oct 2016)

* * * * *

(b) * * *

____ (26) 52.222–19, Child Labor—Cooperation with Authorities and Remedies (Oct 2016) (E.O. 13126).

* * * * *

____ (49) 52.225–5, Trade Agreements (Oct 2016) (19 U.S.C. 2501, *et seq.*, 19 U.S.C. 3301 note).

* * * * *

■ 5. Amend section 52.213–4 by revising the date of the clause and paragraph (b)(1)(ii) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (Oct 2016)

* * * * *

(b) * * *

(1) * * *

(ii) 52.222–19, Child Labor—Cooperation with Authorities and Remedies (Oct 2016) (E.O. 13126). (Applies to contracts for supplies exceeding the micro-purchase threshold).

* * * * *

■ 6. Amend section 52.222–19 by—

■ a. Revising the date of the clause; and

■ b. Removing from paragraph (a)(4) "Malta," and "Taiwan," and adding "Malta, Moldova," and "Taiwan, Ukraine," in their places, respectively.

The revision reads as follows:

52.222–19 Child Labor—Cooperation with Authorities and Remedies.

* * * * *

Child Labor—Cooperation with Authorities and Remedies (Oct 2016)

* * * * *

■ 7. Amend section 52.225–5 by—

■ a. Revising the date of the clause; and

■ b. Removing from paragraph (a), in the definition "Designated country" paragraph (1), the words "Malta," and "Matsu (Chinese Taipei)")," and adding "Malta, Moldova," and "Matsu (Chinese Taipei)"), Ukraine," in their places, respectively.

The revision reads as follows:

52.225–5 Trade Agreements.

* * * * *

Trade Agreements (Oct 2016)

* * * * *

■ 8. Amend section 52.225–11 by—

■ a. Revising the date of the clause; and

■ b. Removing from paragraph (a), in the definition "Designated country", paragraph (1) the words "Malta," and "Taiwan," and adding "Malta, Moldova," and "Taiwan, Ukraine," in their places, respectively.

The revision reads as follows:

52.225–11 Buy American Act—Construction Materials under Trade Agreements.

* * * * *

Buy American Act—Construction Materials Under Trade Agreements (Oct 2016)

* * * * *

■ 9. Amend section 52.225–23 by—

■ a. Revising the date of the clause; and

■ b. Removing from paragraph (a), in the definition “Designated country”, paragraph (1) the words “Malta,” and “Taiwan,” and adding “Malta, Moldova,” and “Taiwan, Ukraine,” in their places, respectively; and

■ c. Removing from paragraph (a), in the definition “Recovery Act designated country”, paragraph (1) the words “Malta,” and “Taiwan,” and adding “Malta, Moldova,” and “Taiwan, Ukraine,” in their places, respectively.

The revision reads as follows:

52.225–23 Required Use of American Iron, Steel, and Manufactured Goods—Buy American Statute—Construction Materials Under Trade Agreements.

* * * * *

Required Use of American Iron, Steel, and Manufactured Goods—Buy American Statute—Construction Materials Under Trade Agreements (Oct 2016)

* * * * *

[FR Doc. 2016–23202 Filed 9–29–16; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 25 and 52

[FAC 2005–91; FAR Case 2014–018; Item IX; Docket No. 2014–0018, Sequence No. 1]

RIN 9000–AN07

Federal Acquisition Regulation: Contractors Performing Private Security Functions

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to remove the DoD-unique requirements for contractors performing private security functions outside the United States and provide a definition of “full cooperation” within the associated clause.

DATES: *Effective:* October 31, 2016.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–91, FAR Case 2014–018.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 80 FR 30202 on May 27, 2015, to implement section 862 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008 (Pub. L. 110–181) (as amended by other NDAAs, see 10 U.S.C. 2302 Note). This rule amends FAR 25.302, Contractors performing private security functions outside the United States, and the associated clause at 52.225–26 to remove the DoD-unique requirements, which were incorporated in the Defense Federal Acquisition Regulation Supplement (DFARS) on June 30, 2016 (81 FR 42559). This rule also adds the definition of “full cooperation” to FAR clause 52.225–26 in order to affirm that the contract clause does not foreclose any contractor rights arising in law, the FAR, or the terms of the contract when cooperating with any Government-authorized investigation into incidents reported pursuant to the clause.

One respondent submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comment in the development of the final rule.

A. Summary of Significant Changes

There were no changes made to the rule as a result of the one comment received. There were no comments on the Regulatory Flexibility Analysis.

B. Analysis of Public Comments

A discussion of the comment follows:

Employing quasi-military armed forces:

Comment: The respondent did not comment on any of the proposed changes in the proposed rule. The respondent commented on the alleged employment of mercenaries by contractors performing private security functions overseas and further stated that this is prohibited as codified at 5 U.S.C. 3181. The respondent recommended a change to the FAR to make it clear that the U.S. Government will not employ mercenaries.

Response: The respondent's comments are not within the scope of this rule.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

> The objective of this rule is to amend FAR 25.302, Contractors performing private security functions outside the United States, and the associated clause at 52.225–26 to remove the DoD-unique requirements, which will be incorporated in the Defense Federal Acquisition Regulation Supplement (DFARS). The rule also adds a definition of “full cooperation” to FAR clause 52.225–26 in order to affirm that the contract clause does not foreclose any contractor rights arising in law, the FAR, or the terms of the contract when cooperating with any Government-authorized investigation into incidents reported pursuant to the clause.
>
> No comments were received from the public relative to the initial regulatory flexibility analysis.
>
> DoD, GSA, and NASA do not expect this final rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Based on data available in the Federal Procurement Data System (FPDS), DoD awarded 403 contracts in FY 2013 in support of a designated contingency operation outside of the United States, of which 63 contracts (15.6 percent) were awarded to small businesses. Therefore, it is estimated that this rule will apply to approximately 63 small businesses.
>
> This rule does not create any new reporting, recordkeeping, or other compliance requirements.
>
> There are no known significant alternatives to the rule. The impact of this rule on small business is not expected to be significant because it is removing DoD-unique requirements from the FAR, to be incorporated in the DFARS.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the

Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

This rule does not affect the information collection requirements in FAR clause 52.225–26, currently approved under OMB Control Number 9000–0184, titled: Contractors Performing Private Security Functions Outside the United States, in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35). The estimated total annual public hour and cost burden in OMB control number 9000–0184 was calculated based on data for the contracts and subcontracts of non-DoD agencies, because DoD's information collection was previously approved under OMB control number 0704–0460. Therefore, removing the DoD-unique requirements from the FAR does not impact the approved estimates for OMB clearance 9000–0184.

List of Subject in 48 CFR Parts 25 and 52

Government procurement.

Dated: September 19, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 25 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 25 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 25—FOREIGN ACQUISITION

25.302–2 [Amended]

■ 2. Amend section 25.302–2 by removing from the definition "Other significant military operations" the phrase "(see 25.302–3(b)(2))." and adding "(see 25.302–3(a)(2))." in its place.

■ 3. Amend section 25.302–3 by—
■ a. Revising paragraph (a);
■ b. Removing paragraph (b); and
■ c. Redesignating paragraphs (c) through (e) as paragraphs (b) through (d), respectively.

The revision reads as follows:

25.302–3 Applicability.

(a) This section applies to contracts that require performance outside the United States—

(1) In an area of combat operations as designated by the Secretary of Defense; or

(2) In an area of other significant military operations as designated by the Secretary of Defense, and only upon agreement of the Secretary of Defense and the Secretary of State.

* * * * *

25.302–4 [Amended]

■ 4. Amend section 25.302–4 by—
■ a. Removing from paragraph (a)(1) "(PSCs) Operating in Contingency Operations, Combat Operations, or Other Significant Military Operations" and adding "Operating in Contingency Operations" in its place; and
■ b. Removing from paragraph (a)(2) "to cooperate" and adding "to fully cooperate" in its place.

■ 5. Amend section 25.302–6 by revising paragraph (a) to read as follows:

25.302–6 Contract clause.

(a) Use the clause at 52.225–26, Contractors Performing Private Security Functions Outside the United States, in solicitations and contracts for performance outside the United States in an area of—

(1) Combat operations, as designated by the Secretary of Defense; or

(2) Other significant military operations, as designated by the Secretary of Defense and only upon agreement of the Secretary of Defense and the Secretary of State.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Amend section 52.212–5 by—
■ a. Revising the date of the clause, paragraphs (b)(51) and (e)(1)(xviii); and
■ b. Amending Alternate II by—
■ 1. Revising the date of Alternate II;
■ 2. Redesignating paragraphs (e)(1)(ii)(O) through (R) as paragraphs (e)(1)(ii)(P) through (S), respectively; and
■ 3. Adding a new paragraph (e)(1)(ii)(T).

The revisions read as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (Oct 2016)

* * * * *

(b) * * *

__ (51) 52.225–26, Contractors Performing Private Security Functions Outside the United States (Oct 2016) (Section 862, as amended, of the National Defense Authorization Act for Fiscal Year 2008; 10 U.S.C. 2302 Note).

* * * * *

(e)(1) * * *

(xviii) 52.225–26, Contractors Performing Private Security Functions Outside the United States (Oct 2016) (Section 862, as amended, of the National Defense Authorization Act for Fiscal Year 2008; 10 U.S.C. 2302 Note).

* * * * *

Alternate II (Oct 2016). * * *

* * * * *

(e)(1) * * *

(ii) * * *

(T) 52.225–26, Contractors Performing Private Security Functions Outside the United States (Oct 2016) (Section 862, as amended, of the National Defense Authorization Act for Fiscal Year 2008; 10 U.S.C. 2302 Note).

* * * * *

■ 7. Amend section 52.213–4 by revising the date of the clause and paragraph (a)(2)(viii) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (Oct 2016)

* * * * *

(a) * * *

(2) * * *

(viii) 52.244–6, Subcontracts for Commercial Items (Oct 2016).

* * * * *

■ 8. Amend section 52.225–26 by—
■ a. Revising the introductory text and the date of the clause;
■ b. Revising the introductory text of paragraph (a); and adding in alphabetical order, the definitions "Area of combat operations", "Full cooperation", and "Other significant military operations";
■ c. Revising paragraph (b);
■ d. Removing from paragraph (c)(2)(i) "(PSCs) Operating in Contingency Operations, Combat Operations, or Other Significant Military Operations" and adding "Operating in Contingency Operations" in its place;
■ e. Removing from paragraph (c)(3) "Cooperate" and adding "Provide full cooperation" in its place; and
■ f. Revising paragraph (f).

The revisions read as follows:

52.225–26 Contractors Performing Private Security Functions Outside the United States.

As prescribed in 25.302–6, insert the following clause:

Contractors Performing Private Security Functions Outside the United States (Oct 2016)

(a) *Definitions.* As used in this clause—

Area of combat operations means an area of operations designated as such by the Secretary of Defense when enhanced coordination of contractors performing private security functions working for Government agencies is required.

Full cooperation—

(1) Means disclosure to the Government of the information sufficient to identify the nature and extent of the incident and the individuals responsible for the conduct. It includes providing timely and complete responses to Government auditors' and investigators' requests for documents and access to employees with information;

(2) Does not foreclose any Contractor rights arising in law, the FAR, or the terms of the contract. It does not require—

(i) The Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or

(ii) Any officer, director, owner, or employee of the Contractor, including a sole proprietor, to waive his or her attorney-client privilege or Fifth Amendment rights; and

(3) Does not restrict the Contractor from—

(i) Conducting an internal investigation; or

(ii) Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.

Other significant military operations means activities, other than combat operations, as part of a contingency operation outside the United States that is carried out by United States Armed Forces in an uncontrolled or unpredictable high-threat environment where personnel performing security functions may be called upon to use deadly force.

* * * * *

(b) *Applicability.* If this contract is performed both in a designated area and in an area that is not designated, the clause only applies to performance in the following designated areas—

(1) Combat operations, as designated by the Secretary of Defense; or

(2) Other significant military operations, as designated by the Secretary of Defense, and only upon agreement of the Secretary of Defense and the Secretary of State.

* * * * *

(f) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (f), in all subcontracts that will be performed outside the United States in areas of—

(1) Combat operations, as designated by the Secretary of Defense; or

(2) Other significant military operations, upon agreement of the Secretaries of Defense and State that the clause applies in that area.

* * * * *

■ 9. Amend section 52.244–6 by revising the date of the clause and paragraph (c)(1)(xv) to read as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (Oct 2016)

* * * * *

(c) * * *

(1) * * *

(xv) 52.225–26, Contractors Performing Private Security Functions Outside the United States (Oct 2016) (Section 862, as amended, of the National Defense Authorization Act for Fiscal Year 2008; 10 U.S.C. 2302 Note).

[FR Doc. 2016–23203 Filed 9–29–16; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 31

[FAC 2005–91; FAR Case 2014–012; Item X; Docket No. 2014–0012; Sequence No. 1]

RIN 9000–AM75

Federal Acquisition Regulation: Limitation on Allowable Government Contractor Employee Compensation Costs

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA and NASA are adopting as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement a section of the Bipartisan Budget Act of 2013. The final rule revises the allowable cost limit relative to the compensation of contractor and subcontractor employees. Also, this final rule implements the narrowly targeted exception to this allowable cost limit for scientists, engineers, or other specialists upon an agency determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and capabilities.

DATES: *Effective:* September 30, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Kathlyn J. Hopkins, Procurement Analyst, at 202–969–7226, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2005–91, FAR Case 2014–012.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 79 FR 35865 on June 24, 2014, to implement section 702 of The Bipartisan Budget Act of 2013 (Pub. L. 113–67), which amended the allowable cost limits of contractor and subcontractor employee compensation. Specifically, section 702 revised the application of the compensation cap, the amount of the cap, and the associated formula for annually adjusting it. The existing formula for determining the limit on the allowability of contractor and subcontractor employee compensation costs under 41 U.S.C. 1127 was repealed for contracts awarded on or after June 24, 2014. Section 702 of the law set the initial limitation on allowable contractor and subcontractor employee compensation costs at $487,000 per year, which will be adjusted annually to reflect the change in the Employment Cost Index for all workers as calculated by the Bureau of Labor Statistics. This final rule also implements the authority provided by 10 U.S.C. 2324(e)(1)(P) and 41 U.S.C. 4304(a)(16), as amended by section 702(a), in which Congress has authorized the heads of Executive agencies to establish "one or more narrowly targeted exceptions for scientists, engineers, or other specialists upon a determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and capabilities."

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments is provided as follows:

A. Summary of Significant Changes

This final rule adopts the interim rule with four changes for clarification.

- The first clarification entails the addition of a table to FAR 31.205–6(p) that summarizes the applicability dates contained in this FAR section.
- The second clarification concerns the reorganization of the FAR text. Existing FAR paragraph 31.205–6(p)(4) has become new paragraph (p)(1), with existing paragraph (p)(1) becoming new paragraph (p)(2). Existing FAR paragraphs 31.205–6(p)(2) and (p)(3) have become new paragraphs (p)(3) and (p)(4), respectively.
- The third clarification entails the removal of the following redundant FAR 31.205–6 text:
  - ○ Paragraph (p)(2)(ii) text "Costs incurred after January 1, 1998."
  - ○ Paragraph (p)(3)(ii) text "Costs incurred after January 1, 2012."
  - ○ Paragraph (p)(4)(ii) text "Costs incurred on or after June 24, 2014."
- The fourth clarification entails reference links in paragraphs (p)(2) and (p)(3) (see *https://www.whitehouse.gov/omb/procurement_index_exec_comp/*)

and another reference link in paragraph (p)(4) (see *http://www.whitehouse.gov/omb/procurement/cecp*). Additionally, some statutory references and explanatory text were added in FAR paragraphs 31.205–6(p)(3) and (p)(4).

B. Analysis of Public Comments

The Regulatory Secretariat Division received responses from three respondents to the interim rule, which are discussed below:

1. Support for the Rule

Comment: One respondent strongly supported the interim rule and applauded the FAR issuing agencies for meeting the statutory deadline for issuance of this rule.

Response: The Government notes the public support for this rule.

2. Application of Rule to Nonprofit Organizations

Comment: One respondent stated that the rule only referenced FAR 31.205–6. Respondent questioned whether this means that the new compensation cap will only apply to contractors or subcontractors that follow this FAR section; would a nonprofit organization that complies with FAR subpart 31.7 be exempt from the compensation cap; or will FAR subpart 31.7 be amended as well.

Response: A nonprofit organization that complies with FAR subpart 31.7 is not exempt from the compensation cap in this rule. Previously, FAR 31.702 referenced the Office of Management and Budget (OMB) Circular Number A–122, Cost Principles for Non-Profit Organizations. The recent FAR case 2014–023 updated the reference from OMB Circular A–122 to the revised OMB Uniform Guidance at 2 CFR 200, subpart E, and applicable appendices, as in effect on the date of the contract, which references the statutory compensation ceilings. These cost principles reference the compensation cap contained in this FAR rule.

3. Retroactive Application of Rule Not Appropriate

Comment: The interim rule stated that the revised compensation cap "will apply to the costs of compensation for all contractor and subcontractor employees for contracts awarded, and cost incurred, on or after June 24, 2014." One respondent stated that reading this sentence literally, the interim rule provides that all executive compensation costs are subject to the revised cap no matter when the contracts to which such costs are allocated were awarded which makes application of the rule retroactive which is inappropriate.

Response: The rule applies to costs incurred on contracts awarded on or after June 24, 2014, and does not apply retroactively to contracts awarded before June 24, 2014. For further clarification, Table 31.1 has been added as a summary of the applicability of the three compensation caps.

4. Application of Rule to Fixed-Price Contracts

Comment: One respondent requested that specific preamble language be included in the final rule that reinforces the existing FAR part 31 language which specifies the application of the cost principles to fixed-price contracts whenever cost analysis is performed. Respondent also stated that by allowing fixed-price contracts that are subject to cost analysis to evade this compensation cap defeats Congressional intent and costs taxpayers significantly.

Response: The reinforcement of this existing FAR part 31 language is unnecessary. This FAR rule revises FAR 31.205–6 specifically regarding the allowability of executive compensation. Other FAR cost principle sections such as 31.102 remain unchanged in their application and use, including when the cost principles are applicable to fixed-price contracts.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

> DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* because, an analysis of data in the Federal Procurement Data System (FPDS) revealed that most contracts awarded to small entities are awarded on a fixed-price basis, and do not require application of the cost principle contained in this rule.
>
> The rule imposes no reporting, recordkeeping, or other information collection requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules, and there are no known significant alternatives to the rule.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Act (44 U.S.C. chapter 35).

List of Subject in 48 CFR Part 31

Government procurement.

Dated: September 19, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Interim Rule Adopted As Final With Changes

■ Accordingly, the interim rule amending 48 CFR part 31 which was published in the **Federal Register** at 79 FR 35865 on June 24, 2014, is adopted as a final rule with the following changes:

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

■ 1. The authority citation for 48 CFR part 31 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

■ 2. Amend section 31.205–6 by revising paragraph (p) to read as follows:

31.205–6 Compensation for personal services.

* * * * *

(p) *Limitation on allowability of compensation.*

TABLE 31–1—EMPLOYEE COMPENSATION LIMITS

Contract award date	Applicable agencies	Covered employees	31.205–6
Before June 24, 2014	Executive Agencies Other than DoD, NASA and Coast Guard.	Senior Executive	(p)(2).
Before December 31, 2011	DoD, NASA and Coast Guard	Senior Executive	(p)(2).
On/after December 31, 2011, and before June 24, 2014.	DoD, NASA, and Coast Guard	All Employees	(p)(3).
On/after June 24, 2014	All Executive Agencies	All Employees	(p)(4).

(1) *Definitions.* As used in this paragraph (p)—

(i) *Compensation* means the total amount of wages, salary, bonuses, deferred compensation (see paragraph (k) of this subsection), and employer contributions to defined contribution pension plans (see paragraphs (j)(4) and (q) of this subsection), for the fiscal year, whether paid, earned, or otherwise accruing, as recorded in the contractor's cost accounting records for the fiscal year.

(ii) *Senior executive* means—

(A) Prior to January 2, 1999—

(*1*) The Chief Executive Officer (CEO) or any individual acting in a similar capacity at the contractor's headquarters;

(*2*) The four most highly compensated employees in management positions at the contractor's headquarters, other than the CEO; and

(*3*) If the contractor has intermediate home offices or segments that report directly to the contractor's headquarters, the five most highly compensated employees in management positions at each such intermediate home office or segment.

(B) Effective January 2, 1999, the five most highly compensated employees in management positions at each home office and each segment of the contractor, whether or not the home office or segment reports directly to the contractor's headquarters.

(iii) *Fiscal year* means the fiscal year established by the contractor for accounting purposes.

(iv) *Contractor's headquarters* means the highest organizational level from which executive compensation costs are allocated to Government contracts.

(2) *Senior executive compensation limit for contracts awarded before June 24, 2014*—(i) *Applicability.* This paragraph (p)(2) applies to the following:

(A) To all executive agencies, other than DoD, NASA and the Coast Guard, for contracts awarded before June 24, 2014;

(B) To DoD, NASA, and the Coast Guard for contracts awarded before December 31, 2011;

(ii) Costs incurred after January 1, 1998, for the compensation of a senior executive in excess of the benchmark compensation amount determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy (OFPP), under 41 U.S.C. 1127 as in effect prior to June 24, 2014, are unallowable (10 U.S.C. 2324(e)(1)(P) and 41 U.S.C. 4304(a)(16), as in effect prior to June 24, 2014). This limitation is the sole statutory limitation on allowable senior executive compensation costs incurred after January 1, 1998, under contracts awarded before June 24, 2014, and applies whether or not the affected contracts were previously subject to a statutory limitation on such costs. (Note that pursuant to section 804 of Pub. L. 105–261, the definition of "senior executive" in paragraph (p)(1) of this section has been changed for compensation costs incurred after January 1, 1999.) See *https://www.whitehouse.gov/omb/procurement_index_exec_comp/.*

(3) All employee compensation limit for contracts awarded before June 24, 2014.

(i) *Applicability.* This paragraph (p)(3) applies to DOD, NASA, and the Coast Guard for contracts awarded on or after December 31, 2011, and before June 24, 2014.

(ii) Costs incurred after January 1, 2012, for the compensation of any contractor employee in excess of the benchmark compensation amount, determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy (OFPP) under 41 U.S.C. 1127 as in effect prior to June 24, 2014 are unallowable (10 U.S.C. 2324(e)(1)(P) as in effect prior to June 24, 2014.) This limitation is the sole statutory limitation on allowable employee compensation costs incurred after January 1, 2012, under contracts awarded on or after December 31, 2011 and before June 24, 2014. (Note that pursuant to section 803 of Pub. L. 112–81, 10 U.S.C. 2324, Allowable costs under defense contracts, was amended by striking "senior executives" and inserting "any contractor employee", making unallowable the excess compensation costs incurred after January 1, 2012, under affected contracts.) See *https://www.whitehouse.gov/omb/procurement_index_exec_comp/.*

(4) All employee compensation limit for contracts awarded on or after June 24, 2014.

(i) *Applicability.* This paragraph (p)(4) applies to all executive agency contracts awarded on or after June 24, 2014, and any subcontracts thereunder.

(ii) Costs incurred on or after June 24, 2014, for the compensation of all employees in excess of the benchmark compensation amount determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy (OFPP) are unallowable under 10 U.S.C. 2324(e)(1)(P) and 41 U.S.C. 4304(a)(16), as in effect on or after June 24, 2014, pursuant to section 702 of Public Law 113–67. This limitation is the sole statutory limitation on allowable employee compensation costs incurred on or after June 24, 2014, under contracts awarded on or after June 24, 2014. See *http://www.whitehouse.gov/omb/procurement/cecp.*

(iii) *Exceptions.* An agency head may establish one or more narrowly targeted exceptions for scientists, engineers, or other specialists upon a determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and capabilities. In making such a determination, the agency shall consider, at a minimum, for each contractor employee in a narrowly targeted excepted position—

(A) The amount of taxpayer funded compensation to be received by each employee; and

(B) The duties and services performed by each employee.

[FR Doc. 2016–23204 Filed 9–29–16; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 4, 22, 23, 26, and 52

[FAC 2005–91; Item XI; Docket No. 2016–0052; Sequence No. 4]

Federal Acquisition Regulation; Technical Amendments

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: This document makes amendments to the Federal Acquisition Regulation (FAR) in order to make editorial changes.

DATES: *Effective:* September 30, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Hada Flowers, Regulatory Secretariat Division (MVCB), 1800 F Street NW., 2nd Floor, Washington, DC 20405, 202–501–4755. Please cite FAC 2005–91, Technical Amendments.

SUPPLEMENTARY INFORMATION: In order to update certain elements in 48 CFR parts 1, 4, 22, 23, 26, and 52 this document makes editorial changes to the FAR.

List of Subjects in 48 CFR Parts 1, 4, 22, 23, 26, and 52

Government procurement.

Dated: September 19, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 4, 22, 23, 26, and 52, as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 4, 22, 23, 26, and 52 continues to read as follow:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.603–1 [Amended]

■ 2. Amend section 1.603–1 by removing "41 U.S.C. 1702(b)(3)(F)" and adding "41 U.S.C. 1702(b)(3)(G)" in its place.

PART 4—ADMINISTRATIVE MATTERS

4.1400 [Amended]

■ 3. Amend section 4.1400 by removing "*http://usaspending.gov*" and adding "*https://www.usaspending.gov*" in its place.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.805 [Amended]

■ 4. Amend section 22.805 by removing from paragraph (a)(4)(i) *http://www.dol-esa.gov/preaward/*" and adding "*https://ofccp.dol-esa.gov/preaward/pa_reg.html*" in its place.

PART 23—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

23.704 [Amended]

■ 5. Amend section 23.704 by removing from paragraphs (b)(1)(iv) and (b)(2) "*www.epa.gov/epeat*" and adding "*https://www.epa.gov/greenerproducts/epas-recommendations-specifications-standards-and-ecolabels*" in its place.

PART 26—OTHER SOCIOECONOMIC PROGRAMS

■ 6. Amend section 26.103 by revising paragraph (b) to read as follows:

26.103 Procedures.

* * * * *

(b) In the event of a challenge to the representation of a subcontractor, the contracting officer shall refer the matter to the U.S. Department of the Interior, Bureau of Indian Affairs (BIA), Attn: Acquisition Management Director, 12220 Sunrise Valley Drive, Reston, VA 20191. The BIA will determine the eligibility and notify the contracting officer.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Amend section 52.234–1 by revising the section and clause headings and the definition "Title III project contractor" to read as follows:

52.234–1 Industrial Resources Developed Under Title III, Defense Production Act.

* * * * *

Industrial Resources Developed Under Title III, Defense Production Act (Sep 2016)

* * * * *

(a) *Definitions.*

* * * * *

Title III project contractor means a contractor that has received assistance for the development or manufacture of an industrial resource under Title III of Defense Production Act (50 U.S.C. App. 2091–2093).

* * * * *

[FR Doc. 2016–23205 Filed 9–29–16; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR 2016–0051, Sequence No. 5]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–91; Small Entity Compliance Guide

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of DOD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rules appearing in Federal Acquisition Circular (FAC) 2005–91, which amends the Federal Acquisition Regulation (FAR). An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2005–91, which precedes this document. These documents are also available via the Internet at *http://www.regulations.gov.*

DATES: September 30, 2016.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact the analyst whose name appears in the table below. Please cite FAC 2005–91 and the FAR case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755.

RULES LISTED IN FAC 2005–91

Item	Subject	FAR case	Analyst
*I	Prohibition on Contracting with Corporations with Delinquent Taxes or a Felony Conviction	2015–011	Davis.
*II	Updating Federal Contractor Reporting of Veterans' Employment	2015–036	Delgado.
*III	Non-Retaliation for Disclosure of Compensation Information (Interim)	2016–007	Delgado.
*IV	Sole Source Contracts for Women-Owned Small Businesses	2015–032	Uddowla.
*V	Unique Identification of Entities Receiving Federal Awards	2015–022	Delgado.
*VI	Consolidation and Bundling	2014–015	Uddowla.
VII	Amendment Relating to Multi-year Contract Authority for Acquisition of Property	2016–006	Jackson.
VIII	New Designated Countries—Ukraine and Moldova	2016–009	Davis.
*IX	Contractors Performing Private Security Functions	2014–018	Jackson.
*X	Limitation on Allowable Government Contractor Employee Compensation Costs	2014–012	Hopkins.
XI	Technical Amendments.		

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these rules, refer to the specific item numbers and subjects set forth in the documents following these item summaries. FAC 2005–91 amends the FAR as follows:

Item I—Prohibition on Contracting With Corporations With Delinquent Taxes or a Felony Conviction (FAR Case 2015–011)

DoD, GSA, and NASA are adopting as final, without change, an interim rule, which amended the FAR to implement sections of the Consolidated and Further Continuing Appropriations Act, 2015. The rule prohibits the Federal Government from entering into a contract with any corporation having a delinquent Federal tax liability or a felony conviction under any Federal law, unless the agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

This final rule will not have a significant economic impact on a substantial number of small entities.

Item II—Updating Federal Contractor Reporting of Veterans' Employment (FAR Case 2015–036)

DoD, GSA, and NASA are adopting as final, without change, an interim rule amending the FAR to implement a final rule issued by the Department of Labor's Veterans' Employment and Training Service (VETS) that revised the regulations at 41 CFR part 61 implementing the reporting requirements under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), as amended and the Jobs for Veterans Act (JVA) (Pub. L. 107–288). VEVRAA requires Federal contractors and subcontractors to annually report on the total number of their employees who belong to the categories of veterans protected under VEVRAA, as amended by the JVA, and the total number of those protected veterans who were hired during the period covered by the report. The VETS rule requires contractors and subcontractors to comply with its revised reporting requirements using the Form VETS–4212, in lieu of the VETS–100 and VETS–100A, beginning with the annual report filed in 2015.

There is no significant impact on small entities imposed by the FAR rule.

Item III—Non-Retaliation for Disclosure of Compensation Information (FAR Case 2016–007) (Interim)

DoD, GSA, and NASA are issuing an interim rule amending the FAR to implement Executive Order (E.O.) 13665, Non-Retaliation for Disclosure of Compensation Information, amending Executive Order 11246, Equal Opportunity in Federal Employment. The E.O. was signed April 8, 2014. The interim rule is also implementing the final rule issued by the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor (DOL) to implement the E.O. The DOL final rule was published in the **Federal Register** at 80 FR 54934, on September 11, 2015, entitled Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions.

E.O. 11246, originally issued September 24, 1965, establishes nondiscrimination and affirmative action obligations in employment for Federal contractors and subcontractors. It prohibits employment discrimination because of race, color, religion, sex, sexual orientation, gender identity, and national origin. E.O. 13665 amends E.O. 11246 and its Equal Opportunity Clause by incorporating, as a covered prohibition, discriminating against employees and job applicants who inquire about, discuss, or disclose the compensation of the employee or applicant or another employee or applicant. Federal contractors and subcontractors must disseminate this nondiscrimination provision, using language prescribed by the Director of OFCCP, including incorporating the provision into existing employee manuals or handbooks and posting it. There is no significant impact on small entities imposed by the FAR rule.

Item IV—Sole Source Contracts for Women-Owned Small Businesses (FAR Case 2015–032)

DoD, GSA, and NASA are adopting as final, with a minor edit, an interim rule that amends the FAR to implement regulatory changes made by the Small Business Administration (SBA) in its final rule as published in the **Federal Register** at 80 FR 55019, on September 14, 2015. SBA's final rule implements the statutory requirements of paragraph (a)(3) of section 825 of the Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, Public Law 113–291, which grants contracting officers the authority to award sole source contracts to economically disadvantaged women-owned small business (EDWOSB) concerns and to women-owned small business (WOSB) concerns eligible under the WOSB Program. The anticipated price, including options, must not exceed $6.5 million for manufacturing North American Industry Classification System (NAICS) codes, or $4 million for other NAICS codes.

This rule may have a positive economic impact on women-owned small businesses.

Item V—Unique Identification of Entities Receiving Federal Awards (FAR Case 2015–022)

DoD, GSA, and NASA are issuing a final rule amending the FAR to redesignate the terminology for unique identification of entities receiving Federal awards. The change to the FAR eliminates references to the proprietary Data Universal Numbering System (DUNS®) number, and provides appropriate references to the Web site where information on the unique entity identifier used for Federal contractors will be located. The Government does not intend to move away from the use of the DUNS® number in the short term. This final rule also establishes definitions of "unique entity identifier", and "electronic funds transfer (EFT) indicator". There is no significant impact on small entities imposed by the FAR rule.

Item VI—Consolidation and Bundling (FAR Case 2014–015)

This final rule incorporates regulatory changes made by the SBA in its final rule which published in the **Federal Register** at 78 FR 61113 on October 2, 2013, concerning consolidation and bundling. SBA's final rule implements sections 1312 and 1313 of the Small Business Jobs Act of 2010 (Pub. L. 111–240), as well as section 1671 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112–239). The FAR final rule adds coverage on consolidations and reorganizes coverage on bundling at FAR 7.107. Before conducting a consolidated acquisition estimated to exceed $2,000,000, the Senior Procurement Executive or Chief Acquisition Officer must make a written determination that the consolidation is necessary and justified. This rule may have a positive economic impact on any small business entity that participates in the Federal procurement arena.

Item VII—Amendment Relating to Multi-Year Contract Authority for Acquisition of Property (FAR Case 2016–006)

DoD, GSA, and NASA are amending FAR subpart 17.1 to implement section 811 of the NDAA for FY 2016 (Pub. L. 114–92). Section 811 amended subsection (a)(1) of 10 U.S.C. 2306b by striking "substantial" and inserting "significant". This rule makes conforming changes at FAR 17.105–1(b)(1) to state that the head of an agency may enter into a multi-year contract for supplies, if the use of such a contract will result in significant savings of the total estimated costs of carrying out the program through annual contracts. This change applies to the DoD, NASA, and the Coast Guard.

This final rule is not required to be published for public comment, because it addresses an internal decision by the contracting officer to enter into a multi-year contract for supplies if certain objects are met. These requirements affect only the internal operating procedures of the Government.

Item VIII—New Designated Country—Ukraine and Moldova (FAR Case 2016–009)

This final rule amends the FAR to add Ukraine and Moldova as new designated countries under the World Trade Organization Government Procurement Agreement (WTO GPA). This final rule has no significant impact on the Government and contractors, including small business entities.

Item IX—Contractors Performing Private Security Functions (FAR Case 2014–018)

This final rule amends FAR 25.302 and the clause at 52.225–26, both entitled "Contractors Performing Private Security Functions Outside the United States."

This rule removes the DoD-unique requirements, which have been incorporated in the Defense Federal Acquisition Regulations Supplement (DFARS). This rule also adds the definition of "full cooperation" to FAR clause 52.225–26 in order to affirm that the contract clause does not foreclose any contractor rights arising in law, the FAR, or the terms of the contract when cooperating with any Government-authorized investigation into incidents reported pursuant to the clause.

This rule will not create any new reporting, recordkeeping, or other compliance requirements. The impact of this rule on small business is not expected to be significant.

Item X—Limitation on Allowable Government Contractor Employee Compensation Costs (FAR Case 2014–012)

This final rule converts the interim rule published in the **Federal Register** at 79 FR 35865 on June 24, 2014 to a final rule with minor changes including a table summarizing the employee compensation limits and applicability dates is added at 31.205–6(p); several paragraphs are reorganized; redundant text is removed; reference links are added for clarity.

This final rule amends the Federal Acquisition Regulation (FAR) to implement section 702 of the Bipartisan Budget Act of 2013. Section 702 revises the allowable compensation cost limit for contractor and subcontractor employees to be $487,000, as adjusted annually to reflect the change in the Employment Cost Index for all workers as calculated by the Bureau of Labor Statistics. Also, section 702 allows for the narrowly targeted exceptions to this allowable cost limit for scientists, engineers or other specialists, upon an agency determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and capabilities.

Because most contracts awarded to small businesses use simplified acquisition procedures or are awarded on a competitive, fixed-price basis, the impact of this compensation limitation on small businesses will be minimal.

Item XI—Technical Amendments

Editorial changes are made at FAR 1.603–1, 4.1400, 22.805, 23.704, 26.103, and 52.234–1.

Dated: September 19, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2016–23209 Filed 9–29–16; 8:45 am]

BILLING CODE 6820–EP–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
1985

FEDERAL REGISTER

Vol. 81 Friday,
No. 190 September 30, 2016

Part V

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Endangered Status for 49 Species From the Hawaiian Islands; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R1–ES–2015–0125; 4500030113]

RIN 1018–BB07

Endangered and Threatened Wildlife and Plants; Endangered Status for 49 Species From the Hawaiian Islands

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine endangered status under the Endangered Species Act of 1973 (Act), as amended, for 10 animal species, including the Hawaii DPS of the band-rumped storm-petrel (*Oceanodroma castro*), the orangeblack Hawaiian damselfly (*Megalagrion xanthomelas*), the anchialine pool shrimp (*Procaris hawaiana*), and seven yellow-faced bees (*Hylaeus anthracinus, H. assimulans, H. facilis, H. hilaris, H. kuakea, H. longiceps,* and *H. mana*), and for 39 plant species from the Hawaiian Islands. This rule adds these species to the Federal Lists of Endangered and Threatened Wildlife and Plants.

DATES: This rule is effective October 31, 2016.

ADDRESSES: This final rule is available on the Internet at *http://www.regulations.gov* and at *http://www.fws.gov/pacificislands.* Comments and materials we received, as well as supporting documentation we used in preparing this rule, are available for public inspection at *http://www.regulations.gov,* or, by appointment, during normal business hours at: U.S. Fish and Wildlife Service, Pacific Islands Fish and Wildlife Office, 300 Ala Moana Boulevard, Honolulu, HI 96850; telephone 808–792–9400; or facsimile 808–792–9581.

FOR FURTHER INFORMATION CONTACT: Mary M. Abrams, Ph.D., Field Supervisor, Pacific Islands Fish and Wildlife Office, 300 Ala Moana Boulevard, Honolulu, HI 96850; telephone 808–792–9400; or facsimile 808–792–9581. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Endangered Species Act (Act), a species may warrant protection through listing if it is endangered or threatened throughout all or a significant portion of its range. Listing a species as an endangered or threatened species can only be completed by issuing a rule. Critical habitat is to be designated, to the maximum extent prudent and determinable, for any species determined to be an endangered or threatened species under the Act.

This rule makes final the listing of 10 animal species (the Hawaii DPS of the band-rumped storm-petrel (*Oceanodroma castro*), the orangeblack Hawaiian damselfly (*Megalagrion xanthomelas*), the anchialine pool shrimp (*Procaris hawaiana*), and seven yellow-faced bees (*Hylaeus anthracinus, H. assimulans, H. facilis, H. hilaris, H. kuakea, H. longiceps,* and *H. mana*)), and 39 plant species (*Asplenium diellaciniatum* (no common name, NCN), *Calamagrostis expansa* (Maui reedgrass), *Cyanea kauaulaensis* (NCN), *Cyclosorus boydiae* (kupukupu makalii), *Cyperus neokunthianus* (NCN), *Cyrtandra hematos* (haiwale), *Deparia kaalaana* (NCN), *Dryopteris glabra* var. *pusilla* (hohiu), *Exocarpos menziesii* (heau), *Festuca hawaiiensis* (NCN), *Gardenia remyi* (nanu), *Huperzia stemmermanniae* (NCN), *Hypolepis hawaiiensis* var. *mauiensis* (olua), *Joinvillea ascendens* ssp. *ascendens* (ohe), *Kadua fluviatilis* (kamapuaa), *Kadua haupuensis* (NCN), *Labordia lorenciana* (NCN), *Lepidium orbiculare* (anaunau), *Microlepia strigosa* var. *mauiensis* (NCN), *Myrsine fosbergii* (kolea), *Nothocestrum latifolium* (aiea), *Ochrosia haleakalae* (holei), *Phyllostegia brevidens* (NCN), *Phyllostegia helleri* (NCN), *Phyllostegia stachyoides* (NCN), *Portulaca villosa* (ihi), *Pritchardia bakeri* (Baker's loulu), *Pseudognaphalium sandwicensium* var. *molokaiense* (enaena), *Ranunculus hawaiensis* (makou), *Ranunculus mauiensis* (makou), *Sanicula sandwicensis* (NCN), *Santalum involutum* (iliahi), *Schiedea diffusa* ssp. *diffusa* (NCN), *Schiedea pubescens* (maolioli), *Sicyos lanceoloideus* (anunu), *Sicyos macrophyllus* (anunu), *Solanum nelsonii* (popolo), *Stenogyne kaalae* ssp. *sherffii* (NCN), and *Wikstroemia skottsbergiana* (akia), as endangered species.

Delineation of critical habitat requires identification of the physical or biological features essential to the species' conservation. A careful assessment of the biological needs of the species and the areas that may have the physical or biological features essential for the conservation of the species and that may require special management considerations or protections, and thus qualify for designation as critical habitat, is required. We require additional time to analyze the best available scientific data in order to identify specific areas appropriate for critical habitat designation and to analyze the impacts of designating such areas as critical habitat. Accordingly, we find designation of critical habitat to be "not determinable" at this time.

The basis for our action. Under the Act, we can determine that a species is an endangered or threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We have determined that these 49 species are experiencing population-level impacts as the result of the following current and ongoing threats:

- Habitat loss and degradation due to urbanization; nonnative feral ungulates (hoofed mammals, *e.g.,* pigs, goats, axis deer, black-tailed deer, mouflon, and cattle); nonnative plants; wildfire; and water extraction.
- Predation or herbivory by nonnative feral ungulates, rats, slugs, bullfrogs, Jackson's chameleons, ants, and wasps.
- Stochastic events such as landslides, flooding, drought, tsunami, and hurricanes.
- Human activities such as recreational use of anchialine pools, dumping of nonnative fish and trash into anchialine pools, and manmade structures and artificial lighting.
- Vulnerability to extinction due to small numbers of individuals and occurrences and lack of regeneration.
- Competition with nonnative plants and nonnative invertebrates.

Existing regulatory mechanisms and conservation efforts are not adequate to ameliorate the impacts of these threats on any of the 49 species such that listing is not warranted. Environmental effects from climate change are likely to exacerbate the impacts of these threats.

Peer review and public comment. We sought comments from independent specialists to ensure that our designation is based on scientifically sound data, assumptions, and analyses. We invited these peer reviewers to comment on our listing proposal. We also considered all comments and information we received during two comment periods, including at one public hearing.

Previous Federal Actions

Please refer to the proposed listing rule for the 49 species from the Hawaiian Islands (80 FR 58820; September 30, 2015) for a detailed description of previous Federal actions concerning these species.

Summary of Comments and Recommendations

On September 30, 2015, we published a proposed rule to list 49 species (39 plants and 9 animals) from the Hawaiian Islands as endangered throughout their ranges and the Hawaii population (distinct population segment (DPS)) of the band-rumped storm-petrel as endangered (80 FR 58820). The comment period for the proposed rule lasted 60 days, ending November 30, 2015 We published a public notice of the proposed rule in the local Honolulu Star Advertiser, West Hawaii Today, Hawaii Tribune-Herald, Molokai Dispatch, The Maui News, and The Garden Island newspapers at the beginning of the comment period. We received two requests for a public hearing. On January 22, 2016 (81 FR 3767), we reopened the comment period for an additional 30 days, ending on February 22, 2016, and we announced a public meeting and public hearing for the proposed rule. We again published a public notice in local newspapers and provided the public notice to local media. For both comment periods, we requested that all interested parties submit comments or information concerning the proposed listing of the 49 species. We contacted all appropriate State and Federal agencies, county governments, elected officials, scientific organizations, and other interested parties and invited them to comment. The public meeting and hearing were held in Hilo, Hawaii, on February 9, 2016.

During the comment periods, we received a total of 41 unique public comment letters (including comments received at the public hearing) on the proposed listing of the 49 species. Of the 41 commenters, 21 were peer reviewers, 3 were Federal agencies (Hawaii Volcanoes National Park, Haleakala National Park, and Kaloko-Honokohau and Puuhonua o Honaunau National Historical Parks (NHPs)), 4 were State of Hawaii agencies (Hawaii Department of Health, Hawaii Department of Land and Natural Resources Division of Aquatic Resources, Hawaii Division of Forestry and Wildlife, and Hawaii Department of Hawaiian Home Lands), and 13 were nongovernmental organizations or individuals (including those who provided comments or testimony at the public hearing). The National Park Service (NPS) provided new information about the numbers and range of species in this rule that occur on NPS lands, and about graduate research on the orangeblack Hawaiian damselfly. We appreciate the time and effort taken by all commenters to submit their views and information, and we have incorporated all substantive new information, *e.g.,* from the National Park Service, into this final rule. However, we received some comments from the public on the possible future designation of critical habitat and on a variety of other topics. To the extent that comments do not pertain to the proposed listing rule, we do not address them in this final rule. In this final rule, we address only those comments relevant to the listing of the 49 species from the Hawaiian Islands.

All substantive information related to the listing action provided during the comment periods has either been incorporated directly into this final rule, or is addressed below. For readers' convenience, we have combined similar comments into a single comment and response.

Peer Review

In accordance with our peer review policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we solicited expert opinions from 29 knowledgeable individuals with scientific expertise on one or more of the 49 Hawaiian Islands species, which include 39 plants, a seabird, a damselfly, an anchialine pool shrimp, and seven yellow-faced bees, and their habitats. This expertise also included familiarity with the geographic region in which these species occur and conservation biology principles. We received responses from 21 of these individuals. We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding the 49 species. Of these 21 peer reviewers, 18 provided comments or new information on one or more of the 49 species. Ten peer reviewers stated support for the proposed listing, and 11 were neutral regarding the proposed listing. These peer reviewers generally supported our methodology and conclusions. Peer reviewer comments are either addressed below or are incorporated into this final rule as appropriate.

(1) *Comment:* One peer reviewer stated that sea-level rise and coastal inundation collectively are also potential future threats to the welfare of *Procaris hawaiana,* because they may cause further loss of anchialine pool habitat.

Our Response: We have added sea-level rise and coastal inundation as threats to *P. hawaiana* and its habitat under the discussion in this rule titled "Climate Change" (*Factor E. Other Natural or Manmade Factors Affecting Their Continued Existence*).

(2) *Comment:* One peer reviewer stated that because sea-level rise could increase surface connectivity between currently isolated anchialine pools, invasion by nonnative fish would be exacerbated.

Our Response: In this rule, we have added surface connectivity to our summary description of the status and stressors to *P. hawaiana* as a factor likely to exacerbate the threat posed by nonnative fish to this species and its anchialine pool habitat (see *Anchialine pool shrimp* (Procaris hawaiana), under *Summary of Biological Status of the 49 Hawaiian Islands Species*).

(3) *Comment:* One peer reviewer recommended that the island of Lanai, and coastal habitat, be included as habitat for the band-rumped storm-petrel, as birds were observed during the breeding season transiting this habitat, which is conducive to nesting where crevices and ledges are numerous and can provide some protection from feral cats (*Felis catus*), goats (*Capra hircus*), and mouflon (*Ovis gmelini musimon*).

Our Response: We have added coastal habitat on Lanai in our description of habitat for the band-rumped storm-petrel in this final listing rule.

(4) *Comment:* One peer reviewer recommended that coastal habitat on leeward east Maui be included for the band-rumped storm-petrel, as remains of a chick were found there in 1999.

Our Response: We understand that coastal habitat on east Maui may be part of the species' historical range, but we have not added coastal areas on leeward east Maui as currently occupied habitat for the band-rumped storm-petrel in this final rule. Unlike coastal Lanai, in coastal areas on leeward east Maui, no indication of the species' presence or use of this habitat has been observed for 17 years.

(5) *Comment:* One peer reviewer stated that predation by bullfrogs (*Lithobates catesbeianus*) should be included as a threat to the orangeblack Hawaiian damselfly, and that impacts of backswimmers (Notonectidae family) and caddisflies (Trichoptera order) on the damselfly are speculative.

Our Response: We have included in this final rule that bullfrogs are a threat to the orangeblack Hawaiian damselfly, and clarified that the effects of predation by backswimmers and caddisflies are not well understood.

Comments From State Agencies

(6) *Comment:* The Hawaii Department of Land and Natural Resources' Division of Forestry and Wildlife did not comment in support of, or in opposition to, the proposed listing of the 49 species from the Hawaiian Islands. District botanists from Kauai, Oahu, Maui, and Hawaii Island provided plant species occurrence updates by island.

Our Response: We appreciate the information provided regarding the 49 plant species from the Hawaiian Islands, and have incorporated it into the Summary of Biological Status of the 49 Hawaiian Islands Species for the appropriate species in this final rule.

(7) *Comment:* The Hawaii Department of Health acknowledged that protecting wildlife and plants can often be important for human and environmental health. They further commented that managing and controlling wild ungulates is necessary for 95 percent of these proposed plant species, the orangeblack Hawaiian damselfly (*Megalagrion xanthomelas*), and the yellow-faced bees (*Hylaeus* spp.), but that it is also essential to preventing erosion, and, therefore, protecting water quality. Fire is a natural process that is now unnaturally frequent, intense, and destructive to the Hawaiian Islands, in part due to invasive grasses. Mitigating wildfires is essential to caring for 38 percent of the plant species, the damselfly, and yellow-faced bees, but it also limits the release of air pollutants that are known to be harmful to human health. Protection of coastal and wetland habitat such as that populated by the anchialine pool shrimp (*Procaris hawaiana*) limits further human pressures on our sensitive coastlines and aquatic environments.

Our Response: We agree that managing and controlling ungulates would provide significant conservation benefits to listed plant and animal species, and would also prevent erosion and protect water quality of the islands and near shore reefs. We also acknowledge that nonnative grasses contribute to the increase in numbers and intensity of wildfires in Hawaii. Protection of coastal habitat (through nonnative plant and ungulate control, and prevention of wildfires) would provide a conservation benefit to the anchialine pool shrimp, and to other species that depend on coastal habitat.

(8) *Comment:* The Hawaii Department of Land and Natural Resources Division of Aquatic Resources concurred that the information in the proposed rule for the anchialine pool shrimp, *Procaris hawaiana*, is the most accurate and up-to-date information available, and supported listing the species as endangered under the Act (16 U.S.C. 1531 *et seq.*).

Our Response: We appreciate this support for the proposed listing of the anchialine pool shrimp, *Procaris hawaiana*.

(9) *Comment:* The Department of Hawaiian Home Lands (DHHL) asked that the Secretary of the Interior consider the effects of designation of endangered species that may potentially have critical habitat on Hawaiian Home Lands in a similar manner to the effects such designation has on tribal lands, including the impact on tribal sovereignty. DHHL is aware that Secretarial Order 3206, issued in June 1997, establishes guidelines for the Service when dealing with Indian tribes relating to endangered species. Secretarial Order 3206 recognizes that, in order to respect the cultural and social aspects of Indian tribes, some environmental restrictions on Indian tribal lands are not appropriate, and it calls on the Service to preserve endangered species while respecting tribal authority over their own lands. While native Hawaiians are not an "Indian tribe" under the Order, DHHL's mission, to place native Hawaiians on its lands for residential, agricultural, and pastoral homesteading purposes, is analogous to the circumstances of Indian tribes. The Department also recommends that the Secretaries of the Interior and Commerce, in determining endangered species and critical habitat designations, consult directly with the Hawaiian Homes Commission, DHHL, Office of Native Hawaiian Relations, and beneficiaries of the Hawaiian Homes Commission Act to include native intelligence and knowledge on species, habitat, and place-based management and protection.

Our Response: In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations With Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems; to incorporate native intelligence and knowledge of species, habitat, and place-based management and protection; to acknowledge that tribal lands are not subject to the same controls as Federal public lands; to remain sensitive to Indian culture; and to make information available to tribes. In addition, a 2004 consolidated appropriations bill (Pub. L. 108–199, see section 148) established the Office of Native Hawaiian Relations within the Secretary of the Interior's Office, and its duties include effectuating and implementing the special legal relationship between the Native Hawaiian people and the United States, and fully integrating the principle and practice of meaningful, regular, and appropriate consultation with the Native Hawaiian people by assuring timely notification of and prior consultation with the Native Hawaiian people before any Federal agency takes any actions that may have the potential to significantly affect Native Hawaiian resources, rights, or lands. A 2011 memorandum of understanding (MOU) signed by the Department of the Interior states that "Federal agencies are required to consult with Native Hawaiian organizations before taking any action that may have the potential to significantly affect Native Hawaiian resources, rights, or lands." Although native Hawaiians are not technically a "recognized Federal tribe" as referenced in the above Executive and Secretarial Orders, we endeavor to fully engage and work directly with native Hawaiians as much as possible. At the time we published our proposed rule (80 FR 58820; September 30, 2015), we notified several Hawaiian organizations including the DHHL, Kamehameha Schools, the Office of Hawaiian Affairs, the Kahoolawe Island Reserve Commission (KIRC), and Kahea-The Hawaiian-Environmental Alliance. We contacted the Department of the Interior's Office of Native Hawaiian Relations on September 28, 2015, to inform them of our proposed listing action. We also conducted in-person meetings with staff of the Department of Hawaiian Home Lands, Kamehameha Schools, and KIRC. We considered all comments and recommendations provided by these organizations in developing this final listing rule. At the time we prepare a proposed critical habitat rule for these species, we will notify these groups and organizations, and carefully consider any comments and new information they provide regarding habitat for these species.

Public Comments

Seven public commenters supported listing of all 49 Hawaiian Islands species. Seven public commenters opposed the listing of the 49 Hawaiian Islands species, and one of these commenters supported the intent of listing but opposed designation of critical habitat on their lands.

(10) *Comment:* One commenter supported this rule because of the facts and analysis stated in the proposed rule. Two commenters stated that humans need to be a voice for plants and animals, and that this listing will positively impact the conservation of many animals and positively lead other conversations in the right direction.

Our Response: We appreciate the comments and believe that listing status will help provide conservation benefits to the species and their habitats.

(11) *Comment:* One commenter stated that the 49 species also play a pivotal role in promoting tourism and building the economy of Hawaii and that they deserve to be put onto the Lists of Endangered and Threatened Wildlife and Plants. Two commenters stated that listing these species will attract wildlife enthusiasts and nature lovers from all around the world, and their spending and tourism helps to build and maintain sources of revenue in Hawaii; most markets within the islands depend on the tourism dollars that wildlife attracts.

Our Response: We do not consider economic consequences in our decisions to list or not list species as endangered or threatened under the Act. Section 4(b)(1)(a) of the Act specifies that listing determinations be made "solely on the basis of the best scientific and commercial data available."

(12) *Comment:* One commenter stated that the potential negative impacts of listing to landowners is very small, as the vast majority of the habitat for these rare species occurs on State and Federal lands, or in private lands devoted to conservation.

Our Response: We agree that many of the 49 species occur or were known from State and Federal lands, or in undeveloped areas already dedicated to conservation. However, listing a species as endangered or threatened is based on the species' biological status; the development of a proposed rule for critical habitat for these species will be completed in a separate rule, and the effects of critical habitat on landowners will be analyzed upon preparation of that proposed rule.

(13) *Comment:* One commenter stated that island residents have entirely lost historical and cultural opportunities and rights as a result of species protection enforcement and that those in the field of endangered species protection have a single focus, with little or no concern for cultural and historical values. Another commenter stated that this listing would cause a further loss for the public of cultural, historical, and economic resources. A third commenter stated that native Hawaiian society believes they should be able to manage their people, land, and resources autonomously.

Our Response: Listing a species as endangered or threatened does not cause loss of historical and cultural opportunities; in fact, it highlights the need to protect the characteristics that are unique to the Hawaiian Islands. We acknowledge that some economic impacts are a possible consequence of listing a species under the Act; for example, there may be costs to the landowner associated with the development of a habitat conservation plan (HCP). In other cases, if the landowner does not acquire a permit for incidental take (for animals), the landowner may choose to forego certain activities on their property to avoid violating the Act, resulting in potential lost income. However, the Act does not provide for the consideration of such impacts when making a listing decision. Section 4(b)(1)(a) of the Act specifies that listing determinations be made "solely on the basis of the best scientific and commercial data available." The language provided by Congress in the Act thus precludes such costs from consideration in association with a listing determination. We work collaboratively with private landowners, and strongly encourage those with listed species on their property to work with us to develop incentive-based measures such as strategic habitat areas (SHAs) and HCPs, which have the potential to provide conservation measures that effect positive results for the species and their habitat while providing regulatory relief for landowners. The conservation and recovery of endangered and threatened species, especially of those in Hawaii that occur nowhere else in the world, and the ecosystems upon which they depend, is the ultimate objective of the Act, and the Service recognizes the vital importance of voluntary, nonregulatory conservation measures that provide incentives for landowners in achieving that objective. In regards to land management by native Hawaiians, see our response to *Comment* (9), above. The Act does provide for the consideration of potential economic impacts in the course of designating critical habitat (limited to activities that are funded, authorized, or carried out by a Federal agency), and that analysis will be conducted as we prepare a rule proposing critical habitat for the multi-island species.

(14) *Comment:* Four commenters were concerned that listing a species would entail removal of nonnative species with cultural significance, or removal of those used for food and sport hunting, and that control of nonnative ungulates would not be conducted humanely.

Our Response: Habitat destruction and modification by ungulates is a threat to 37 of the 39 plants, and to 9 of the 10 animals proposed for listing. Herbivory by ungulates is a threat to 27 of the 39 plants proposed for listing. Hawaii was inhabited as early as the 2nd century; therefore, hunting of game mammals is a relatively recent activity (Tomich 1986, p. 1). The first Polynesian settlers brought domestic pigs of southeast Asia (*Sus scrofa* or a species derived from *Sus scrofa vittatus*) with them that were small in size, domesticated, and allowed to run freely around habitations (Tomich 1986, p. 120). Cook brought English pigs on his first voyage to Hawaii and landed a boar and sow on Niihau in 1778 (Tomich 1986, p. 121). Goats and European boars were introduced and released (on Niihau in 1778) by ship captains with the intent of establishing feral populations of these animals to be an available food source in future visits to the islands. Cattle (*Bos taurus*) and domestic sheep (*Ovis aries*) were released in 1794, by Vancouver. Deer were released later; first, axis deer in 1867, and then mule deer (black-tailed deer) in 1961 (Tomich 1986, pp. 127, 133, 141, 150, 158). These ungulates multiplied rapidly, with immense negative impacts to native vegetation (Loope 1988, pp. 274–276). The need for control of feral cattle was recognized as early as 1918, by C.S. Judd (Tomich 1986, p. 146). The commenter may be referring to the Federal court order mandating the removal of sheep and goats for protection of the palila (*Loxioides bailleui*), an endangered bird endemic to Hawaii. Aerial hunting is an efficient control method and was chosen by the State to comply with this order. Carcasses taken during hunts (in both 2014 and 2015) were available to the permitted public for salvage (DLNR 2014, in litt.; DLNR 2015, in litt.). Aerial hunting is not conducted by the Service in Hawaii.

(15) *Comment:* One commenter stated that once species are listed for protection under the Act, there is no public recourse.

Our Response: There is public recourse after a rulemaking is published in the **Federal Register**. Under the Act, an interested person may petition to add a species to, or to remove a species from, either of the Lists of Endangered and Threatened Wildlife and Plants. Within 12 months of the petition, the Secretary will make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. Persons may also petition to designate or revise a critical habitat designation. Our petition regulations are set forth at 50 CFR 424.14.

(16) *Comment:* Two commenters expressed concern that the magnitude of the proposed listing rule and the subsequent designation of critical habitat will have negative effects on Hawaii's economy, property values, and land use.

Our Response: We understand there is confusion and concern about the effects of listing the 49 multi-island species. Listing provides certain protections to the species under the Act. Section 7 of the Act states that each Federal agency (through consultation) shall insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any endangered or threatened species. For endangered species of fish or wildlife, section 9 of the Act prohibits any person subject to the jurisdiction of the United States to import or export; "take" (defined as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt any of these actions) within the United States or the territorial sea of the United States; take upon the high seas; deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce. For endangered plants, section 9 of the Act prohibits any person subject to the jurisdiction of the United States to import or export; deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of a commercial activity; sell or offer for sale in interstate or foreign commerce; remove and reduce the species to possession from areas under Federal jurisdiction; maliciously damage or destroy any such species on areas under Federal jurisdiction; or remove, cut, dig up, or damage or destroy any species species in knowing violation of any State law or regulations or in the course of any violation of a State criminal trespass law. Section 10 of the Act provides for permitting of actions that may enhance the propagation or survival of the species, or that may "take" a species. We acknowledge that some economic impacts are a possible consequence of listing a species under the Act; for example, there may be costs to the landowner associated with the development of an HCP. In other cases, if the landowner does not acquire a permit for incidental take, the landowner may choose to forego certain activities on their property to avoid violating the Act, resulting in potential lost income. However, the statute does not provide for the consideration of such impacts when making a listing decision. Listing determinations are made "solely on the basis of the best scientific and commercial data available." This rule only lists the 49 species from the Hawaiian Islands; it does not designate critical habitat.

(17) *Comment:* Two commenters stated that listing species and designating critical habitat on private property in Hawaii will alienate ranchers, a group that can help with species and habitat conservation. The commenters state that conservation can best be achieved by cooperation and coordination with private landowners.

Our Response: This rule only addresses the listing of 49 species from the Hawaiian Islands and does not designate critical habitat. We agree that partnerships can provide benefits for listed species and their habitat through development of conservation plans and implementation of management actions.

(18) *Comment:* One commenter stated that the Service should include the public now, not after designating critical habitat, with outreach, public forums, presentations, and meetings on every island for community groups, industry and business groups, the Soil and Water Conservation Districts, the Farm Bureau, Hawaii Cattlemen's Council, and schools.

Our Response: As described above, the publication of the proposed listing rule did not include a critical habitat proposal. We opened a 60-day comment period on the proposed listing rule, obtained extensive peer review, published notices in numerous local newspapers, reopened the comment period, and held a public hearing and information meeting. We considered all comments we received in preparing this final listing rule, and this rule incorporates new, substantive information provided to us by commenters.

Summary of Changes From the Proposed Rule

In preparing this final rule, we reviewed and fully considered comments from the public and peer reviewers on the proposed rule, and incorporated the following substantive changes into this final rule. None of the new information we received changed our evaluation of the threats to these species or our determinations in this final rule that they are endangered.

(1) We made revisions to the demographic status or distribution of 31 species of plants, based on comments from peer reviewers, by correcting current locations or numbers of individuals for: *Asplenium diellaciniatum, Calamagrostis expansa, Cyanea kauaulaensis, Cyclosorus boydiae, Cyrtandra hematos, Dryopteris glabra* var. *pusilla, Exocarpos menziesii, Gardenia remyi, Huperzia stemmermanniae, Joinvillea ascendens* ssp. *ascendens, Kadua fluviatilis, Microlepia strigosa* var. *mauiensis, Myrsine fosbergii, Nothocestrum latifolium, Ochrosia haleakalae, Phyllostegia brevidens, P. helleri, P. stachyoides, Portulaca villosa, Pritchardia bakeri, Pseudognaphalium sandwicensium* var. *molokaiense, Ranunculus hawaiensis, R. mauiensis, Sanicula sandwicensis, Santalum involutum, Schiedea diffusa* ssp. *diffusa, S. pubescens, Sicyos lanceoloideus, S. macrophyllus, Stenogyne kaalae* ssp. *sherffii,* and *Wikstroemia skottsbergiana.*

(2) We made revisions to specific threats to 31 plant species, based on comments from peer reviewers, including: *Asplenium diellaciniatum, Calamagrostis expansa, Cyanea kauaulaensis, Cyclosorus boydiae, Cyperus neokunthianus, Cyrtandra hematos, Deparia kaalaana, Dryopteris glabra* var. *pusilla, Exocarpos menziesii, Huperzia stemmermanniae, Hypolepis hawaiiensis* var. *mauiensis, Joinvillea ascendens* ssp. *ascendens, Kadua fluviatilis, K. haupuensis, Labordia lorenciana, Lepidium orbiculare, Microlepia strigosa* var. *mauiensis, Myrsine fosbergii, Nothocestrum latifolium, Ochrosia haleakalae, Phyllostegia brevidens, P. helleri, P. stachyoides, Portulaca villosa, Sanicula sandwicensis, Santalum involutum, Schiedea diffusa* ssp. *diffusa, S. pubescens, Sicyos lanceoloideus, Solanum nelsonii,* and *Wikstroemia skottsbergiana.*

(3) We corrected the taxonomy for the nonnative plant, California grass, from *Brachiaria mutica* to *Urochloa mutica.*

(4) We added further references concerning genetic research that supports differences in populations of the band-rumped storm-petrel breeding in different oceans and archipelagos.

(5) We added additional information on current nesting sites of the band-rumped storm-petrel on Lehua Island, Kauai, Molokai (coastal), Lanai (coastal), Hawaii Island (Hawaii Volcanoes National Park), and subalpine habitat

(Hawaii Island), based on comments regarding audio detections.

(6) We added information regarding additional populations of the orangeblack Hawaiian damselfly on Hawaii Island.

(7) We added information on predation of the orangeblack Hawaiian damselfly by Jackson's chameleons, backswimmers, and bullfrogs as a threat, and predation by the black twig borer as a threat to *Labordia lorenciana* and *Nothocestrum latifolium.*

(8) We added competition with caddisflies for resources, prey, and space as a potential threat to the orangeblack Hawaiian damselfly.

(9) We made revisions to the demographic status or distribution of the yellow-faced bees *Hylaeus anthracinus, H. facilis,* and *H. longiceps.*

(10) We added tsunami as a threat to the yellow-faced bees that occur in coastal areas (*Hylaeus anthracinus, H. assimulans, H. facilis, H. hilaris,* and *H. longiceps*), and to *Solanum nelsonii,* also in coastal areas.

(11) We changed "Australian colletid" to "alien *Hylaeus"* bees, and included competition with sweat bees (*Lasioglossum* spp.) as a threat to the yellow-faced bees.

(12) We noted that transmission of diseases carried by nonnative insects through shared food sources could be a threat to the yellow-faced bees, but we have no specific evidence of this type of disease transmission.

(13) We added drought as a potential threat to all seven yellow-faced bees.

(14) We added infiltration of waste water, fertilizers, or pesticides resulting from development activities as a potential threat to the anchialine pool shrimp.

(15) We added sea-level rise and coastal inundation as a potential threat to *Solanum nelsonii,* as occurrences in low-lying coastal areas are at risk, and to the anchialine pool shrimp, as these events could increase connectivity of anchialine pools leading to further incursion by nonnative fish from one pool to another.

Background

Please refer to the proposed listing rule for the 49 species from the Hawaiian Islands (80 FR 58820; September 30, 2015), available at *http://www.regulations.gov* (see **ADDRESSES**), for the following information:

- For background information on the Hawaii Islands, see "The Hawaiian Islands" under **Background**;
- For ecosystem descriptions, see An Ecosystem-Based Approach To Assessing the Conservation Status of the 49 Species in the Hawaiian Islands;
- For detailed descriptions of the species and their taxonomy, see Description of the 49 Hawaiian Islands Species.

Hawaiian Islands Species Addressed in This Final Rule

Table 1A (plants) and Table 1B (animals), below, provide the common name, scientific name, and range (by Hawaiian Island) for the 49 species addressed in this final rule.

TABLE 1A—PLANT SPECIES LISTED AS ENDANGERED

Scientific name	Common name	Hawaiian Island
Plants		
Asplenium diellaciniatum	No common name (NCN)	Kauai.
Calamagrostis expansa	Maui reedgrass	Hawaii, Maui.
Cyanea kauaulaensis	NCN	Maui.
Cyclosorus boydiae	kupukupu makalii	Hawaii (H), Maui, Oahu.
Cyperus neokunthianus	NCN	Maui (H).
Cyrtandra hematos	haiwale	Molokai.
Deparia kaalaana	NCN	Hawaii (H), Maui, Kauai (H).
Dryopteris glabra var. *pusilla*	hohiu	Kauai.
Exocarpos menziesii	heau	Hawaii, Lanai (H).
Festuca hawaiiensis	NCN	Hawaii, Maui (H).
Gardenia remyi	nanu	Hawaii, Maui, Molokai, Kauai.
Huperzia stemmermanniae	NCN	Hawaii, Maui (H).
Hypolepis hawaiiensis var. *mauiensis*	olua	Maui.
Joinvillea ascendens ssp. *ascendens*	ohe	Hawaii, Maui, Molokai, Oahu, Kauai.
Kadua fluviatilis	kamapuaa	Oahu, Kauai.
Kadua haupuensis	NCN	Kauai (H).
Labordia lorenciana	NCN	Kauai.
Lepidium orbiculare	anaunau	Kauai.
Microlepia strigosa var. *mauiensis*	NCN	Hawaii, Maui, Oahu.
Myrsine fosbergii	kolea	Oahu, Kauai.
Nothocestrum latifolium	aiea	Maui, Lanai (H), Molokai, Oahu, Kauai (H).
Ochrosia haleakalae	holei	Hawaii, Maui.
Phyllostegia brevidens	NCN	Hawaii, Maui.
Phyllostegia helleri	NCN	Kauai.
Phyllostegia stachyoides	NCN	Hawaii (H), Maui, Molokai.
Portulaca villosa	ihi	Hawaii, Maui, Kahoolawe, Lanai (H), Molokai, Oahu (H), Kaula (H), Lehua (H), Nihoa (H).
Pritchardia bakeri	Baker's loulu	Oahu.
Pseudognaphalium sandwicensium var. *molokaiense*	enaena	Maui, Lanai (H), Molokai, Oahu (H).
Ranunculus hawaiensis	makou	Hawaii, Maui (H).
Ranunculus mauiensis	makou	Hawaii (H), Maui, Molokai (H), Oahu (H), Kauai.
Sanicula sandwicensis	NCN	Hawaii, Maui.
Santalum involutum	iliahi	Kauai.
Schiedea diffusa ssp. *diffusa*	NCN	Maui, Molokai (H).
Schiedea pubescens	maolioli	Maui, Lanai (H), Molokai.
Sicyos lanceoloideus	anunu	Oahu, Kauai.
Sicyos macrophyllus	anunu	Hawaii, Maui (H).
Solanum nelsonii	popolo	Hawaii, Maui (H), Molokai, Niihau (H), Pearl & Hermes, Kure, Midway, Laysan, Nihoa.
Stenogyne kaalae ssp. *sherffii*	NCN	Oahu (H).

TABLE 1A—PLANT SPECIES LISTED AS ENDANGERED—Continued

Scientific name	Common name	Hawaiian Island
Wikstroemia skottsbergiana	akia	Kauai.

(H) = historically known from island, but not observed in the past 20 years.

TABLE 1B—ANIMAL SPECIES LISTED AS ENDANGERED

Common name	Scientific name	Hawaiian Island
Animals		
Band-rumped storm-petrel	*Oceanodroma castro*	Hawaii, Maui, Kahoolawe, Lanai, Molokai (H), Oahu (H), Kauai, Lehua.
Yellow-faced bee	*Hylaeus anthracinus*	Hawaii, Maui, Kahoolawe, Lanai (H), Molokai, Oahu.
Yellow-faced bee	*Hylaeus assimulans*	Maui, Kahoolawe, Lanai, Oahu (H).
Yellow-faced bee	*Hylaeus facilis*	Maui (H), Lanai (H), Molokai, Oahu.
Yellow-faced bee	*Hylaeus hilaris*	Maui (H), Lanai (H), Molokai.
Yellow-faced bee	*Hylaeus kuakea*	Oahu.
Yellow-faced bee	*Hylaeus longiceps*	Maui, Lanai, Molokai, Oahu.
Yellow-faced bee	*Hylaeus mana*	Oahu.
Orangeblack Hawaiian damselfly	*Megalagrion xanthomelas*	Hawaii, Maui, Lanai, Molokai, Oahu, Kauai (H).
Anchialine pool shrimp	*Procaris hawaiana*	Hawaii, Maui.

(H) = Historically known from the island, but not observed in the last 20 years.

Summary of Biological Status of the 49 Hawaiian Islands Species

The Act directs us to determine whether any species is an endangered species or a threatened species because of any one of the factors listed in section 4(a)(1). We summarize, below, the biological condition of, and factors affecting, each of the 49 species and determine whether each species is endangered or threatened. The summaries below include only brief lists of factors affecting each species. Each of these factors is fully considered, in detail, in the subsequent section, Summary of Factors Affecting the 49 Species From the Hawaiian Islands.

Climate Change Vulnerability Assessment for the Hawaiian Plants

Twenty-seven of the plant species described below were evaluated for their vulnerability to climate change as part of a comprehensive vulnerability analysis of native Hawaiian plants, as indicated in Table 2 (Fortini *et al.* 2013, 134 pp.). This analysis used "climate envelopes" (geographic ranges encompassing suitable climate for each species, as defined by temperature and moisture (Fortini *et al.* 2013, p. 17)) developed from field records by Price *et al.* (2012) to project each species' potential range in the year 2100. The location and spatial extent of these future ranges, and their overlap with current ranges, allows calculation of a vulnerability score. Estimates of vulnerability based on climate-envelope modeling are conservative in that they do not take into account potential changes in interspecific interactions such as predation, disease, pollination, or competition. This study provides a landscape- or island-scale picture of potential climate-change vulnerability of Hawaiian plants; the results are less clear at finer spatial scales (Fortini *et al.* 2013, p. 42). However, all 27 of these plant species scored moderately or extremely vulnerable in the analysis because of their relative inability to exhibit the possible responses necessary for persistence under projected climate change (Fortini *et al.* 2013, 134 pp.). These responses include the migration response (dispersal and establishment in new areas beyond their current distribution), the microrefugia response (persistence in topographically complex areas that are less exposed), evolutionary adaptation response (morphological changes in response to the changing environment), and toleration response (adaptation to environmental changes through phenotypic plasticity). In the study, response probabilities ranged from 0 (not vulnerable at all) to 1.0 (extremely vulnerable; species likely to disappear or "wink out" by the year 2100) (Fortini *et al.* 2013, pp. 6–7). Many species found to be moderately vulnerable in this study, with scores of 0.5 or greater, already are listed as endangered; some already are extinct (Fortini *et al.* 2013, pp. 24, 93). Therefore, because the species in this rule were found by the Fortini *et al.* (2013) study to be moderately (0.5) to extremely (1.0) vulnerable, we deem the likelihood of their persistence to be low with the impacts of climate change in addition to other threats these species face. The environmental changes associated with climate change are likely to exacerbate these ongoing threats and further reduce the likelihood that these species will persist in the future.

Plants

Asplenium diellaciniatum (no common name, NCN), a terrestrial or epipetric (growing on rocks) fern in the spleenwort family (Aspleniaceae), is endemic to Kauai (Palmer 2003, p. 117). Little is known of the historical distribution of this species. It was described from a collection from "Halemanu," the Knudsen homestead area on western Kauai. Currently, this fern is found in montane mesic forest at Kawaiiki and Kaluahaulu Ridge (Palmer 2003, p. 117; HBMP 2010; Lorence *et al.* 2013, p. 167) in 3 occurrences, totaling approximately 100 individuals, 30 of which are in an ungulate exclosure (TNCH 2007; HBMP 2010; Lorence *et al.* 2013, p. 167; Wood 2013, in litt.; Plant Extinction Prevention Program (PEPP) 2014, pp. 33, 59; Kishida 2015, in litt.; Williams 2015, in litt.).

Feral pigs (*Sus scrofa*), goats (*Capra hircus*), and black-tailed deer (*Odocoileus hemionus columbianus*) modify and destroy the habitat of *Asplenium diellaciniatum* on Kauai, with evidence of the activities of these animals reported in the areas where *A. diellaciniatum* occurs (Service 1999, p. 72; HBMP 2010). Feral pigs, goats, and black-tailed deer also forage on *A. diellaciniatum.* Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt; Hawaii Administrative

Rule-Hawaii Department of Land and Natural Resources (HAR–DLNR) 2010, in litt.). Nonnative plants, such as *Adiantum hispidulum* (rough maidenhair fern), *Blechnum appendiculatum* (no common name), *Erigeron karvinskianus* (daisy fleabane), and *Rubus argutus* (prickly Florida blackberry), compete with *A. diellaciniatum,* modify and destroy native habitat, and displace native plant species by competing for water, nutrients, light, and space; they may also produce chemicals that inhibit growth of other plants (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 *in* Cuddihy and Stone 1990, p. 74; Williams 2015, in litt.). Additionally, the small number of individuals of *A. diellaciniatum* limits this species' ability to adapt to environmental change.

The remaining occurrences of *Asplenium diellaciniatum* are at risk; *A. diellaciniatum* numbers are decreasing on Kauai, and both the species and its habitat continue to be negatively affected by destruction and modification by ungulates and by direct competition by nonnative plants, combined with herbivory by nonnative ungulates. Because of the threats described above, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Calamagrostis expansa (Maui reedgrass), a perennial in the grass family (Poaceae), is known from the islands of Maui and Hawaii (O'Connor 1999, p. 1509; Wagner and Herbst 2003, p. 59). Historically, *C. expansa* was known from wet forest, open bogs, and bog margins on Maui at 17 locations on east Maui, and in a large occurrence covering nearly the entire summit on west Maui, and was discovered in 7 occurrences totaling approximately 750 individuals on the island of Hawaii in 1995 (O'Connor 1999, p. 1509; HBMP 2010; Smithsonian National Museum of Natural History (NMNH) Botany Collections 2014, in litt.; Vetter 2015, in litt.). Currently, this species is known from 13 to 33 occurrences totaling fewer than 750 individuals. This species is rhizomatous (growing from underground stems), making it difficult to determine exact numbers of distinct individuals and populations, and botanists' estimations vary. On the island of Maui, there are 2 occurrences in the west Maui Mountains (approximately 100 individuals) and from 7 to as many as 40 occurrences in the east Maui Mountains (totaling at least 200 individuals), often along ridges above 6,000 feet (ft) (1,830 meters (m)), or on raised hummocks in wet forest and bogs, in the montane wet ecosystem (Wood 2005a, in litt.; TNCH 2007; Welton 2008 and 2010, in litt.; Fay 2010, in litt.; HBMP 2010; Oppenheimer 2010, in litt.; Agorastos 2011, in litt.; Vetter 2015, in litt.). Most of the east Maui occurrences are in exclosures (Duvall 2015, in litt.). On the island of Hawaii, there are 3 occurrences in the Kohala Mountains (totaling several hundred individuals) and 1 occurrence of 6 individuals last observed in 2004 in Upper Waiakea Forest Reserve, in the montane wet ecosystem (Perry 2006, in litt; TNCH 2007; HBMP 2010; Perry 2015, in litt.).

Feral pigs modify and destroy the habitat of *Calamagrostis expansa* on Maui and Hawaii, with evidence of the activities of feral pigs reported in the areas where *C. expansa* occurs on east Maui, and on Hawaii Island in the Kohala Mountains and in the Waiakea Forest Reserve (Hobdy 1996, in litt.; Perlman 1996, in litt.; Wood 1996, in litt.; Perry 2006, in litt.; HBMP 2010). Some occurrences on east and west Maui are currently fenced; however, ungulate and weed control activities must be maintained to provide continued protection (Duvall 2015, in litt.). Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Rats have been noted by biologists as a threat to *C. expansa* at Laupahoehoe Natural Area Reserve (NAR) on Hawaii Island, by consuming seeds (HBMP 2010). Nonnative plants compete with this species and modify and destroy native habitat, negatively affecting *C. expansa* on east and west Maui and Hawaii Island. Additionally, the small number of individuals limits this species' ability to adapt to environmental change. Fortini *et al.* (2013, p. 68) found that, as environmental conditions are altered by climate change, *C. expansa* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *C. expansa* described above (see "Climate Change" under *Factor E. Other Natural or Manmade Factors Affecting Their Continued Existence,* below).

The remaining occurrences of *Calamagrostis expansa* are at risk; *C. expansa* populations are decreasing on Maui and Hawaii Island, and this species continues to be negatively affected by habitat modification and destruction by feral pigs, and by direct competition from nonnative plants, combined with herbivory by feral pigs and rats. This species is vulnerable to the effects of climate change, and the likelihood of its persistence with the impacts of climate change, exacerbated by the ongoing threats, is low. We find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Cyanea kauaulaensis (NCN), a shrub in the bellflower family (Campanulaceae), is endemic to Maui (Oppenheimer and Lorence 2012, p. 15). *Cyanea kauaulaensis* occurs on leeward west Maui, on talus or basalt boulder-strewn slopes along perennial streams from 2,400 to 3,000 ft (730 to 900 m), in the lowland wet ecosystem (TNCH 2007; HBMP 2010; Oppenheimer and Lorence 2012, pp. 17–18). This species was first collected during a botanical survey in 1989. Further surveys (in 2008, 2009, and 2011) revealed more individuals, and study of the collections indicated that it was a new species of *Cyanea.* Currently, *C. kauaulaensis* is known from Kauaula Valley (approximately 100 individuals) (Oppenheimer and Lorence 2012, pp. 15–16, 20; Duvall 2015, in litt.; Oppenheimer 2015, in litt.).

The greatest threats to this species currently are the low numbers of occurrences and individuals, its limited range, poor seedling recruitment, and loss of pollinators and dispersal agents (Oppenheimer and Lorence 2012, pp. 20–21; Duvall 2015, in litt.). Rats and slugs are noted as a threat to *Cyanea kauaulaensis* because of their herbivory and seed predation. Additionally, nonnative plants modify and destroy native habitat and outcompete native species, negatively affecting *C. kauaulaensis* and its habitat. Although feral ungulates are present on west Maui, the known occurrences of *C. kauaulaensis* may be less at risk from this particular threat because of their location in extremely steep and rugged terrain; however, erosion, landslides, flooding, and drying due to climate change affect this species because of the terrain where it occurs (Oppenheimer and Lorence 2012, pp. 20–21; Duvall 2015, in litt.). The remaining occurrence of *Cyanea kauaulaensis* is at risk. Because of the threats described above, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Cyclosorus boydiae (previously *Christella boydiae*) (kupukupu makalii) is a small to medium-sized member of the thelypteroid fern family (Thelypteridaceae) (Pukui and Elbert 1986, p. 186; Palmer 2003, pp. 87–88). Typical habitat for *C. boydiae* is exposed, rocky, or moss-covered banks of stream courses in dense-wet *Metrosideros-Acacia* (ohia-koa) forest, from 2,300 to 4,400 ft (700 to 1,350 m), with other native ferns, grasses, and dwarfed woody species, in the lowland wet and montane wet ecosystems (Hillebrand 1888, p. 572; Medeiros *et al.* 1993, p. 87; Wagner (W.H.) *et al.* 1999, p. 156; TNCH 2007; HBMP 2010; Gates 2015, in litt.). Historically, this fern was known from near sea level to 4,400 ft (1,350 m) on Oahu, Maui, and Hawaii Island (Hillebrand 1888, p. 572; Medeiros *et al.* 1993, pp. 86–87; Palmer 2003, pp. 87–88). Currently, *C. boydiae* is found on Oahu and east Maui, in 13 occurrences totaling approximately 400 individuals (Palmer 2003, pp. 87–88; Oppenheimer 2008, in litt.; Fay 2010, in litt.; HBMP 2010; Welton 2010, in litt.). On east Maui, there are at least 11 occurrences (over 1,000 individuals) in the lowland wet and montane wet ecosystems, and on Oahu there are 2 occurrences in the Koolau Mountains in the montane wet ecosystem, totaling 40 individuals, and one historic occurrence in Kaluanui Drainage, but the status of the species at this location is currently unknown (Palmer 2003, pp. 87–88; Wood 2007a, in litt.; Kam 2008, in litt.; Oppenheimer 2008 and 2010, in litt.; HBMP 2010; Welton 2010, in litt.; Ching 2011, in litt.; Ching Harbin 2015, in litt.; Oppenheimer 2015, in litt.). The historical occurrence of *C. boydiae* on the island of Hawaii was found in the lowland wet ecosystem (HBMP 2010).

Feral pigs modify and destroy the habitat of *Cyclosorus boydiae* on Maui and Oahu, with evidence of their activities reported at three occurrences of *C. boydiae* on east Maui and at two occurrences on Oahu. However, on east Maui, two of the five occurrences are provided protection in Haleakala National Park (Wood 2007a, in litt.; HBMP 2010; Kawelo 2011, in litt.). Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Historical occurrences of *C. boydiae* on Oahu have dramatically declined in numbers or disappeared as a result of habitat modification and destruction, landslides and flooding, invasion of lower elevation stream courses by nonnative plants, and manmade stream diversions (Medeiros *et al.* 1993, p. 88; Palmer 2003, p. 88). Nonnative plants, such as *Tibouchina herbacea* (glorybush), modify and destroy native habitat of. *C. boydiae* and outcompete this and other native species for water, nutrients, light, and space (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 *in* Cuddihy and Stone 1990, p. 74). Herbivory by feral pigs negatively impacts this species (HBMP 2010). This species occurs on stream banks at or just above water level, and flash floods or drought can damage and destroy it (Ching Harbin 2015, in litt.). Fortini *et al.* (2013, p. 72) found that, as environmental conditions are altered by climate change, *C. boydiae* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *C. boydiae* described above.

The remaining occurrences of *Cyclosorus boydiae* are at risk; *C. boydiae* populations are decreasing on Oahu and Maui, and the species continues to be negatively affected by habitat loss and destruction by ungulates, direct competition with nonnative plants, and herbivory by ungulates. Flash floods and drought can damage and destroy this species. The effects of climate change are likely to further exacerbate these threats. Because of the threats describe above, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Cyperus neokunthianus (NCN) is a perennial plant in the sedge family (Cyperaceae) (Koyama 1999, p. 1420). *Cyperus neokunthianus* occurs in riparian areas of the lowland wet ecosystem on west Maui (Koyama 1999, p. 1420; TNCH 2007; HBMP 2010). Historically, this species was known from Honokohau Falls and Waihee Valley (HBMP 2010; Global Biodiversity Information Facility (GBIF) database 2014, in litt.). This species was last observed in 1996. Currently, there are no known individuals in the wild; however, Waihee Valley and Maui County lands have been suggested as potential habitat for further surveys (PEPP 2013, p. 32; PEPP 2014, p. 59; Duvall 2015, in litt.).

Feral pigs modify and destroy the habitat of *Cyperus neokunthianus* on west Maui, with evidence of the activities of feral pigs reported in the area where this species was last observed (HBMP 2010). Habitat modifications resulting from activities of feral pigs that affect *C. neokunthianus* include direct destruction of this species and other native plants, disruption of topsoil leading to erosion, and establishment and spread of nonnative plants. Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Additionally, nonnative plants modify and destroy native habitat and outcompete native species, also negatively affecting habitat of *C. neokunthianus* on west Maui. Currently, there are no known extant individuals, and low numbers makes this species more vulnerable to extinction because of the higher risks from genetic bottlenecks, random demographic fluctuations, and localized catastrophes.

Cyperus neokunthianus is at risk and continues to be negatively affected by modification and destruction by nonnative animals and plants (Duvall 2015, in litt.). Because of the threats described above, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Cyrtandra hematos (haiwale), a shrub in the African violet family (Gesneriaceae), is endemic to Molokai (Wagner *et al.* 1999, pp. 760, 762). *Cyrtandra hematos* occurs in wet forest from 3,400 to 3,800 ft (1,030 to 1,150 m) on eastern Molokai, in the montane wet ecosystem (Wagner *et al.* 1999, pp. 760, 762; HBMP 2010; TNCH 2007). Historically, this species was known from four locations on Molokai (Wagner *et al.* 1999, pp. 760, 762). Currently, there are fewer than 100 individuals at two locations on Molokai (Duvall 2015, in litt.; Oppenheimer 2015, in litt.).

Feral pigs and goats modify and destroy the habitat of *Cyrtandra hematos* on Molokai, with evidence of the activities of these animals reported in the areas where this species occurs (Service 2015, in litt.). Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Additionally, nonnative plants modify and destroy native habitat and outcompete this and other native species for water, nutrients, light, and space, or a nonnative plant may produce chemicals that inhibit growth of other plants (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 in Cuddihy and Stone 1990, p. 74; Service 2015, in litt.). This species experiences reduced reproductive vigor due to low numbers and lack of regeneration, leading to diminished capacity to adapt to environmental changes, and thereby lessening the probability of long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361). This species hybridizes with *C. grayana* (Oppenheimer 2015, in litt.). Fortini *et al.* (2013, p. 72) found that, as environmental conditions are altered by climate change, *C. hematos* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *C. hematos* described above.

The remaining occurrences of *Cyrtandra hematos* are at risk. The known individuals are restricted to a small area on Molokai and continue to be negatively affected by habitat modification and destruction by ungulates and nonnative plants, and by direct competition with nonnative plants. The low number of remaining individuals limits this species' ability to adapt to environmental changes. Hybridization results in a reduction of the numbers of *C. hematos*. The effects of climate change are likely to further exacerbate these threats. We find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Deparia kaalaana (NCN), a small, terrestrial fern in the ladyfern family (Athyriaceae), is recognized as a distinct taxon by Palmer (2003, pp. 109–111) and Christenhusz *et al.* (2012, p. 16). This fern is historically known from the islands of Kauai, Maui, and Hawaii, on rocky stream banks and in wet forest, in the lowland mesic and lowland wet ecosystems (Palmer 2003, pp. 109–111; TNCH 2007; HBMP 2010; Oppenheimer and Bustamente 2014, p. 103; PEPP 2014, p. 95). *Deparia kaalaana* was presumed extinct on all three islands where it previously occurred until one individual was discovered on east Maui, growing along a perennial stream on the western side of a small pool with other native ferns and herbaceous plants (Oppenheimer and Bustamente 2014, pp. 103–107; PEPP 2014, p. 95).

Feral pigs modify and destroy habitat of *Deparia kaalaana* by facilitating the spread of nonnative plants, which converts vegetation communities from native to nonnative (Cuddihy and Stone 1990, p. 63; Oppenheimer and Bustamente 2014, p. 106). Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt; HAR–DLNR 2010, in litt.). Nonnative plants, such as *Blechnum appendiculatum* (NCN), *Clidemia hirta* (Koster's curse), *Hedychium gardnerianum* (kahili ginger), *Prunella vulgaris* (selfheal), and *Rubus argutus,* are capable of displacing all of the riparian habitat elements, including native plants, in the area where *D. kaalaana* occurs. Nonnative slugs such as *Derocerus laeve* and *Limax maximus* are common in the area and can consume young plants (Joe and Daehler 2008, pp. 252–253). Flash floods and drought can damage and destroy this species at its only known location. A single catastrophic event may result in extirpation of the remaining individual.

The remaining occurrence of *Deparia kaalaana* is at risk, and both the species and its habitat on Hawaii, Maui, and Kauai continues to be negatively affected by modification and destruction by nonnative ungulates, and by direct competition with nonnative plants, combined with herbivory by nonnative ungulates and slugs. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *D. kaalaana* described above. We find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Dryopteris glabra var. *pusilla* (hohiu) is a small, terrestrial fern in the wood fern family (Dryopteridaceae) (Palmer 2003, p. 144). Habitat for *D. glabra* var. *pusilla* is deep shade on rocky, mossy streambanks in wet forest at about 4,000 ft (1,200 m), in the montane wet ecosystem on Kauai (Palmer 2003, p. 144; TNCH 2007; HBMP 2010). Historically, *D. glabra* var. *pusilla* was known from the Kawaikoi stream area (HBMP 2010). Currently, this variety is known from fewer than 250 individuals in the Alakai Wilderness Preserve on Kauai (National Tropical Botanical Garden (NTBG) Herbarium Database 1995, in litt.; HBMP 2010; Wood 2015, in litt.).

Dryopteris glabra var. *pusilla* is at risk from habitat modification and destruction by nonnative plants, feral pigs, and black-tailed deer (Wood 2015, in litt.). Most individuals occur in the Alakai Wilderness Preserve; however, only portions of the Preserve are fenced to prevent ungulate incursion. Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plants modify and destroy native habitat and outcompete this and other native species for water, nutrients, light, and space, or a nonnative plant may produce chemicals that inhibit growth of other plants, also negatively affecting habitat of *D. glabra* var. *pusilla* (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 *in* Cuddihy and Stone 1990, p. 74). Herbivory by rats and slugs is a threat to *D. glabra* var. *pusilla* (Wood 2015, in litt.). In addition, the limited number of occurrences and few individuals lead to a diminished capacity to adapt to environmental changes, thereby lessening the probability of long-term persistence, and a single catastrophic event may result in extirpation of remaining occurrences. Landslides along streambanks have been known to destroy populations of this fern (Wood 2015, in litt.).

Fortini *et al.* (2013, p. 74) found that, as environmental conditions are altered by climate change, *D. glabra* var. *pusilla* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *D. glabra* var. *pusilla* described above. Because of these threats, we find that this variety is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Exocarpos menziesii (heau) is a shrub in the sandalwood family (Santalaceae) (Wagner *et al.* 1999, p. 1218). This species occurs in *Metrosideros* shrubland or drier forest areas, and on lava flows with sparse vegetation, from 4,600 to 6,900 ft (1,400 to 2,100 m), in the montane dry ecosystem on the island of Hawaii (Wagner *et al.* 1999, p.

1218; TNCH 2007), and historically occurred in the lowland mesic (Lanai and Hawaii Island) and montane mesic ecosystems (Hawaii Island) (TNCH 2007; Bishop Museum 2014). *Exocarpos menziesii* is historically known from the island of Lanai and was wide-spread on the island of Hawaii (Wagner *et al.* 1999, p. 1218; TNCH 2007; Bishop Museum 2014). Currently, there are seven scattered occurrences on Hawaii Island, six of which consist of only a few individuals, the seventh totals an estimated 1,800 individuals (PEPP 2013, pp. 10, 33; Thomas 2014, in litt.; Evans 2015a, in litt.; Orlando 2015, in litt.; Perry 2015, in litt.). There are no currently known occurrences of this species on Lanai.

Feral goats, mouflon, and sheep modify and destroy the habitat of *Exocarpos menziesii* on Hawaii Island, and may forage on this species, with evidence of the activities of these animals reported in the areas where this species occurs (Service 2015, in litt.). Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt; HAR–DLNR 2010, in litt.). Feral ungulate management is incorporated into the U.S. Army's Pohakuloa Training Area (PTA) management plan, and plants at PTA may be provided some protection within fenced management units in the training area (Evans 2015a, in litt.); however, it is reported that feral goats are still being removed from within the fenced area (Nadig 2015, in litt.). Any individuals of *E. menziesii* outside of fenced exclosures or outside of the managed area are at risk. Additionally, nonnative plants modify and destroy native habitat and outcompete this and other native species for water, nutrients, light, and space, or a nonnative plant may produce chemicals that inhibit growth of other plants, also negatively affecting habitat of *E. menziesii* (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 *in* Cuddihy and Stone 1990, p. 74). Occurrences and numbers of individuals have declined on the island of Hawaii (HBMP 2010; Thomas 2014, in litt.), where *E. menziesii* was once widely distributed from the south to the west sides of the island, and are now restricted to seven locations. Consequently, *E. menziesii* experiences reduced reproductive vigor due to reduced levels of genetic variability, leading to diminished capacity to adapt to environmental changes, thereby reducing the probability of long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361). Fire is a likely threat to this species; although the U.S. Army has constructed firebreaks and has standard operating procedures (SOPs) in place for prevention and suppression of wildfires at the PTA, wildfires may encroach from other areas (U.S. Army Garrison 2013, in litt.). The small number of individuals outside the larger occurrence at the PTA limits this species' ability to adapt to environmental changes. Fortini *et al.* (2013, p. 76) found that, as environmental conditions are altered by climate change, *E. menziesii* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *E. menziesii* described above.

The remaining occurrences of *Exocarpos menziesii* are at risk from modification and destruction by feral goats, mouflon, and sheep; from herbivory by these ungulates; and by the small number of remaining occurrences. Fire is a likely threat to this species. The effects of climate change are likely to exacerbate these threats. Because of these threats, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Festuca hawaiiensis (NCN) is a cespitose (growing in tufts or clumps) annual in the grass family (Poaceae) (O'Connor 1999, p. 1547). Typical habitat for this species is dry forest at 6,500 ft (2,000 m), in the montane dry ecosystem (O'Connor 1999, p. 1547). Historically, *F. hawaiiensis* occurred at Hualalai and Puu Huluhulu on the island of Hawaii, and possibly at Ulupalakua on Maui; however, it is no longer found at these sites (O'Connor 1999, p. 1547). Currently, *F. hawaiiensis* is only known from the U.S. Army's PTA on the island of Hawaii (HBMP 2010). These remaining four occurrences are within an area of less than 10 square miles (mi) (26 square kilometers (km)) and total approximately 1,500 individuals (U.S. Army Garrison 2013, in litt.; Evans 2015a, in litt.).

Habitat destruction and modification by feral goats and sheep is a threat to *Festuca hawaiiensis*. These ungulates also browse on native plants such as grasses, including *F. hawaiiensis*. Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Feral ungulate management is incorporated into the U.S. Army's PTA management plan, and these plants are provided some protection within fenced management units in the training area (Evans 2015a, in litt.); however, feral goats are still being removed from inside the fenced area (Nadig 2015, in litt.). In addition, any individuals of *F. hawaiiensis* outside of fenced exclosures or outside of the managed area are at risk. Nonnative plants, such as *Cenchrus setaceus* (*Pennisetum setaceum;* fountain grass), are naturalized in the area and outcompete *F. hawaiiensis* and other native plants. Occurrences and numbers of individuals are declining on the island of Hawaii, and *F. hawaiiensis* experiences reduced reproductive vigor due to reduced levels of genetic variability, leading to diminished capacity to adapt to environmental changes, thereby reducing the probability of long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361; HBMP 2010). Fire is a likely threat to this species, especially because of the ingress of nonnative grass species. Although the U.S. Army has constructed firebreaks and has SOPs in place for prevention and suppression of wildfires at the PTA, fires may encroach from other areas, exacerbated by fuel loads provided by nonnative grasses (U.S. Army Garrison 2013, in litt.). Fortini *et al.* (2013, p. 76) found that, as environmental conditions are altered by climate change, *F. hawaiiensis* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *F. hawaiiensis* described above.

The remaining occurrences of *Festuca hawaiiensis* are at risk; *F. hawaiiensis* occurrences have decreased on Hawaii Island, as it no longer occurs at Hualalai and Puu Huluhulu, and the species may be extirpated from Maui. This species continues to be negatively affected by habitat modification and destruction by ungulates and by direct competition with nonnative plants, combined with herbivory by ungulates. Fire is a likely threat to the species and its habitat. The effects of climate change are likely to further exacerbate these threats. Because of the threats described above, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Gardenia remyi (nanu) is a tree in the coffee family (Rubiaceae) (Wagner *et al.* 1999, p. 1133). Typical habitat for *G. remyi* is mesic to wet forest from 190 to 3,000 ft (60 to 760 m), in the lowland mesic (Kauai, Molokai, and Hawaii Island) and lowland wet ecosystems (Kauai, Molokai, Maui, and Hawaii Island) (Wagner *et al.* 1999, p. 1133; TNCH 2007; HBMP 2010; Oppenheimer 2015, in litt.). Historically, this species was found on the island of Hawaii at Wao Kele O Puna NAR, Waiakea Forest Reserve, Pahoa, and Hakalau Nui. On Maui, this species was known from Wailuaiki and Waikamoi in the Koolau Forest Reserve, and from Papaaea and Kipahulu. On Molokai, this species was known from Keopukaloa, Pukoo, Honomuni, Halawa, and Kaluaaha (HBMP 2010). On Kauai, this species ranged across the island, and was known from Halelea, Kealia, Moloaa, and Lihue-Koloa Forest Reserves, including Hanakapiai Valley, Mahaulepu, and east Wahiawa Bog. Currently, *G. remyi* is known from 16 occurrences totaling approximately 90 individuals on the islands of Hawaii, Maui, Molokai, and Kauai (Wood 2005b, in litt.; Oppenheimer 2006, in litt; Perry 2006, in litt.; Welton 2008, in litt.; Agorastos 2010, in litt.; HBMP 2010; Perlman 2010, in litt.). An occurrence on east Maui has been observed to decline from 14 individuals in 1992, to only 1 individual by 2015 (Duvall 2015, in litt.).

Habitat modification and destruction by feral pigs, goats, and axis deer negatively affects *Gardenia remyi* and areas suitable for its reintroduction (Perry, in litt. 2006; PEPP 2008, p. 102; HBMP 2010). Feral pigs and signs of their activities have been reported at occurrences of *G. remyi* on the island of Hawaii, on Kauai, on east and west Maui, and on Molokai. Goats and signs of their activities are reported at the occurrences *G. remyi* on Kauai and Molokai. Axis deer and signs of their activities are reported at the occurrences of *G. remyi* on Molokai (HBMP 2010). Herbivory by these ungulates is a threat to *G. remyi,* as they browse on leaves and other parts of almost any woody or fleshy plant species. Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plants, such as *Clidemia hirta, Hedychium gardnerianum, Psidium cattleianum* (strawberry guava), and *Tibouchina herbacea* on Hawaii Island (Perry 2006, in litt.); *Lantana camara* (lantana), *Psidium guajava,* and *Rubus argutus* on Kauai (Wood 2004, in litt.); *Ageratina adenophora* (Maui pamakani), *Rubus rosifolius* (thimbleberry), and *T. herbacea* on Maui (HBMP 2010); and *C. hirta* and *P. cattleianum* on Molokai (HBMP 2010), modify and destroy native habitat of *G. remyi* and outcompete this and other native plants for water, nutrients, light, and space in areas where *G. remyi* occurs on these islands. Landslides are a threat to occurrences and habitat of *G. remyi* on Hawaii Island (Perry 2006, in litt.). Lack of pollination was suggested as the cause for abortion of immature fruits that were seen among plants on Hawaii Island (PEPP 2010, p. 73). Similarly, Agorastos (2011, in litt.) reported no viable seed production in the wild or within *ex situ* collections and no recruitment in the wild among the 14 individuals observed on the island of Hawaii, Maui, and Molokai, for unknown reasons (Duvall 2015, in litt.; Oppenheimer 2015, in litt.). Some species of *Gardenia* are dioecious (male and female flowers on separate plants) and although the breeding system of *G. remyi* is currently unknown, this may be a cause of failure to produce viable seed in isolated individuals (Lorence 2015, in litt.). Predation of seeds by rats is reported as a threat to individuals on Kauai (NTBG 2008, in litt.). Fortini *et al.* (2013, p. 76) found that, as environmental conditions are altered by climate change, *G. remyi* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *G. remyi* described above.

The remaining occurrences of *Gardenia remyi* are at risk. *Gardenia remyi* continues to be negatively affected by habitat modification and destruction by ungulates, and by direct competition from nonnative plants, combined with herbivory by ungulates and seed predation by rats. Natural events such as landslides are a threat to occurrences on the island of Hawaii. Pollination and seed production are observed to be limited. Low numbers of individuals (90 total individuals distributed across 4 islands) makes this species more vulnerable to extinction because of the higher risks from genetic bottlenecks, random demographic fluctuations, and localized catastrophes. The effects of climate change are likely to exacerbate these threats. Because of the threats, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Huperzia stemmermanniae (NCN) is an epiphytic hanging fir-moss (a fern ally) in the club moss family (Lycopodiaceae) (Palmer 2003, pp. 257–259). This species is epiphytic on rough bark of living trees or fallen logs in *Metrosideros polymorpha-Acacia koa* forest on the island of Hawaii, from 3,200 to 3,800 ft (975 to 1,160 m), in the montane wet ecosystem (Medeiros *et al.* 1996b, p. 93; Palmer 2003, pp. 257, 259; TNCH 2007; HBMP 2010). There is little information available on the historical range of this species. *Huperzia stemmermanniae* was first collected in 1981, from two occurrences totaling 10 individuals in Laupahoehoe NAR on the island of Hawaii, and was mistakenly identified as *H. mannii* (Medeiros *et al.* 1996b, p. 93; HBMP 2010). One individual occurred in Kaapahu Valley on east Maui, but has not been relocated since 1995 (Perry 2006, in litt.; Welton 2008, in litt.; HBMP 2010; Conry 2012, in litt.; Perry 2015, in litt.). In 2006, there were estimated to be as many as 20 individuals in Laupahoehoe (Perry 2006, in litt.). Currently, there are only a few individuals remaining due to prolonged drought conditions (Perry 2015, in litt.).

Feral pigs, goats, axis deer, and cattle modify and destroy the habitat of *Huperzia stemmermanniae* on Maui, and feral pigs modify and destroy the habitat of this species on Hawaii Island (Medeiros *et al.* 1996b, p. 96; Wood 2003, in litt.; HBMP 2010). Herbivory by these ungulates is a threat to *H. stemmermanniae.* Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plants, such as *Clidemia hirta, Miconia calvescens, Psidium cattleianum,* and *Cyathea cooperi* (Australian tree fern), modify and destroy the forest habitat that supports the native species upon which this epiphytic plant grows, and drought also negatively affects this species and its habitat (Medeiros *et al.* 1996b, p. 96; Perry 2006, in litt.; HBMP 2010). *Huperzia stemmermanniae* experiences reduced reproductive vigor due to reduced levels of genetic variability, leading to diminished capacity to adapt to environmental changes, thereby lessening the probability of long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361; HBMP 2010). Fortini *et al.* (2013, p. 77) found that, as environmental conditions are altered by climate change, *H. stemmermanniae* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *H. stemmermanniae* described above.

The remaining occurrences of *Huperzia stemmermanniae* are at risk. The known individuals are restricted to a small area on Hawaii Island, and this species continues to be negatively affected by habitat modification and destruction by ungulates. The low numbers of individuals *H. stemmermanniae* reduces the probability of its long-term persistence. The effects of climate change are likely to further exacerbate these threats. Because of the threats described above, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Hypolepis hawaiiensis var. *mauiensis* (olua) is a small terrestrial member of the bracken fern family (Dennstaedtiaceae), and is recognized as a distinct taxon by Palmer (2003, pp. 168–169). *Hypolepis hawaiiensis* var. *mauiensis* occurs in wet forest, predominately in the montane wet ecosystem (Palmer 2003, pp. 168–170; Oppenheimer 2015, in litt.). This variety is historically known from west Maui (Palmer 2003, pp. 168–170). Currently, 5 to 10 individuals are known from openings between bogs on west Maui, and a few individuals are known from east Maui (Maui Nui Task Force (MNTF) 2010, in litt.).

Nonnative plants, such as *Tibouchina herbacea,* modify and destroy the habitat of *Hypolepis hawaiiensis* var. *mauiensis* on east and west Maui (HBMP 2010; MNTF 2010, in litt.). Nonnative plants also displace this and other native plant species by competing for water, nutrients, light, and space, or they may produce chemicals that inhibit growth of other plants (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 *in* Cuddihy and Stones 1990, p. 74; MNTF 2010, in litt.). Herbivory by slugs is a threat (Oppenheimer 2015, in litt.). This fern experiences reduced reproductive vigor due to low numbers of individuals, leading to diminished capacity to adapt to environmental changes, and thereby lessening the probability of long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361). Fortini *et al.* (2013, p. 78) found that, as environmental conditions are altered by climate change, *H. hawaiiensis* var. *mauiensis* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *H. hawaiiensis* var. *mauiensis* described above.

The remaining occurrences of *Hypolepis hawaiiensis* var. *mauiensis* are at risk. Nonnative plants modify and destroy native habitat, and also outcompete native plants, and this plant is threatened by herbivory by slugs. This fern is also vulnerable to the impacts of climate change, and the small number of remaining individuals limits its ability to adapt to environmental change. Because of these threats, we find that this variety is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Joinvillea ascendens ssp. *ascendens* (ohe) is an erect perennial herb in the joinvillea family (Joinvilleaceae) (Wagner *et al.* 1999, p. 1450). *Joinvillea ascendens* ssp. *ascendens* occurs in wet to mesic *Metrosideros polymorpha-Acacia koa* lowland and montane forest, and along intermittent streams, from 1,000 to 4,300 ft (305 to 1,300 m); in the lowland mesic (Kauai and Oahu), lowland wet (Oahu, Molokai, Maui, and Hawaii Island), montane wet (Kauai, Oahu, Molokai, Maui, and Hawaii Island), and montane mesic ecosystems (Kauai) (TNCH 2007; HBMP 2010). Historically, this subspecies was found in widely distributed occurrences on the islands of Kauai, Oahu, Molokai, Maui, and Hawaii Island (HBMP 2010). On Kauai, this subspecies was wide-ranging across the mountains and into coastal areas (HBMP 2010). On Oahu, this subspecies was known from the summit area of the Waianae Mountains, and ranged along the entire length of the Koolau Mountain range. On Molokai, this subspecies was known from the eastern half of the island ranging from Pelekunu Preserve and east to Halawa Valley. On west Maui, this subspecies occurred in the summit area, and on the northeastern side of east Maui it ranged from the Koolau FR to Kaapahu (Gates 2015, in litt.). On Hawaii Island, it occurred almost island-wide. Currently, *J. ascendens* ssp. *ascendens* is still found on the same islands, in only 56 occurrences totaling approximately 200 individuals (HBMP 2010; Conry 2012, in litt.).

Nonnative ungulates modify and destroy habitat on all of the islands where *Joinvillea ascendens* ssp. *ascendens* occurs (Moses 2006, in litt.; Oppenheimer 2006, in litt.; Welton and Haus 2008, p. 16; HBMP 2010; Perlman 2010, in litt.). Herbivory by feral pigs, goats, axis deer, black-tailed deer, and rats is a threat to this subspecies (HBMP 2010; Williams 2015, in litt.). Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Many nonnative plant species, such as *Passiflora tarminiana* (banana poka), *Rubus ellipticus* (yellow Himalayan raspberry), and *Setaria palmifolia* (palmgrass) on Hawaii Island; *Clidemia hirta, Psidium cattleianum,* and *P. guajava* on Kauai; *C. hirta* and *Tibouchina herbacea* on Maui; *Juncus effusus* (Japanese mat rush) on Molokai; and *C. hirta* and *P. cattleianum* on Oahu, modify and destroy habitat and outcompete this subspecies (HBMP 2010). Randomly occurring natural events, such as landslides, are a threat to the occurrences of *J. ascendens* ssp. *ascendens* on Kauai and Molokai (HBMP 2010). Fire is likely to be a threat to this subspecies in the drier areas of the Waianae Mountains of Oahu (HBMP 2010). This subspecies is usually found as widely separated individuals. Seedlings have rarely been observed in the wild, and, although mature seeds germinate in cultivation, these seedlings also rarely survive to maturity. It is uncertain if this rarity of reproduction is typical, or if it is related to habitat disturbance, or possibly a lack of soil mycorrhizae (symbiotic relationship between fungi and plants) required for successful establishment (Wagner *et al.* 1999, p. 1451; Oppenheimer 2015, in litt.). Fortini *et al.* (2013, p. 76) found that, as environmental conditions are altered by climate change, *J. ascendens* ssp. *ascendens* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *J. ascendens* ssp. *ascendens* described above.

The remaining occurrences of *Joinvillea ascendens* ssp. *ascendens* are at risk. The known individuals continue to be negatively affected by habitat modification and destruction by ungulates, compounded with herbivory by ungulates and rats. The small number of remaining individuals, smaller distribution, and poor recruitment in the wild limits this subspecies' ability to adapt to environmental changes. Destruction by fire, landslides, rockfalls, and floods can occur at any time. The effects of climate change are likely to further exacerbate these threats. Because of these threats, we find that this subspecies is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Kadua fluviatilis (previously *Hedyotis fluviatilis*) (kamapuaa) is a climbing shrub in the coffee family (Rubiaceae) family (Wagner *et al.* 1999, pp. 1142–1144). Typical habitat for this species on Kauai is mixed native shrubland and *Metrosideros* forest from 750 to 2,200 ft (230 to 680 m), in the lowland mesic ecosystem (TNCH 2007; HBMP 2010); and in open shrubland with sparse tree cover in the lowland mesic ecosystem (Wood 1998, in litt.; TNCH 2007). On Oahu, *K. fluviatilis* occurs along rocky streambanks in wet *Metrosideros* forest from 820 to 1,990 ft (250 to 607 m) in the lowland wet ecosystem (TNCH 2007; HBMP 2010).

Historically, *Kadua fluviatilis* was known from the island of Kauai in at least 5 occurrences ranging from the north coast across the central plateau to the south coast, and from the island of Oahu in at least 11 occurrences in the northern Koolau Mountains (HBMP 2010; Williams 2015, in litt.). Currently, during surveys on Oahu in 2013, only 20 to 25 individuals were observed in one occurrence (Wood 2005b, in litt., NTBG 2009, in litt.; HBMP 2010; Ching Harbin 2015, in litt.). On Kauai, *K. fluviatilis* is known from two occurrences totaling approximately 500 individuals (HBMP 2010).

Feral pigs and goats modify and destroy habitat of *Kadua fluviatilis* (HBMP 2010). Evidence of the activities of feral pigs has been reported at the occurrences on Kauai and Oahu (Wood 1998, in litt.; HBMP 2010). Feral goats and evidence of their activities have been observed at one location on Kauai (HBMP 2010). Herbivory by feral pigs and goats is a threat to *K. fluviatilis.* Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plant species, such as *Lantana camara, Paspalum conjugatum* (Hilo grass), *Psidium cattleianum, P. guajava, Rubus rosifolius,* and *Schinus terebinthifolius* (Christmas berry), degrade habitat and outcompete this and other native species for water, nutrients, light, and space, or may produce chemicals that inhibit growth of other plants (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 in Cuddihy and Stone 1990, p. 74; Wood 1998, in litt.; HBMP 2010). *Kadua fluviatilis* is negatively affected by landslides on Kauai (HBMP 2010). Fortini *et al.* (2013, p. 78) found that, as environmental conditions are altered by climate change, *K. fluviatilis* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *K. fluviatilis* described above.

The remaining occurrences of *Kadua fluviatilis* are at risk. Numbers of occurrences and individuals are decreasing on Oahu and Kauai, from 16 occurrences to 3, and from over 1,000 individuals to about 500 individuals (HBMP 2010; OTFM 2014, in litt.). This species continues to be negatively affected by habitat modification and destruction by feral pigs and goats, stochastic events such as landslides, and direct competition from nonnative plants, combined with herbivory by nonnative ungulates. Climate change is likely to further exacerbate these threats. Because of these threats, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Kadua haupuensis (NCN) is a shrub in the coffee family (Rubiaceae) (Lorence *et al.* 2010, p. 137). There is no historical information for this species as it was recently discovered and described from one occurrence just below and along cliffs in an isolated area on southern Kauai, from 980 to 1,640 ft (300 to 500 m), in the lowland mesic ecosystem (TNCH 2007; Lorence *et al.* 2010, pp. 137–144). Currently, however, there are no known extant individuals of *K. haupuensis;* the single natural occurrence is thought to be extirpated. Ten individuals were propagated from seed collected in 1999, with cuttings from these currently under cultivation. Seeds are in storage at NTBG's seed bank (Lorence 2015, in litt.).

Feral pigs modify and destroy the habitat of *Kadua haupuensis* on Kauai (Lorence *et al.* 2010, p. 140). Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Predation of fruits and seeds by rats is a threat. Landslides are an additional threat to this species at its last known occurrence. Nonnative plants, such as *Caesalpinia decapetala* (wait-a-bit), *Passiflora laurifolia* (yellow granadilla), and various nonnative grasses, modify and destroy native habitat, outcompete native plants, and are found at the last known location of *K. haupuensis.* The small number of remaining individuals limits this species' ability to adapt to environmental change. Because of these threats, we find that *K. haupuensis* is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Labordia lorenciana (NCN) is a small tree in the Logania family (Loganiaceae) (Wood *et al.* 2007, pp. 195–197). This species occurs on the island of Kauai at 3,800 ft (1,160 m), in forest in the montane mesic ecosystem (Wood *et al.* 2007, pp. 197–198). Currently, there are four known individuals. Additional surveys for *L. lorenciana* have not been successful; however, experts believe this species may occur in other areas (Wood *et al.* 2007, p. 198).

Labordia lorenciana is at risk from habitat modification and destruction and herbivory by nonnative mammals, displacement of individuals through competition with nonnative plants, stochastic events, and problems associated with small populations. Feral pigs, goats, and black-tailed deer modify and destroy the habitat of *L. lorenciana* (Wood *et al.* 2007, p. 198; Kishida 2015, in litt.). Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction by these animals (Anderson *et al.* 2007, in litt; HAR–DLNR 2010, in litt.). Predation of seeds by rats is a threat to this species (Wood *et al.* 2007, p. 198). Habitat destruction and modification by nonnative plants, and competition with nonnative plants including *Lantana camara, Passiflora tarminiana, Psidium cattleianum,* and *Rubus argutus,* are a threat to *Labordia lorenciana,* as these nonnative plants have the ability to spread rapidly and cover large areas in the forest understory (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 *in* Cuddihy and Stone 1990, p. 74; Wood *et al.* 2007, p. 198). Randomly occurring natural events, such as landslides, flash floods, fallen tree limbs, and fire, are threats to *L. lorenciana* where it occurs on Kauai (Wood *et al.* 2007, p. 198). This species experiences reduced reproductive vigor as there is no *in situ* seedling recruitment and a very small number of individuals remain (Wood *et al.* 2007, p. 198). Infestation by the black twig borer (*Xylosandrus compactus*) is a threat to this species (Kishida 2015, in litt.). Because of these threats, we find that *L. lorenciana* is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Lepidium orbiculare (anaunau) is a small, many-branched shrub in the mustard family (Brassicaceae) (St. John 1981, pp. 371–373; Wagner *et al.* 1999, p. 409). This species occurs in mesic forest on the island of Kauai, in the lowland mesic ecosystem (Wagner *et al.* 1999, p. 409; TNCH 2007; HBMP 2010; PEPP 2014, p. 34). Historically, this species was known from widely scattered occurrences on Kauai (Wagner *et al.* 1999, p. 409). Currently, there is one occurrence of fewer than 50 individuals (Wagner *et al.* 2012, p. 19; PEPP 2014, p. 34; Smithsonian Institution 2015, in litt.).

Feral pigs and goats have been documented to modify and destroy habitat of other rare and endangered native plant species at the same location on Kauai (Lorence *et al.* 2010, p. 140; Kishida 2015, in litt.); therefore, we consider that activities of feral pigs and goats also pose a threat to *Lepidium orbiculare.* Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plants, such as *Melinis minutiflora* (molasses grass) and *Stachytarpheta jamaicensis* (Jamaica vervain), degrade native habitat, outcompete native plants, and are found at the last known location of *L. orbiculare* (HBMP 2010). Landslides are an additional threat to this species. Because there are fewer than 50 individuals, *L. orbiculare* experiences reduced reproductive vigor due to reduced levels of genetic variability, leading to diminished capacity to adapt to environmental changes, and thereby lessening the probability of long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361; PEPP 2014, p. 34).

The remaining occurrence of *Lepidium orbiculare* is at risk and the species continues to be negatively affected by the threats described above. Because of these threats, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Microlepia strigosa var. *mauiensis* (NCN) is a terrestrial, medium-sized fern in the bracken fern family (Dennstaedtiaceae) (Palmer 2003, p. 186). Typical habitat for *M. strigosa* var. *mauiensis* is mesic to wet forest from 1,400 to 6,000 ft (425 to 1,830 m), in the lowland mesic (Oahu), montane mesic (Hawaii Island), and montane wet (Maui and Hawaii Island) ecosystems (Palmer 2003, p. 186; TNCH 2007: HBMP 2010). Little is known of the historical locations of *M. strigosa* var. *mauiensis;* however, it was wide-ranging on the islands of Hawaii, Maui, and Oahu (HBMP 2010). Currently, *M. strigosa* var. *mauiensis* is known from nine occurrences totaling fewer than 100 individuals on the islands of Oahu (about 40 individuals), Maui (fewer than 20 individuals on east and west Maui), and Hawaii (35 individuals last observed in 2004) (Palmer 2003, p. 186; Lau 2007, pers.comm.; Oppenheimer 2007 and 2008, in litt.; Welton 2008, in litt.; Ching 2011, in litt.; Ching Harbin 2015, in litt.; Oppenheimer 2015, in litt.).

Habitat modification and destruction by feral pigs and goats is a threat to *Microlepia strigosa* var. *mauiensis* (Oppenheimer 2007, in litt.; Bily 2009, in litt.; HBMP 2010). Herbivory by feral pigs is a threat to *M. strigosa* var. *mauiensis* (Oppenheimer 2007, in litt.; Bily 2009, in litt.; HBMP 2010). Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plants, such as *Ageratina adenophora, Juncus acuminatus* (rush), *Plantago major* (broad-leaved plantain), and *Tibouchina herbacea,* degrade habitat and outcompete this variety on Maui (Oppenheimer 2007, in litt.). Hybridization with other species and varieties of *Microlepia* is a threat to this plant on Oahu and is compounded by the low number of individuals (Kawelo 2010, in litt.). Because of these threats, we find that this variety is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Myrsine fosbergii (kolea) is a branched shrub or small tree in the myrsine family (Myrsinaceae) (Wagner *et al.* 1999, p. 940). Typical habitat for this species on Oahu is *Metrosideros*-mixed native shrubland, from 2,200 to 2,800 ft (670 to 850 m) (Wagner *et al.* 1999, p. 940; TNCH 2007; HBMP 2010). Typical habitat for this species on Kauai is *Metrosideros-Diospyros* (ohia-lama) lowland mesic forest and *Metrosideros-Cheirodendron* (ohia-olapa) montane wet forest, often on watercourses or stream banks, from 900 to 4,300 ft (270 to 1,300 m), in the lowland mesic, lowland wet, and montane wet ecosystems (TNCH 2007; HBMP 2010; Wagner *et al.* 2012, p. 53). *Myrsine fosbergii* was historically known from the summit ridges of the Koolau Mountains of Oahu (HBMP 2010). This species was first collected on Kauai in 1987. Currently, on Oahu, there are fewer than 30 individuals in the Koolau Mountains (lowland mesic and lowland wet ecosystems) (HBMP 2010; OTFM 2014, in litt.; Reynolds 2015, in litt.; Sailer 2015, in litt.). Propagation attempts of the Oahu plants have been unsuccessful (Ching Harbin 2015, in litt.). On Kauai, this species was once widely scattered in the northwest and central areas, but is currently known from only 55 remaining individuals (Wood 2005e and 2007c, in litt.; HBMP 2010).

Myrsine fosbergii is at risk from habitat modification and destruction by nonnative ungulates and plants. On Oahu, evidence of the activities of feral pigs has been reported at all summit occurrences (HBMP 2010). On Kauai, evidence of the activities of feral pigs has been reported at the remaining occurrence (Wood 2005e and 2007c, in litt.; HBMP 2010), and evidence of the activities of feral goats has also been reported (HBMP 2010). Herbivory by feral pigs and goats is a threat to *M. fosbergii* (Wood 2005e and 2007c, in litt.; HBMP 2010). Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.;

HAR–DLNR 2010, in litt.). Nonnative plants, such as *Axonopus fissifolius* (narrow-leaved carpetgrass), *Clidemia hirta, Erigeron karvinskianus, Psidium cattleianum, P. guajava,* and *Rubus rosifolius,* compete with *M. fosbergii* and modify and destroy its native habitat on Oahu and Kauai (HBMP 2010). Hybridization is a threat to this species, as *M. fosbergii* hybridizes with other *Myrsine* species, and the number of non-hybrid individuals may actually be lower than estimated (Ching Harbin 2015, in litt.). Fortini *et al.* (2013, p. 82) found that, as environmental conditions are altered by climate change, *M. fosbergii* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *M. fosbergii* described above.

The remaining occurrences of *Myrsine fosbergii* are at risk from the threats described above. The effects of climate change are likely to exacerbate the threats described above. Because of these threats, we find that *M. fosbergii* is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Nothocestrum latifolium (aiea) is a small tree in the nightshade family (Solanaceae) (Symon 1999, p. 1263). Typical habitat for this species is dry to mesic forest in the dry cliff (Kauai, Oahu, Lanai, and Maui), lowland dry (Oahu, Lanai, and Maui), and lowland mesic (Oahu, Molokai, Lanai, and Maui) ecosystems (TNCH 2007; HBMP 2010). Historically, *N. latifolium* was known from the Waianae Mountains of Oahu, Molokai, Lanai, and Maui (HBMP 2010; Sailer 2015, in litt.). This species was collected once on Kauai in 1986, but has not been observed there before or after that time (Symon 1999, p. 1263; BISH 504035-Montgomery; Williams 2015, in litt.). Currently, on the island of Oahu, there is one individual remaining, with only one of the other previously extant individuals represented in an ex situ collection (Moses 2006, in litt.; Starr 2006, in litt.; HBMP 2010; Kawakami 2010, in litt.; Kawelo 2010, in litt.; Welton 2010, in litt.; Ching 2011, in litt.; Ching Harbin 2015, in litt.; Sailer 2015, in litt.). On Molokai, there a few individuals on the central south slope (Oppenheimer 2015, in litt.). There are 18 occurrences totaling approximately 1,600 individuals on east and west Maui (Ching 2011, in litt.; HBMP 2010; Oppenheimer 2015, in litt.). On Lanai, no individuals were found during surveys in 2012, and this species may be extirpated from this island, although there are plans to continue surveying suitable habitat (PEPP 2012, p. 129; Oppenheimer 2015, in litt.). In summary, the species' range on each island has decreased dramatically since 2001 (Kawelo 2005 and 2010, in litt.; HBMP 2010; Oppenheimer 2011, in litt.).

Feral pigs (Oahu, Maui, Kauai), goats (Maui, Kauai), mouflon (Lanai), feral cattle (Maui), axis deer (Lanai, Maui), and black-tailed deer (Kauai) modify and destroy habitat of *Nothocestrum latifolium* (HBMP 2010; Oppenheimer 2015, in litt.). Herbivory by these animals also poses a threat to this species. Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plants, such as *Fraxinus uhdei* (tropical ash), *Grevillea robusta* (silk oak), *Lantana camara, Leucaena leucocephala* (koa haole), *Melinis minutiflora, Passiflora suberosa* (huehue haole), *Schinus terebinthifolius,* and *Toona ciliata* (Australian red cedar), outcompete *N. latifolium* and modify and destroy habitat at all known occurrences. Wildfire, and fire caused by military training activities, is a threat to this species and its habitat (Sailer 2015, in litt.). Low numbers of individuals limits this species' ability to adapt to environmental change. Infestation by the black twig borer is a threat to *N. latifolium* (Ching Harbin 2015, in litt.). This species continues to decline, and, for unknown reasons, there is an observed lack of regeneration in *N. latifolium* in the wild (HBMP 2010; Duvall 2015, in litt.). Fortini *et al.* (2013, p. 83) found that, as environmental conditions are altered by climate change, *N. latifolium* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *N. latifolium* described above.

The remaining occurrences of *Nothocestrum latifolium* are at risk from the threats described above. Because of these threats, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Ochrosia haleakalae (holei) is a tree in the dogbane family (Apocynaceae) (Wagner *et al.* 1999, p. 218). Typical habitat for this species is dry to mesic forest, sometimes wet forest, and often lava, from 2,300 to 4,000 ft (700 to 1,200 m), in the dry cliff (Maui), lowland mesic (Maui and Hawaii Island), and montane mesic (Maui) ecosystems (Medeiros *et al.* 1986, pp. 27–28; Wagner *et al.* 1999, p. 218; TNCH 2007; HBMP 2010). Historically, this species was known from east Maui and Hawaii Island (HBMP 2010). Currently, *O. haleakalae* is known from 4 occurrences totaling about 15 individuals on the island of Maui (Medeiros 2007, in litt.; Oppenheimer 2008, in litt.; HBMP 2010; Oppenheimer 2015, in litt.). On Hawaii Island, there are two occurrences totaling at least 150 individuals in Hawaii Volcanoes National Park, with 150 outplanted in nearby kipuka (vegetated areas surrounded by lava flows), and one individual in the Laupahoehoe section of Hilo Forest Reserve (Pratt 2005, in litt.; Bio 2008a, in litt.; HBMP 2010; Pratt 2011, in litt.; Conry 2012, in litt.; Orlando 2015, in litt.; Perry 2015, in litt.).

Feral pigs and goats modify and destroy the habitat of *Ochrosia haleakalae* on Maui and Hawaii Island; in addition, cattle modify and destroy the habitat of this species on Maui (Medeiros 1995, in litt.; Pratt 2005, in litt.; Oppenheimer 2015, in litt.). Herbivory by these animals also poses a threat to this species. Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plant species, such as *Cestrum diurnum* (day cestrum), *Fraxinus uhdei, Psidium cattleianum, P. guajava, Rubus argutus, Setaria palmifolia* (palmgrass), and *Toona ciliata,* modify and destroy habitat and outcompete native plants, including *O. haleakalae* (HBMP 2010). In dry areas, wildfires affecting the habitat of this species are exacerbated by the presence of introduced grass species such as *Pennisetum clandestinum* (kikuyu grass) (HBMP 2010; Oppenheimer 2015, in litt.). Herbivory and seed predation by slugs and rats is a threat to this species (Oppenheimer 2015, in litt.). There is low to no reproduction observed in the wild, and this reduced reproductive vigor is due to reduced levels of genetic variability resulting from low numbers of individuals. This decreases the species' capacity to adapt to environmental changes, and thereby lessens the probability of its long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361; Duvall 2015, in litt.). Fortini *et al.* (2013, p. 83) found that, as environmental conditions are altered by climate change, *O. haleakalae* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *O. haleakalae* described above.

Ochrosia haleakalae is at risk from habitat degradation and loss by feral pigs, goats, cattle, and nonnative plants; the displacement of individuals due to competition with nonnative plants for space, nutrients, water, air, and light; herbivory by feral pigs, goats, and cattle; seed predation by slugs and rats; and by the small number of remaining individuals. The effects of climate change are likely to further exacerbate these threats. Because of these threats, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Phyllostegia brevidens (NCN) is a scandent (climbing) subshrub in the mint family (Lamiaceae) (Wagner *et al.* 1999, pp. 814–815). This species occurs in wet forest on the islands of Maui and Hawaii from 2,900 to 3,200 ft (880 to 975 m), in the lowland wet (Maui), montane wet (Hawaii Island), and wet cliff (Maui) ecosystems (Wagner *et al.* 1999, pp. 814–815; TNCH 2007; HBMP 2010). *Phyllostegia brevidens* is historically known from Hilo Forest Reserve, Mauna Kea, and Kulani on Hawaii Island; and from Kipahulu Valley on Maui (Haleakala National Park) (Wagner *et al.* 1999, p. 815; HBMP 2010; Smithsonian Institution 2015, in litt.). Currently, there is one individual on the island of Maui and two individuals on Hawaii Island (PEPP 2009, p. 90; Wagner *et al.* 2012, p. 46; PEPP 2014, p. 136; Gates 2015, in litt.; Oppenheimer 2015, in litt.; Perry 2015, in litt.).

Feral pigs modify and destroy habitat of this species on Maui (PEPP 2014, p. 136). The two remaining individuals on Hawaii Island are currently fenced (Perry 2015, in litt.); however, owing to the potential for accidental damage or vandalism (irrespective of maintenance), fences do not guarantee protection from ungulate ingress. Herbivory by feral pigs also poses a threat to this species on Maui. Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plants, such as *Clidemia hirta* and *Hedychium gardnerianum,* modify and destroy habitat and outcompete *P. brevidens* on Maui (PEPP 2009, p. 90). Herbivory by slugs is a threat to the remaining individual on Maui (PEPP 2014, p. 136). In addition, natural events such as landslides and erosion are threats to the occurrence on Maui (PEPP 2014, p. 136). The small number of remaining individuals limits this species' ability to adapt to environmental change. Fortini *et al.* (2013, p. 84) found that, as environmental conditions are altered by climate change, *P. brevidens* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *P. brevidens* described above.

The remaining occurrences of *Phyllostegia brevidens* are at risk. The species continues to be negatively affected by habitat modification and destruction by ungulates and nonnative plants, and by direct competition from nonnative plants, combined with herbivory by ungulates and slugs. The effects of climate change are likely to further exacerbate these threats. We find that *P. brevidens* is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Phyllostegia helleri (NCN) is a weakly erect to climbing shrub in the mint family (Lamiaceae) (Wagner *et al.* 1999, pp. 816–817). This species occurs on ridges or spurs from 2,800 to 4,000 ft (860 to 1,200 m) in diverse forest on Kauai in the lowland wet, montane wet, and wet cliff ecosystems (Wagner *et al.* 1999, p. 817; TNCH 2007; HBMP 2010). Historically, *P. helleri* was wide-ranging on the island of Kauai, from the north and east sides throughout the central plateau (Wagner *et al.* 1999, p. 817; HBMP 2010). Currently, this species is limited to one occurrence of four individuals (PEPP 2014, p. 35; Kishida 2015, in litt.).

Feral pigs and goats modify and destroy the habitat of *Phyllostegia helleri* on Kauai (HBMP 2010). Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Herbivory on fruits and seeds by rats negatively affects the remaining individuals (HBMP 2010). The only known occurrence of this species is located at the base of cliffs, and landslides are an additional threat (HBMP 2010). Nonnative plants, such as *Erigeron karvinskianus, Kalanchoe pinnata* (air plant), *Psidium guajava, Rubus rosifolius,* and various grasses, modify and destroy native habitat, outcompete native plants, and are found at the last known occurrence of *Phyllostegia helleri* (HBMP 2010). This species experiences reduced reproductive vigor due to reduced levels of genetic variability, leading to diminished capacity to adapt to environmental changes, and thereby lessening the probability of long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361). Fortini *et al.* (2013, p. 84) found that, as environmental conditions are altered by climate change, *P. helleri* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *P. helleri* described above.

The remaining occurrence of *Phyllostegia helleri* is at risk. The numbers of individuals are decreasing on Kauai, as this species was wide-ranging on the island, extending from the north and east sides throughout the central plateau, and is now known from only one occurrence of four individuals. These four individuals continue to be negatively affected by habitat modification and destruction by ungulates and nonnative plants, direct competition by nonnative plants, and by seed predation by rats. Natural events such as landslides may damage or destroy the remaining four individuals. The small number of remaining individuals limits this species' ability to adapt to environmental changes. The effects of climate change are likely to further exacerbate these threats. Because of these threats, we find that *P. helleri* is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Phyllostegia stachyoides (NCN) is a weakly erect to climbing subshrub in the mint family (Lamiaceae) (Wagner *et al.* 1999, p. 823). This species occurs in mesic to wet forest from 3,600 to 4,600 ft (1,000 to 1,400 m), in the montane wet (Hawaii Island, Maui, and Molokai) and montane mesic (Hawaii Island and Maui) ecosystems (Wagner *et al.* 1999, p. 823; TNCH 2007; HBMP 2010). *Phyllostegia stachyoides* is historically known from the eastern and central Molokai, west Maui, and wide-ranging occurrences on Hawaii Island (Wagner *et al.* 1999, p. 823; HBMP 2010; VanDeMark 2016, in litt.). Currently, occurrences on west Maui total about 15 individuals (Oppenheimer 2015, in litt.). Those on Molokai occur at 5 locations and total fewer than 30 individuals (Orlando 2015, in litt.; PEPP 2012, p. 156). Plants on Hawaii Island are now considered to be *P. ambigua* (VanDeMark 2016, in litt.).

Feral pigs, goats, and axis deer modify and destroy the habitat of *Phyllostegia stachyoides* on Maui, with evidence of the activities of these animals reported in areas where this species occurs (HBMP 2010; PEPP 2014, p. 141). Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plants, such as *Ageratina adenophora, Erigeron karvinskianus,* and *Tibouchina herbacea,* compete with *P. stachyoides,* modify and destroy its native habitat, and displace other native plant species (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 *in* Cuddihy and Stone 1990, p. 74; PEPP 2014, pp. 141–142). Herbivory by slugs and rats on leaves and nutlets of *P. stachyoides* poses a threat to this species at known locations on Maui and Molokai (PEPP 2014, pp. 140–142). On Maui, stochastic events such as floods and drought (with ensuing erosion) pose a threat to small, isolated occurrences of *P. stachyoides;* rockfalls and landslides are a threat to occurrences on Molokai (PEPP 2014, pp. 140–142). This species experiences reduced reproductive vigor due to reduced levels of genetic variability, leading to diminished capacity to adapt to environmental changes, and thereby lessening the probability of long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361). Fortini *et al.* (2013, p. 84) found that, as environmental conditions are altered by climate change, *P. stachyoides* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *P. stachyoides* described above.

The remaining occurrences of *Phyllostegia stachyoides* are at risk. The known individuals are restricted to small areas on west Maui and Molokai, and continue to be negatively affected by habitat modification and destruction by ungulates and by direct competition with nonnative plants, combined with herbivory by slugs and rats. The small number of remaining individuals limits this species' ability to adapt to environmental changes. Flooding, drought, and the effects of climate change are likely to further exacerbate these threats. Because of these threats, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Portulaca villosa (ihi) is a perennial herb in the purslane family (Portulacaceae) (Wagner *et al.* 1999, p. 1074). *Portulaca villosa* occurs on dry, rocky, clay, lava, or coralline reef sites, from sea level to 1,600 ft (490 m), in the coastal (Lehua, Kaula, Oahu, Kahoolawe, Maui, and Hawaii Island) and lowland dry (Oahu, Molokai, Lanai, Kahoolawe, Maui, and Hawaii Island) ecosystems, and one reported occurrence in the montane dry (Hawaii Island) ecosystem (Wagner *et al.* 1999, p. 1074; TNCH 2007; HBMP 2010). *Portulaca villosa* is historically known from all the main Hawaiian Islands except Niihau and Kauai (Wagner *et al.* 1999, p. 1074). *Portulaca villosa* has been observed on the small islets of Kaula and Lehua (west of Kauai and Niihau), and on Nihoa (NWHI); however, the current status of these occurrences is unknown. This species has not been observed on Oahu since the 1960s, when it was locally abundant at Kaohikaipu Island (HBMP 2010). Historically, on the island of Hawaii, this species occurred in the coastal area of Hawaii Volcanoes National Park west of Kamoamoa, but was extirpated in 1993 by lava flows (Orlando 2015, in litt.). On the island of Lanai, two individuals were last observed in 1996 (HBMP 2010). Currently, *P. villosa* is known from a few individuals on Molokai, 2 individuals on east Maui and 24 individuals on west Maui, fewer than 15 individuals on Kahoolawe, and five occurrences totaling 10 individuals on Hawaii Island (MNTF 2010, in litt.; Evans 2015a, in litt.).

Axis deer (Maui and Lanai), goats (Maui), mouflon (Lanai), and cattle (Hawaii Island) modify and destroy the habitat of *Portulaca villosa* (HBMP 2010; Oppenheimer 2015, in litt.). These ungulates also forage directly on this species. Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plants, such as *Lantana camara, Nicotiana glauca* (tree tobacco), *Pennisetum ciliare* (buffelgrass), and *Prosopis pallida* (kiawe, mesquite), compete with *Portulaca villosa,* modify and destroy its native habitat, displace other native plant species, and pose a threat to the known occurrences on Hawaii Island, Maui, Kahoolawe, and Molokai (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 *in* Cuddihy and Stone 1990, p. 74). *P. villosa* occurs in drier coastal and lowland habitats, all of which are affected by wildfires. Some coastal habitat includes exposed cliffs, which erode and cause landslides and rockfalls in areas where *P. villosa* occurs (Kahoolawe), posing a threat to this species (HBMP 2010). This species experiences reduced reproductive vigor due to low levels of genetic variability, leading to diminished capacity to adapt to environmental changes, and thereby lessening the probability of long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361). Fortini *et al.* (2013, p. 86) found that, as environmental conditions are altered by climate change, *P. villosa* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *P. villosa* described above.

The remaining occurrences of *Portulaca villosa* are at risk; the numbers of individuals are decreasing on Maui, Molokai, and Hawaii Island, and the species continues to be negatively affected by continued habitat modification and destruction by feral ungulates and nonnative plants, and by competition with nonnative plants. Because of its small and isolated remaining occurrences, natural events such as rockfalls, landslides, and wildfires may pose a threat to this species. The small number of remaining individuals limits this species' ability to adapt to environmental changes. The effects of climate change are likely to further exacerbate these threats. Because of these threats, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Pritchardia bakeri (Baker's loulu) is a small to medium-sized tree in the palm family (Arecaceae) (Hodel 2009, pp. 173–179; Hodel 2012, pp. 70–73). This species occurs in the lowland mesic ecosystem in the Koolau Mountains on Oahu, from 1,500 to 2,100 ft (457 to 640 m), in disturbed, windswept, and mostly exposed shrubby or grassy areas, and sometimes on steep slopes in these areas (Bacon *et al.* 2012, pp. 1–17; Hodel 2012, pp. 71–73). Currently, occurrences total fewer than 100 individuals (Ching Harbin 2015, in litt.).

Habitat modification and destruction by feral pigs impact the range and abundance of *Pritchardia bakeri.* Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plants compete with and degrade and destroy native habitat of *P. bakeri,* and displace native plant species by competing for water, nutrients, light, and space, or they may produce chemicals that inhibit growth of other plants (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 *in* Cuddihy and Stone 1990, p. 74). Stochastic events such as hurricanes modify and destroy the habitat of *P. bakeri,* and can directly damage or kill plants. Rats eat the fruit before they mature, leading to minimal or no recruitment (Hodel 2012, pp. 42, 73). This species experiences reduced reproductive vigor due to low levels of genetic variability caused by seed predation by rats and widely separated occurrences, leading to diminished capacity to adapt to environmental changes, and thereby lessening the probability of long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361; Hodel 2012, p. 73).

The remaining occurrences of *Pritchardia bakeri* are at risk; the known individuals are restricted to small areas on Oahu, and continue to be negatively affected by habitat degradation and loss by feral pigs and nonnative plants, fruit predation by rats, and the small number and reduced range of remaining individuals. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *P. bakeri* described above. Based on these threats, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Pseudognaphalium sandwicensium var. *molokaiense* (enaena) is a perennial herb in the sunflower family (Asteraceae) (Wagner *et al.* 1999, p. 321). Typical habitat for this variety is strand vegetation in dry consolidated dunes, in the coastal ecosystem (Wagner *et al.* 1999, p. 321; TNCH 2007; HBMP 2010). Historically, this variety was known from Molokai, Oahu, Maui, and Lanai (HBMP 2010; MNTF 2010, in litt.). Currently, *P. sandwicensium* var. *molokaiense* is known only from two locations on Molokai (as many as 20,000 individuals, depending on rainfall), and from fewer than 25 individuals on the northwest coast of Maui (Moses 2006, in litt.; Starr 2006, in litt.; Kallstrom 2008, in litt.; Oppenheimer 2015, in litt.). This variety was last observed on Lanai in 1960, and on Oahu (5 individuals) in the 1980s (HBMP 2010).

Goats and axis deer modify and destroy the habitat of *Pseudognaphalium sandwicensium* var. *molokaiense,* with evidence of the activities of these animals reported in the areas where this plant occurs (Moses 2006, in litt.; Starr 2006, in litt.; Kallstrom 2008, in litt; HBMP 2010). Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Additionally, nonnative plants, such as *Atriplex semibaccata* (Australian saltbush), *Chenopodium murale* (aheahea, goosefoot), *Pennisetum ciliare, Prosopis pallida,* and *Setaria parviflora* (foxtail), compete with and displace native plant species by competing for water, nutrients, light, and space, or they may produce chemicals that inhibit growth of other plants (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 *in* Cuddihy and Stone 1990, p. 74; Moses 2006, in litt.). This variety experiences reduced reproductive vigor due to low levels of genetic variability, leading to diminished capacity to adapt to environmental changes, and thereby lessening the probability of long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361). Rockfalls and landslides are a threat to the occurrence of this variety on a sea cliff on west Maui (HBMP 2010). Fortini *et al.* (2013, p. 86) found that, as environmental conditions are altered by climate change, *P. sandwicensium* var. *molokaiense* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *P. sandwicensium* var. *molokaiense* described above.

The remaining occurrences of *Pseudognaphalium sandwicensium* var. *molokaiense* on Molokai and Maui are at risk; individuals no longer occur on Oahu and Lanai. Occurrences on Maui and Molokai continue to be negatively affected by habitat modification and destruction by ungulates, and by direct competition with nonnative plants. The small number of remaining occurrences limits this plant's ability to adapt to environmental changes. The effects of climate change are likely to further exacerbate these threats. Because of these threats, we find that this variety is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Ranunculus hawaiensis (makou) is an erect or ascending perennial herb in the buttercup family (Ranunculaceae) (Duncan 1999, p. 1088). Typical habitat is mesic forest on grassy slopes and scree, and in open pastures, from 6,000 to 6,700 ft (1,800 to 2,000 m), in the montane mesic (Hawaii Island), montane dry (Hawaii Island), and subalpine (Hawaii Island and Maui) ecosystems (Bio 2008a, in litt; Pratt 2007, in litt.; Duncan 1999, p. 1088; TNCH 2007; HBMP 2010). Historically, *R. hawaiensis* was wide-ranging on the island of Hawaii. On Maui, this species was known from Haleakala National Park (HBMP 2010). In the 1980s and 1990s, this species numbered several hundred individuals on both islands. Currently, there are six occurrences totaling 14 individuals on Hawaii Island (Bio 2008a, in litt.; PEPP 2008, p. 108; Pratt 2008, in litt.; HBMP 2010; Agorastos 2011, in litt.; Imoto 2013, in litt.; Orlando 2015, in litt.). On Maui, a few individuals were observed on a cliff in 1994; however, this occurrence was not relocated in further surveys (PEPP 2013, p. 177). Additionally, no individuals were re-observed in Haleakala National Park (DLNR 2006, p. 61).

Feral pigs, mouflon, and cattle modify and destroy the habitat of *Ranunculus hawaiensis* on Hawaii Island, with evidence of the activities of these animals reported in the areas where this species occurs (HBMP 2010). These ungulates also forage on *R. hawaiensis.* Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plants, such as *Ehrharta stipoides* (meadow ricegrass), *Holcus lanatus* (common velvetgrass), and various grasses, modify and destroy native habitat, outcompete native plants, and have been reported in areas where *R. hawaiensis* occurs (HBMP 2010). Drought and erosion pose a threat in the areas of the last known occurrences of *R. hawaiensis* on Maui (PEPP 2013, p. 177). This species experiences reduced reproductive vigor due to low levels of genetic variability, leading to diminished capacity to adapt to environmental changes, and thereby lessening the probability of long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361). Fortini *et al.* (2013, p. 86) found that, as environmental conditions are altered by climate change, *R. hawaiensis* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *R. hawaiensis* described above.

The remaining occurrences of *Ranunculus hawaiensis* are at risk; the known individuals are restricted to small areas on Hawaii Island and continue to be negatively affected by habitat modification and destruction by feral ungulates, and by direct competition with nonnative plants, combined with predation by ungulates. Drought and erosion pose a threat in the areas of the last known occurrences on Maui. The small number of remaining individuals limits this species' ability to adapt to environmental changes. The effects of climate change are likely to further exacerbate these threats. Because of these threats, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Ranunculus mauiensis (makou) is an erect to weakly ascending perennial herb in the buttercup family (Ranunculaceae) (Duncan 1999, p. 1089). Typical habitat for *R. mauiensis* is open sites in mesic to wet forest and along streams, from 3,500 to 5,600 ft (1,060 to 1,700 m), in the montane wet (Kauai, Oahu, Molokai, and Maui), montane mesic (Kauai, Molokai, Maui, and Hawaii Island), and wet cliff (Molokai and Maui) ecosystems (Duncan 1999, p. 1089; TNCH 2007; HBMP 2010). Historically, *R. mauiensis* was known from Kauai, Oahu, Molokai, Maui, and Hawaii (HBMP 2010). Oahu occurrences have not been observed since the 1800s, and Hawaii Island occurrences have not been observed since 1980 (HBMP 2010). Currently, *R. mauiensis* is known from Kauai (53 individuals) and east Maui (112 individuals). Two individuals formerly known from Molokai have not been observed on recent surveys (Bily 2007, in litt.; Perlman 2007a, in litt.; Wood 2007b, in litt.; HBMP 2010; PEPP 2010, p. 105; Bakutis 2011, in litt.; PEPP 2011, p. 161; PEPP 2013, p. 177; Oppenheimer 2015, in litt.).

Feral pigs, goats, axis deer, black-tailed deer, and cattle modify and destroy the habitat of *Ranunculus mauiensis* on Kauai, Molokai, and Maui, with evidence of the activities of these animals reported in the areas where this species occurs (HBMP 2010; PEPP 2014, pp. 155–156). Ungulates are managed in Hawaii as game animals (except for cattle), but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plants, such as *Buddleja asiatica* (dog tail), *Clidemia hirta, Erigeron karvinskianus, Hedychium gardnerianum, Lantana camara, Passiflora edulis* (passion fruit), *P. tarminiana, Psidium cattleianum, Rubus argutus, R. rosifolius,* and *Tibouchina herbacea,* modify and destroy the native habitat of *Ranunculus mauiensis* and displace native plant species by competing for water, nutrients, light, and space; they may also produce chemicals that inhibit the growth of other plants (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 *in* Cuddihy and Stone 1990, p. 74; HBMP 2010; PEPP 2014, p. 155). Herbivory by slugs (Maui) and seed predation by rats (Maui, Kauai) are both reported as threats to *R. mauiensis* (HBMP 2010; PEPP 2014, pp. 154–155). Stochastic events such as drought (Maui), landslides (Kauai), and fire (Maui) are also reported as threats to *R. mauiensis* (HBMP 2010). Erosion is a threat to occurrences on Maui and Kauai (PEPP 2014, pp. 155–156). This species experiences reduced reproductive vigor due to low levels of genetic variability, leading to diminished capacity to adapt to environmental changes, thereby lessening the probability of its long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361). Fortini *et al.* (2013, p. 86) found that, as environmental conditions are altered by climate change, *R. mauiensis* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *R. mauiensis* described above.

The remaining occurrences of *Ranunculus mauiensis* are at risk, the known individuals are restricted to small areas on Kauai and Maui, and continue to be negatively affected by habitat modification and destruction by ungulates, direct competition with nonnative plants, and herbivory and predation by slugs and rats. Because of its small, isolated occurrences, landslides, drought, and erosion also negatively affect this species. The small number of remaining individuals limits this species' ability to adapt to environmental changes. The effects of climate change are likely to further exacerbate these threats. Because of these threats, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Sanicula sandwicensis (NCN) is a stout, erect, perennial herb in the parsley family (Apiaceae) (Constance and Affolter 1999, p. 210). This species occurs from 6,500 to 8,500 ft (2,000 to 2,600 m) in shrubland and woodland on the islands of Maui and Hawaii Island, in the montane mesic (Hawaii Island and Maui), montane dry (Hawaii Island), and subalpine (Hawaii Island and Maui) ecosystems (Constance and Affolter 1999, p. 210; TNCH 2007; NTBG Database 2014, in litt.). *Sanicula sandwicensis* is historically known from Haleakala on Maui and from Mauna Kea, Mauna Loa, and Hualalai on Hawaii Island (Constance and Affolter 1999, p. 210). Currently, there are more than 50 individuals of *S. sandwicensis* on east and west Maui (MNTF 2010, in litt.; PEPP 2011, pp. 162–164; Oppenheimer 2015, in litt.). In 2008, an occurrence of fewer than 20 individuals was found in Hawaii Volcanoes National Park (Benitez *et al.* 2008, p. 59). Following ungulate removal, this occurrence increased to as many as 45 individuals, with many juvenile plants

(Orlando 2015, in litt.). A single individual was found farther east at about 7,400 ft (Orlando 2015, in litt.).

Feral pigs and goats modify and destroy the habitat of *Sanicula sandwicensis* on Maui, with evidence of the activities of these animals reported in the areas where this species occurs (PEPP 2011, pp. 162–164; Oppenheimer 2015, in litt.). Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plants modify and destroy the habitat of *S. sandwicensis* and displace native plant species by competing for water, nutrients, light, and space; they may also produce chemicals that inhibit the growth of other plants (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 *in* Cuddihy and Stone 1990, p. 74; PEPP 2011, pp. 162–164). Those nonnative plants observed to directly affect *S. sandwicensis* and its habitat are *Ageratina adenophora, Anthoxanthum odoratum* (sweet vernalgrass), *Epilobium ciliatum* (willow herb), *Holcus lanatus* (common velvetgrass), *Pinus* spp., *Prunella vulgaris,* and *Rubus argutus* (PEPP 2011, pp. 162–164). Stochastic events such as drought, flooding, and fires are all reported to pose threats to this species (PEPP 2011, pp. 162–164). Erosion is a threat to occurrences on Maui (PEPP 2011, pp. 162–163). Herbivory by rats also is a threat because they eat the taproot, killing the plant (Oppenheimer 2015, in litt.). This species experiences reduced reproductive vigor due to low levels of genetic variability, leading to diminished capacity to adapt to environmental changes, thereby lessening the probability of its long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361). Fortini *et al.* (2013, p. 88) found that, as environmental conditions are altered by climate change, *S. sandwicensis* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *S. sandwicensis* described above.

The remaining occurrences of *Sanicula sandwicensis* are at risk; the known individuals are restricted to small areas on Maui and Hawaii Island and continue to be negatively affected by habitat modification and destruction by feral pigs and goats and by direct competition with nonnative plants. Stochastic events such as drought, flooding, erosion, and fires are threats to this species. The small number of remaining individuals limits this species' ability to adapt to environmental changes. The effects of climate change are likely to further exacerbate these threats. Because of these threats, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Santalum involutum (iliahi) is a shrub or small tree in the sandalwood family (Santalaceae) (Harbaugh *et al.* 2010, pp. 827–838). Habitat for *S. involutum* is mesic and wet forest on Kauai, from 400 to 2,500 ft (120 to 750 m), in the lowland mesic and lowland wet ecosystems (TNCH 2007; Harbaugh *et al.* 2010, pp. 827–838). Historically, this species was known from northern Kauai at Kee, Hanakapiai, and Wainiha, and from southern Kauai at Wahiawa, but has not been observed in these areas for 30 years (Harbaugh *et al.* 2010, p. 835). Currently, approximately 50 to 100 individuals occur in isolated forest pockets on Kauai (Harbaugh *et al.* 2010, p. 835; Wood 2015, in litt.).

Feral pigs and goats modify and destroy the habitat of *Santalum involutum* on Kauai, with evidence of the activities of these animals reported in the areas where this species occurs (Harbaugh *et al.* 2010, pp. 835–836; Wood 2015, in litt.). Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plants modify and destroy the native habitat of *S. involutum* and displace native plant species by competing for water, nutrients, light, and space; they may also produce chemicals that inhibit the growth of other plants (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 *in* Cuddihy and Stone 1990, p. 74; HBMP 2010). Nonnative plants reported to modify and destroy habitat of *S. involutum* include *Clidemia hirta, Hedychium gardnerianum, Lantana camara, Melinis minutiflora, Psidium cattleianum, P. guajava,* and *Rubus argutus* (Harbaugh *et al.* 2010, p. 836). Herbivory and seed predation by rats is a threat to this species (Harbaugh *et al.* 2010, p. 836; Wood 2015, in litt.). Wildfire is a threat to this species in mesic areas (Harbaugh *et al.* 2010, p. 836). This species experiences reduced reproductive vigor due to low levels of genetic variability, leading to diminished capacity to adapt to environmental changes, thereby lessening the probability of its long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361).

The remaining occurrences of *Santalum involutum* are at risk; the known individuals are restricted to a small area on Kauai and continue to be negatively affected by habitat modification and destruction by ungulates, direct competition with nonnative plants, and by herbivory and fruit predation by rats. The small number of remaining individuals limits this species' ability to adapt to environmental changes. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *S. involutum* described above. Because of these threats, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Schiedea diffusa ssp. *diffusa* (NCN) is a reclining or weakly climbing vine in the pink family (Caryophyllaceae) (Wagner *et al.* 1999, pp. 511–512; Wagner *et al.* 2005, pp. 103–106). *Schiedea diffusa* ssp. *diffusa* occurs in wet forest from 3,000 to 5,300 ft (915 to 1,600 m) on Molokai, and to 6,700 ft (2,050 m) on Maui, in the lowland wet (Maui) and montane wet (Maui and Molokai) ecosystems (Wagner *et al.* 1999, p. 512; TNCH 2007; HBMP 2010). Historically, on Molokai, this subspecies was known from Kawela to Waikolu valleys, and on Maui it was wide-ranging on both the east and west mountains (Wagner *et al.* 2005, p. 106). Currently, *S. diffusa* ssp. *diffusa* is known only from east Maui in scattered occurrences (fewer than 50 individuals total), in a much smaller range, with some remaining in Haleakala National Park (HBMP 2010; Gates 2015, in litt.). Two occurrences were observed within Hanawi NAR in 2005; however, their current status is unknown (Vetter 2015, in litt.). On Molokai, there were two occurrences totaling fewer than 10 individuals; however, these have not been seen since the 1990s (HBMP 2010; Oppenheimer 2015, in litt.).

Feral pigs modify and destroy the habitat of *Schiedea diffusa* ssp. *diffusa* on Maui and Molokai, with evidence of the activities of these animals reported in the areas where this subspecies occurs (HBMP 2010; PEPP 2014, p. 159). Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plants, such as *Adiantum raddianum* (NCN), *Ageratina adenophora, Hypochaeris radicata* (hairy cat's ear), *Juncus planifolius* (rush), *Passiflora tarminiana, Prunella vulgaris, Rubus argutus,* and *R. rosifolius,* modify and destroy the native habitat of *S. diffusa* ssp. *diffusa* and displace native plant species by competing for water, nutrients, light, and space; they may also produce chemicals that inhibit the growth of other plants (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 *in* Cuddihy and Stone 1990, p. 74; HBMP 2010; PEPP 2014, p. 159). Herbivory by slugs and seed predation by rats are both reported as threats to this subspecies (HBMP 2010; PEPP 2014, p. 159; Duvall 2015, in litt.). This subspecies experiences reduced reproductive vigor due to low levels of genetic variability, leading to diminished capacity to adapt to environmental changes, thereby lessening the probability of its long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361).

The remaining occurrences of *Schiedea diffusa* ssp. *diffusa* are at risk. The known individuals are restricted to small areas on Maui and continue to be negatively affected by habitat modification and destruction by ungulates, direct competition with nonnative plants, and herbivory and predation by slugs and rats. The small number of remaining individuals limits this subspecies' ability to adapt to environmental changes. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *S. diffusa* ssp. *diffusa* described above. Because of these threats, we find that this subspecies is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Schiedea pubescens (maolioli) is a reclining or weakly climbing vine in the pink family (Caryophyllaceae) (Wagner *et al.* 1999, p. 519; Wagner *et al.* 2005, pp. 99–102). This species occurs in diverse mesic to wet *Metrosideros* forest from 2,000 to 4,000 ft (640 to 1,220 m) in the lowland wet, montane wet, montane mesic, and wet cliff ecosystems (Wagner *et al.* 1999, 519; Wagner *et al.* 2005, p 100; TNCH 2007; HBMP 2010). Historically, on Molokai, this species was known from Kalae to Pukoo ridge; on Lanai, it was known from the Lanaihale summit area but has not been observed since 1922; on Maui, it was known from the western mountains at Olowalu, Kaanapali, and Waihee, with a possible occurrence the eastern mountains at Makawao (HBMP 2010). Currently, this species is known from one occurrence on Molokai totaling fewer than 30 individuals. The occurrence on east Maui has not been re-observed, but this species is found at seven locations on west Maui (Wood 2001, in litt.; Oppenheimer 2006, in litt.; Bakutis 2010, in litt.; HBMP 2010; MNTF 2010, in litt.; Oppenheimer 2010, in litt.; PEPP 2014, pp. 162–163; Oppenheimer 2015, in litt.). It was determined that the report of 4 to 6 individuals of *S. pubescens* at the PTA on Hawaii Island was a misidentification of individuals from the species *Schiedea hawaiiensis* (Wagner *et al.* 2005, pp. 93, 95).

Feral pigs, goats, axis deer, and cattle modify and destroy the habitat of *Schiedea pubescens* on Maui and Molokai, with evidence of the activities of these animals reported in the areas where this species occurs (HBMP 2010; PEPP 2014, p. 162). Ungulates are managed in Hawaii as game animals (except for cattle), but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plants, such as *Buddleja asiatica, Cestrum nocturnum* (night cestrum), *Clidemia hirta, Erigeron karvinskianus, Psidium cattleianum, Rubus rosifolius,* and *Tibouchina herbacea,* modify and destroy the native habitat of *S. pubescens* and displace native plant species by competing for water, nutrients, light, and space; they may also produce chemicals that inhibit the growth of other plants (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 *in* Cuddihy and Stone 1990, p. 74; HBMP 2010; PEPP 2014, pp. 162–163). Herbivory by slugs and seed predation by rats are both reported to be threats to *S. pubescens* on Maui (HBMP 2010; PEPP 2014, p. 162; Duvall 2015, in litt.). Stochastic events such as drought, erosion, fire, and flooding are also reported as threats to *S. pubescens* (HBMP 2010; PEPP 2014, p. 162; Oppenheimer 2015, in litt.). This species is outcrossing; however, very low population sizes may have reduced its genetic variation (Weller 2015, in litt.). Fortini *et al.* (2013, p. 88) found that, as environmental conditions are altered by climate change, *S. pubescens* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *S. pubescens* described above.

The remaining occurrences of *Schiedea pubescens* are at risk. The known individuals are restricted to small areas on Molokai and Maui, and continue to be negatively affected by habitat modification and destruction by ungulates, direct competition with nonnative plants, and herbivory and predation by slugs and rats. Landslides, flooding, fire, and drought impact this species. The small number of remaining individuals limits this species' ability to adapt to environmental changes. The effects of climate change are likely to further exacerbate these threats. Because of these threats, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Sicyos lanceoloideus (anunu) is a perennial vine in the gourd family (Cucurbitaceae) (Telford 1999, p. 581; Wagner and Shannon 1999, p. 444). *Sicyos lanceoloideus* occurs on ridges or spurs in mesic forest from 1,800 to 2,700 ft (550 to 800 m), in the dry cliff (Oahu), lowland mesic (Oahu, Kauai), and montane mesic (Kauai) ecosystems (Telford 1999, p. 581; TNCH 2007; HBMP 2010). *Sicyos lanceoloideus* was historically found at Kalalau Valley and Waimea Canyon on Kauai and in the Waianae Mountains on Oahu (Telford 1999, p. 581). Currently, on Kauai, there are four individuals in three locations (Kishida 2015, in litt.). On Oahu, this species occurs in 5 locations in the Waianae Mountains totaling fewer than 35 individuals (HBMP 2010; U.S. Army 2014 database). Because this species is a vine, determining exact numbers is difficult (PEPP 2013, p. 189). In addition, occurrences and numbers vary widely as individuals have been observed to persist for fewer than 7 years (Sailer 2015, in litt.).

Feral pigs, goats, and black-tailed deer modify and destroy the habitat of *Sicyos lanceoloideus* on Kauai and Oahu, with evidence of the activities of these animals reported in the areas where this species occurs (HBMP 2010; PEPP 2013, p. 189; PEPP 2014, p. 166; Williams 2015, in litt.). Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plants, such as *Clidemia hirta, Lantana camara, Melia azedarach* (chinaberry), *Paspalum urvillei* (vasey grass), *Passiflora edulis, Pluchea carolinensis* (sourbush), *Psidium cattleianum, P. guajava, Ricinus communis* (castor bean), *Rubus argutus, Schinus terebinthifolius,* and *Stachytarpheta jamaicensis,* modify and destroy the native habitat of *Sicyos lanceoloideus,* and displace native plant species by competing for water, nutrients, light, and space; they may also produce chemicals that inhibit the growth of other plants (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 *in* Cuddihy and Stone 1990, p. 74; HBMP 2010; Sailer 2015, in litt.). Drought is also reported as a threat to *S. lanceoloideus* (PEPP 2014, p. 166; HBMP 2010; Sailer 2015, in litt.). Fires are a threat to the occurrence in the Waianae Mountains of Oahu (Sailer 2015, in litt.). Because of the small remaining number of individuals, this species experiences reduced reproductive vigor due to low levels of genetic variability, leading to diminished capacity to adapt to environmental changes, thereby lessening the probability of its long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361). Fortini *et al.* (2013, p. 89) found that, as environmental conditions are altered by climate change, *S. lanceoloideus* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *S. lanceoloideus* described above.

The remaining occurrences of *Sicyos lanceoloideus* are at risk. The known individuals are restricted to small areas on Kauai and Oahu and continue to be negatively affected by habitat modification and destruction by ungulates, direct competition with nonnative plants, and stochastic events such as drought and fire. The small number of remaining individuals limits this species' ability to adapt to environmental change. The effects of climate change are likely to further exacerbate these threats. Because of these threats, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Sicyos macrophyllus (anunu) is a perennial vine in the gourd family (Cucurbitaceae) (Telford 1999, p. 578; Wagner and Shannon 1999, p. 444). Typical habitat is wet *Metrosideros polymorpha* forest and *Sophora chrysophylla-Myoporum sandwicense* (mamane-naio) forest, from 4,000 to 6,600 ft (1,200 to 2,000 m) in the montane mesic (Hawaii Island), montane wet (Maui), and montane dry (Hawaii Island) ecosystems (Telford 1999, p. 578; TNCH 2007; HBMP 2010). Historically, *S. macrophyllus* was known from Puuwaawaa, Laupahoehoe, Puna, and South Kona on Hawaii Island, and from Kipahulu Valley on the island of Maui (HBMP 2010). Currently, *S. macrophyllus* is known from 10 occurrences totaling between 24 and 26 individuals on Hawaii Island (Bio 2008, pers. comm.; Pratt 2008, in litt.; HBMP 2010; Evans 2015b, in litt.; Orlando 2015, in litt.). This species has been outplanted at several sites in Hawaii Volcanoes National Park and is persisting (Orlando 2015, in litt.). The individual on Maui has not been observed since 1987 (HBMP 2010).

Feral pigs, mouflon, and cattle modify and destroy the habitat of *Sicyos macrophyllus* on the island of Hawaii, with evidence of the activities of these animals reported in the areas where this species occurs (HBMP 2010). Ungulates are managed in Hawaii as game animals (except for cattle), but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plants, such as *Cenchrus setaceus, Delairea odorata* (German ivy), *Ehrharta stipoides,* and *Pennisetum clandestinum,* modify and destroy the native habitat of *S. macrophyllus* and displace native plant species by competing for water, nutrients, light, and space; they may also produce chemicals that inhibit the growth of other plants (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 *in* Cuddihy and Stone 1990, p. 74; HBMP 2010). Seed predation by rats is reported to pose a threat to this species (HBMP 2010). Stochastic events such as fire are also reported as a threat to *S. macrophyllus* (HBMP 2010). This species experiences reduced reproductive vigor due to low levels of genetic variability, leading to diminished capacity to adapt to environmental changes, thereby lessening the probability of its long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361). Fortini *et al.* (2013, p. 89) found that, as environmental conditions are altered by climate change, *S. macrophyllus* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *S. macrophyllus* described above.

The remaining occurrences of *Sicyos macrophyllus* are at risk. The only known individuals are restricted to small areas on Hawaii Island and continue to be negatively affected by habitat modification and destruction by ungulates, direct competition with nonnative plants, and seed predation by rats. Fire is also a threat to this species. The small number of remaining individuals limits this species' ability to adapt to environmental changes. The effects of climate change are likely to further exacerbate these threats. Because of these threats, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Solanum nelsonii (popolo) is a sprawling or trailing shrub up to 3 ft (1 m) tall, in the nightshade family (Solanaceae) (Symon 1999, pp. 1273–1274). Typical habitat for this species is coral rubble or sand in coastal sites up to 490 ft (150 m), in the coastal ecosystem (Symon 1999, pp. 1273–1274; TNCH 2007; HBMP 2010). Historically, *S. nelsonii* was known from Kaalualu, Kamilo, and Kaulana Bay, and South Point (5 individuals total) on Hawaii Island; from Kealea Bay, Kawaewaae, and Leahi on Niihau; and from the Northwest Hawaiian Islands of Nihoa, Laysan, Pearl and Hermes, and Kure Atoll (Green Island) (Lamoureux 1963, p. 6; Clapp *et al.* 1977, p. 36; HBMP 2010). This species was last collected on Niihau in 1949 (HBMP 2010). The only known individual on Maui was reported to have disappeared in the mid-1990s after cattle had been allowed to graze in its last known habitat (HBMP 2010; Duvall 2015, in litt.). Currently, *S. nelsonii* occurs in the coastal ecosystem on the islands of Hawaii and Molokai (approximately 50 individuals), and on the Northwest Hawaiian Islands of Kure (an unknown number of individuals), Midway (approximately 260 individuals on Sand, Eastern, and Spit islands), Laysan (approximately 490 individuals), Pearl and Hermes (30 to 100 individuals), and Nihoa (8,000 to 15,000 individuals) (Aruch 2006, in litt.; Rehkemper 2006, in litt.; Tangalin 2006, in litt.; Bio 2008 a and 2008b, in litt.; Vanderlip 2011, in litt.; Conry 2012, in litt.; PEPP 2013, pp. 190–191).

Axis deer and feral cattle modify and destroy the habitat of *Solanum nelsonii* on the main Hawaiian islands of Maui, Molokai, and Hawaii, with evidence of the activities of these animals reported in the areas where this species occurs (HBMP 2010). Ungulates are managed in Hawaii as game animals (except for cattle), but public hunting does not adequately control the numbers of ungulates to eliminate habitat modification and destruction, and herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plants, such as *Lantana camara, Leucaena leucocephala, Pennisetum ciliare, Prosopis pallida,* and *Setaria verticillata* (bristly foxtail), modify and destroy the native habitat of *S. nelsonii* both on the main Hawaiian Islands and on some of the Northwest Hawaiian Islands (HBMP 2010). Nonnative plants displace native plant species by competing for water, nutrients, light, and space, or they may produce chemicals that inhibit the growth of other plants (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 *in* Cuddihy and Stone 1990, p. 74; PEPP 2008, p. 110; HBMP 2010). Seed predation by rats has been reported as a threat to *S. nelsonii* on Molokai (PEPP 2014, p. 167). Stochastic events such as drought, erosion, fire, and flooding are also reported as threats to *S. nelsonii* (HBMP 2010; PEPP 2014, p. 167). In 2011, a tsunami swept over Midway Atoll's Eastern Island and Kure Atoll's Green Island, inundating *S. nelsonii* plants, spreading plastic debris, and destroying seabird nesting areas, reaching about 500 ft (150 m) inland (DOFAW 2011, in litt.; Starr 2011, in litt.; USFWS 2011, in litt.). Occurrences of this species on the main Hawaiian Islands and on some of the Northwest Hawaiian Islands experience reduced reproductive vigor due to low levels of genetic variability, leading to diminished capacity to adapt to environmental changes, thereby lessening the probability of its long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361). The effects of climate change resulting in sea-level rise will alter environmental conditions and ecosystem that support this species. Fortini *et al.* (2013, p. 89) found that, as environmental conditions are altered by climate change, *S. nelsonii* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *S. nelsonii* described above.

The remaining occurrences of *Solanum nelsonii* on the main Hawaiian Islands are restricted to small areas of Molokai and Hawaii Island, and continue to be negatively affected by habitat modification and destruction by ungulates, direct competition with nonnative plants, and herbivory and predation by rats. Even though most individuals of *S. nelsonii* in the Northwestern Hawaii Islands are found on lands managed by the Service as part of the Hawaiian Islands National Wildlife Refuge, the relatively isolated occurrences of *S. nelsonii* there are negatively affected by nonnative plants. The small number of remaining individuals limits this species' ability to adapt to environmental changes. A tsunami occurred and impacted habitat for this species, and sea level rise associated with global warming will modify and destroy habitat for *S. nelsonii* in the low-lying Northwestern Hawaiian Islands. Because of these threats, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Stenogyne kaalae ssp. *sherffii* (NCN) is a climbing vine in the mint family (Lamiaceae) (Wagner and Weller 1999, pp. 448–449; Weller and Sakai 1999, p. 838). This species occurs in the Koolau Mountains of Oahu, in diverse forest from 1,500 to 1,600 ft (450 to 490 m) in the lowland wet ecosystem (Wagner and Weller 1999, pp. 448–449; TNCH 2007; HBMP 2010; U.S. Army 2014 database). *Stenogyne kaalae* ssp. *sherffii* is historically known from diverse mesic forest in the Waianae Mountains of Oahu, and from the lowland wet ecosystem of the Koolau Mountains (although, as described in the proposed rule, it was thought to be a different species, *S. sherffii*, until the mid-1990s). This subspecies occurred within a very small range in the northern Koolau Mountains, but now all wild individuals are extirpated. There are propagules from collections from those plants that have been outplanted in the same areas (PEPP 2014, p. 169; Ching Harbin 2015, in litt.).

Feral pigs modify and destroy the habitat of *Stenogyne kaalae* ssp. *sherffii* on Oahu, with evidence of the activities of these animals reported in the areas where this subspecies occurred (HBMP 2010; PEPP 2014, p. 169). Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat destruction and modification, and herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plants, such as *Blechnum appendiculatum* (NCN), *Clidemia hirta, Cyclosorus parasiticus* (NCN), *Psidium cattleianum,* and *Rubus rosifolius,* destroy and modify the native habitat of *S. kaalae* ssp. *sherffii* and displace native plant species by competing for water, nutrients, light, and space; they may also produce chemicals that inhibit the growth of other plants (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 *in* Cuddihy and Stone 1990, p. 74; HBMP 2010). This subspecies experiences reduced reproductive vigor due to low levels of genetic variability, leading to diminished capacity to adapt to environmental changes, thereby lessening the probability of its long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361). Fortini *et al.* (2013, p. 90) found that, as environmental conditions are altered by climate change, *S. kaalae* ssp. *sherffii* is unlikely to tolerate or adapt to projected changes in temperature and moisture, and is unlikely to be able to move to areas with more suitable climatic conditions. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *S. kaalae* ssp. *sherffii* described above.

Any remaining occurrences of *Stenogyne kaalae* ssp. *sherffii* are at risk; the last known wild individuals were restricted to a very small area on Oahu, and the habitat continues to be negatively affected by habitat modification and destruction by ungulates and direct competition with nonnative plants. The small number of remaining individuals (outplanted only) limits this subspecies' ability to adapt to environmental changes. The effects of climate change are likely to further exacerbate these threats. Because of these threats, we find that this subspecies is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Wikstroemia skottsbergiana (akia) is a shrub or small tree in the akia family (Thymelaceae) (Peterson 1999, p. 1290). *Wikstroemia skottsbergiana* occurs in wet forest on the island of Kauai, in the lowland wet ecosystem (Peterson 1999, p. 1290; TNCH 2007). *Wikstroemia skottsbergiana* is historically known from the Wahiawa Mountains, Hanalei Valley, and Kauhao Valley, on the island of Kauai (Peterson 1999, p. 1290). Currently, this species is limited to 30 individuals at one location (PEPP 2012, p. 26; Wood 2015, in litt.).

Feral pigs and goats destroy and modify the habitat of *Wikstroemia skottsbergiana* on Kauai, with evidence of the activities of these animals reported in the areas where this species occurs (DLNR 2005, in litt.; Wood 2015, in litt.). Ungulates are managed in Hawaii as game animals, but public hunting does not adequately control the numbers of ungulates to eliminate habitat destruction and modification or herbivory by these animals (Anderson *et al.* 2007, in litt.; HAR–DLNR 2010, in litt.). Nonnative plants destroy and modify the native habitat of *W. skottsbergiana* and displace native plant species by competing for water, nutrients, light, and space; they may also produce chemicals that inhibit the growth of other plants (Smith 1985, pp. 180–250; Vitousek *et al.* 1987 *in* Cuddihy and Stone 1990, p. 74; HBMP 2010). Predation of seeds by rats is a threat to this species (DLNR 2005, in litt.). Landslides are a threat to the only known occurrence of this species (Wood 2015, in litt.). This species experiences reduced reproductive vigor due to low levels of genetic variability, leading to diminished capacity to adapt to environmental changes, thereby lessening the probability of its long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361; DLNR 2005, in litt.).

The remaining occurrences of *Wikstroemia skottsbergiana* are at risk. The known individuals are restricted to a very small area on Kauai and continue to be negatively affected by habitat modification and destruction by ungulates, direct competition with nonnative plants, and seed predation by rats. The small number of remaining individuals limits this species' ability to adapt to environmental changes. Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *W. skottsbergiana* described above. Because of these threats, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Animals

Band-Rumped Storm-Petrel (*Oceanodroma castro*)—Hawaii Population

The band-rumped storm-petrel, a small seabird, is a member of the family Hydrobatidae (order Procellariiformes) and a member of the Northern Hemisphere subfamily Hyrdrobatinae (Slotterback 2002, p. 2). This seabird is found in several areas of the subtropical Pacific and Atlantic Oceans (del Hoyo *et al.* 1992 *in* Bird Life International 2015, in litt.). The Atlantic breeding populations are restricted to islands in the eastern portions: Cape Verde, Ascension, Madeira, and the Azores Islands (Allan 1962, p. 274; Harrison 1983, p. 274). Wintering birds may occur as far west as the mid-Atlantic; however, Atlantic breeding populations are not within the borders of the United States or in areas under U.S. jurisdiction. Three widely separated breeding areas occur in the Pacific: in Japan, Hawaii, and Galapagos (Richardson 1957, p. 19; Harris 1969, p. 96; Harrison 1983, p. 274). The Japanese population, which breeds on islets off the east coast of Japan (Hidejima and Sanganjima *in* Allan 1962, p. 274; Harris 1969, p. 96), ranges within 860 mi (1,400 km) east and south of the breeding colonies. Populations in Japan and Galapagos total as many as 23,000 pairs (Boersma and Groom 1993, p. 114); however, a recent survey on Hidejima Island revealed only 117 burrows, some of which were occupied by Leach's storm petrels (*Oceanodroma leucorhoa*) (Biodiversity Center of Japan 2014, p. 1). Surveyors noted that the nesting area had been affected by extensive erosion caused by the 2011 earthquake and tsunami (Biodiversity Center of Japan 2014, p. 1).

When Polynesians arrived about 1,500 years ago, the band-rumped storm-petrel probably was common on all of the main Hawaiian Islands (Harrison *et al.* 1990, pp. 47–48). As evidenced by bones found in middens on Hawaii Island (Harrison *et al.* 1990, pp. 47–48) and in excavation sites on Oahu and Molokai (Olson and James 1982, pp. 30, 33), band-rumped storm-petrels were once numerous enough to be harvested for food and possibly for their feathers (Harrison *et al.* 1990, p. 48).

In Hawaii, band-rumped storm-petrels are known to nest in remote cliff locations on Kauai and Lehua Island, in steep open to vegetated cliffs, and in little vegetated, high-elevation lava fields on Hawaii Island (Wood *et al.* 2002, p. 17–18; VanderWerf *et al.* 2007, pp. 1, 5; Joyce and Holmes 2010, p. 3; Banko 2015 in litt.; Raine 2015, in litt.). Vocalizations were heard in Haleakala Crater on Maui in 1992 (Johnston 1992, *in* Wood *et al.* 2002, p. 2), on Lanai (Penniman 2015, in litt.), and in Hawaii Volcanoes National Park (Orlando 2015, in litt.). Based on the scarcity of known breeding colonies in Hawaii and their remote, inaccessible locations today compared to prehistoric population levels and distribution, the band-rumped storm-petrel appears to be significantly reduced in numbers and range following human occupation of the Hawaiian Islands, likely as a result of predation by nonnative mammals and habitat loss.

Taxonomists have typically combined the Pacific populations of band-rumped storm-petrel into a single taxon, and currently the American Ornithologist's Union (AOU) regards the species as monotypic (2015, in litt.). However, molecular studies are ongoing and indicate genetic differences between populations in different oceans and archipelagos (Friesen *et al.* 2007b, pp. 18590–18952; Smith *et al.* 2007, p. 770; Taylor *et al.*, in prep *in* Raine 2015, in litt.) and between sympatric populations that breed in different seasons (*e.g.*, in the Galapagos Islands; Smith and Friesen 2007, pp. 1599–1560; Smith *et al.* 2007, p. 756).

Band-rumped storm-petrels are regularly observed in coastal waters around Kauai, Niihau, and Hawaii Island (Harrison *et al.* 1990, p. 49; Holmes and Joyce 2009, 4 pp.), and in "rafts" (regular concentrations) of a few birds to as many as 100, possibly awaiting nightfall before coming ashore to breeding colonies. Kauai likely has the largest population, with an estimated 221 nesting pairs in cliffs along the north shore of the island in 2002, and additional observations on the north and south side of the island in 2010 (Harrison *et al.* 1990, p. 49; Wood *et al.* 2002, pp. 2–3; Holmes and Joyce 2009, 4 pp.; Joyce and Holmes 2010, pp. 1–3). Audio detections for Kauai indicate this species may be predominantly breeding on the Na Pali coast and Waimea Canyon, with a very small number in Wainiha Valley (Raine 2015, in litt.). The band-rumped storm-petrel is also known from Lehua Island (as detected there by auditory surveys) (VanderWerf *et al.* 2007, p.1; Raine 2015, in litt.), Maui (Mitchell *et al.* 2005, in litt.), Kahoolawe (Olson 1992, pp. 38, 112), Lanai (Penniman 2015, in litt.) and Hawaii Island (Mitchell *et al.* 2005, in litt.; Orlando 2015, in litt.). Additional surveys have been conducted on several islands in recent years, including surveys confirming the presence of band-rumped storm-petrels at the PTA on Hawaii Island, but further data are not yet available (Swift 2015, in litt.). The species likely once nested in coastal Maui, where the remains of a chick were found in 1999, and islands such as Niihau and Kaula, where surveys have not been conducted, likely have suitable nesting habitat and may harbor the species (Penniman 2015, in litt.). We do not have a current estimate of total numbers in Hawaii at this time.

Nesting sites are in burrows and in crevices, holes, and on protected ledges along cliff faces, where a single egg is laid (Allan 1962, p. 274–275; Harris 1969, pp. 104–105; Slotterback 2002, p. 11). Predation by nonnative animals on nests and adults during the breeding season is the greatest threat to the Hawaiian population of the band-rumped storm-petrel. These predators include feral cats (*Felis catus*), barn owls (*Tyto alba*), small Indian mongoose (*Herpestes auropunctatus*), black rats (*Rattus rattus*), Norway rats (*R. norvegicus*), and Polynesian rats (*R. exulans*) (Scott *et al.* 1986, pp. 1, 363–364; Tomich 1986, pp. 37–45; Harrison *et al.* 1990, pp. 47–48; Slotterback 2002, p. 19; Raine 2015, in litt.). Attraction of fledglings to artificial lights and collisions with structures, such as communication towers and utility lines, is also a threat (Reed *et al.* 1985, p. 377; Telfer *et al.* 1987, pp. 412–413; Harrison *et al.* 1990, p. 49; Banko *et al.* 1991, p. 651; Cooper and Day 1998, p. 18; Podolsky *et al.* 1998, pp. 21, 27–30; Holmes and Joyce 2009, p. 2). Monitoring of power lines on Kauai has recorded over 1,000 strikes by seabirds annually (mostly Newell's shearwaters (*Puffinus newelli*); Travers *et al.* 2014, pp. 19, 42) that may result in injury or death. Recent studies of attraction of seabirds to artificial lights indicate that 40 percent of those downed by exhaustion (from circling the lights) are killed by collisions with cars or other objects (Anderson 2015, p. 4–13). The small numbers of these birds and their nesting areas on remote cliffs make population-level impacts difficult to document. However, the band-rumped storm-petrel has similar behavior, life-history traits, and habitat needs to the Newell's shearwater, a threatened species that has sustained major losses as a result of light attraction and collisions with lines or other objects (Banko *et al.* 1991, p. 651; Banko 2015, in litt.; Raine 2015, in litt.). Therefore, we conclude that these are threats to the band-rumped storm-petrel as well. Erosion and landslides at nest sites caused by the actions of nonnative ungulates is a threat in some locations on the island of Kauai (Raine 2015, in litt.). Nonnative plants outcompete native plants and can also affect nesting sites of the band-rumped storm-petrel by accelerating erosion, leading to landslides and rockfalls (Wood *et al.* 2002, pp. 7–19). Regulatory mechanisms (*e.g.*, the Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703 *et seq.*)) contribute minimally to the active recovery and management of this species (USFWS 2013, in litt.). The small population size and limited distribution of the band-rumped storm-petrel in Hawaii is a threat to this population (Soulé 1987, p. 8; Lande 1988, pp. 1455, 1458–1459; Harrison *et al.* 1990, p. 50; Furness 2003, p. 33). During the breeding season, a single hurricane or landslide caused by erosion could cause reproductive failure and kill a significant number of adult birds. Commercial fisheries and ocean pollution have negative impacts to seabirds, and also are likely to have negative impacts to the band-rumped storm petrel, although the information about the impacts of fisheries and plastics on storm-petrel species is limited. In this rule, our listing determination applies only to the Hawaiian population of the band-rumped storm-petrel (see Distinct Population Segment (DPS) Analysis, below). Because of the deleterious and cumulative effects to the band-rumped storm-petrel caused by the threats described above, we find that the Hawaii population is endangered throughout its range, and, therefore, we find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Yellow-Faced Bees (*Hylaeus* spp.)

Bees in the genus *Hylaeus* (family Colletidae), which includes the seven species in this final rule, are commonly known as yellow-faced bees or masked bees for their yellow-to-white facial markings. All *Hylaeus* bees roughly resemble small wasps in appearance; however, *Hylaeus* bees have plumose (branched) hairs on the body that are longest on the sides of the thorax, which readily distinguish them from wasps (Michener 2000, in litt.). Bees in the family Colletidae are also referred to as plasterer bees because they line their nests with a self-secreted, cellophane-like material. Eggs hatch and develop into larvae (immature stage) and as larvae grow, they molt through three successive stages (instars), then change into pupae (a resting form) in which they metamorphose and emerge as adults (Michener 2000, in litt.). The diet of the larval stages is unknown, although it is presumed the larvae feed on stores of pollen and nectar collected and deposited in the nest by the adult female.

Yellow-Faced Bee (*Hylaeus anthracinus*)

Hylaeus anthracinus was historically known from numerous coastal and lowland dry forest habitats up to 2,000 ft (610 m) in elevation on the islands of Hawaii, Maui, Lanai, Molokai, and Oahu, and in some areas was "locally abundant." Between 1997 and 1998, surveys for Hawaiian *Hylaeus* were conducted at 43 sites that were either historical collecting localities or potential suitable habitat. *Hylaeus anthracinus* was observed at 13 of the 43 survey sites, but was not found at any of the 9 historically occupied sites (Daly and Magnacca 2003, p. 217). Several of the historical collection sites have been urbanized or are dominated by nonnative vegetation (Liebherr and Polhemus 1997, pp. 346–347; Daly and Magnacca 2003, p. 55; Magnacca 2007, pp. 186–188). There has been a dramatic decline in abundance or presence of *H. anthracinus* since surveys conducted in 1999 through 2002, noted on surveys conducted between 2011 and 2013 (Magnacca 2015, in litt.). Currently, *H. anthracinus* is known from 15 small patches of coastal and lowland dry forest habitat (Magnacca 2005a, in litt., p. 2); 5 locations on the island of Hawaii in the coastal ecosystem; 2 locations on Maui in the coastal and lowland dry ecosystems; 1 location on Kahoolawe in the lowland dry ecosystem; 3 locations on Molokai in the coastal ecosystem, and 4 locations on Oahu in the coastal ecosystem (Daly and Magnacca 2003, p. 217; Magnacca 2005a, in litt., p. 2; Magnacca and King 2013, pp. 13–14; Graham 2015, in litt.). These 15 locations supported small populations of *H. anthracinus*, but the number of individual bees is unknown. In 2004, a single individual was collected in montane dry forest on the island of Hawaii (possibly a vagrant); however, the presence of additional individuals has not been confirmed at this site (Magnacca 2005a, in litt., p. 2). Although this species was previously unknown from the island of Kahoolawe, it was observed at one location on the island in 2002 (Daly and Magnacca 2003, p. 55). Additionally, during surveys between 1997 and 2008, *H. anthracinus* was absent from 17 other sites with potentially suitable habitat from which other species of *Hylaeus* were collected (Daly and Magnacca 2003, pp. 4, 55) on Hawaii Island, Maui, Lanai, Molokai, and Oahu.

Habitat destruction and modification by urbanization and land use conversion lead to the direct fragmentation of foraging and nesting areas used by *Hylaeus anthracinus*. Habitat destruction and modification by nonnative plants adversely impacts native plant species by modifying the availability of light, altering soil-water regimes, modifying nutrient cycling, altering the fire characteristics (increasing the fire cycle), and ultimately converting native dominated plant communities to nonnative plant communities, and results in removal of food sources and nesting sites for *H. anthracinus* (Graham 2015, in litt.). Habitat modification and destruction by nonnative animals such as feral pigs, goats, axis deer, and cattle, is considered one of the primary factors underlying degradation of native vegetation in the Hawaiian Islands, and these habitat changes also remove food sources and nesting sites for *H. anthracinus* (Stone 1985, pp. 262–263; Cuddihy and Stone 1990, pp. 60–66, 73). Fire is a threat to *H. anthracinus,* as it destroys native coastal and lowland plant communities on which the species depends, and opens habitat for increased invasion by nonnative plants. Because of the greater frequency, intensity, and duration of fires that have resulted from the human alteration of landscapes and the introduction of nonnative plants, especially grasses, fires are now more destructive to the coastal and lowland dry ecosystems (Brown and Smith 2000, p. 172). A single grass-fueled fire often kills most native trees and shrubs in the area (D'Antonio and Vitousek 1992, p. 74) and could destroy food and nesting resources for *H. anthracinus.* The number and size of wildfires are increasing in the main Hawaiian Islands; however, their occurrences and locations are unpredictable, and could affect habitat for yellow-faced bees at any time (Gima 1998, in litt.; County of Maui 2009, Ch. 3, p. 3; Hamilton 2009, in litt.; Honolulu Advertiser 2010, in litt.; Pacific Disaster Center 2011, in litt.). Random, naturally occurring events such as hurricanes, tsunami, and drought can also modify and destroy habitat of *H. anthracinus* by creating disturbed areas conducive to invasion by nonnative plants and by eliminating food and nesting resources (Kitayama and Mueller-Dombois 1995, p. 671; Businger 1998, pp. 1–2; Magnacca 2015, in litt.). Predation by nonnative ants including the big-headed ant (*Pheidole megacephala*), the yellow crazy ant (*Anoplolepis gracilipes*), *Solenopsis papuana* (NCN), and *S. geminata* (NCN) on *Hylaeus* egg, larvae, and pupal stages is a threat to *H. anthracinus,* and ants also compete with *H. anthracinus* for their nectar food and nesting resources (Howarth 1985, p. 155; Hopper *et al.* 1996, p. 9; Holway *et al.* 2002, pp. 188, 209; Daly and Magnacca 2003, p. 9; Lach 2008, p. 155; Graham 2015, in litt.). Predation by nonnative western yellow jacket wasps (*Vespula pensylvanica*) is a threat to *H. anthracinus* because the wasp is an aggressive, generalist predator, and occurs in great numbers in many habitat types, from sea level to over 8,000 ft (2,450 m), including areas where *H. anthracinus* and other yellow-faced bees occur (Gambino *et al.* 1987, p. 169; Graham 2015, in litt.). Existing regulatory mechanisms and agency policies do not address the primary threats to the yellow-faced bees and their habitat from nonnative ungulates. Competition with nonnative bees (honeybees, carpenter bees, sweat bees (*Lasioglossum* spp.), and alien *Hylaeus* bees) for nectar and pollen, and by exclusion from foraging, is a potential threat to *H. anthracinus* (Magnacca 2007, p. 188; Graham 2015, in litt.; Magnacca 2015, in litt.). The small number of populations and individuals of *H. anthracinus* makes this species more vulnerable to extinction because of the higher risks from genetic bottlenecks, random demographic fluctuations, and localized catastrophes such as hurricanes, tsunami, and drought (Daly and Magnacca 2003, p. 3; Magnacca 2007, p. 173; Magnacca 2015, in litt.). Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *H. anthracinus* described above. In addition, disease has been suggested as a threat, as pathogens carried by nonnative bees, wasps, and ants could be transmitted to *H. anthracinus* through shared food sources (Graham 2015, in litt.); however, we have no reports of this type of disease transmission at this time.

The remaining populations of *Hylaeus anthracinus* and its habitat are at risk. The known individuals are restricted to 15 locations on Hawaii, Maui, Kahoolawe, Molokai, and Oahu and continue to be negatively affected by habitat destruction and modification by urbanization and land-use conversion, and by habitat destruction and removal of food and nesting sites by nonnative ungulates and nonnative plants. Habitat destruction by fire is a threat. Randomly occurring events such as hurricanes and drought modify habitat and remove food and nesting sources for *H. anthracinus.* Predation by nonnative ants and wasps is a threat. Existing regulatory mechanisms and agency policies do not address the primary threats to the yellow-faced bees and their habitat from nonnative ungulates. Competition with nonnative bees for food and nesting sites is a threat. The small number of remaining populations limits this species' ability to adapt to environmental changes. The effects of climate change are likely to further exacerbate these threats. Because of these threats, we find that *H. anthracinus* is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Yellow-Faced Bee (*Hylaeus assimulans*)

Historically, *Hylaeus assimulans* was known from numerous coastal and lowland dry forest habitats up to 2,000 ft (610 m) in elevation on the islands of Maui (coastal and lowland dry ecosystems), Lanai (lowland dry ecosystem), and Oahu (coastal and lowland dry ecosystem). There are no collections from Molokai although it is likely *H. assimulans* occurred there because all other species of *Hylaeus* known from Maui, Lanai, and Oahu also occurred on Molokai (Daly and Magnacca 2003, pp. 217–229). Between 1997 and 1998, surveys for Hawaiian *Hylaeus* were conducted at 25 sites on Maui, Kahoolawe, Lanai, Molokai, and Oahu. *Hylaeus assimulans* was absent from 6 of its historical localities on Maui, Lanai, and Oahu, and was not observed at the remaining 19 sites with potentially suitable habitat (Daly and Magnacca 2003, pp. 56, 217; Magnacca 2005b, in litt., p. 2; Magnacca 2007, pp. 177, 181, 183; Xerces Society 2009, p. 4). Currently, *H. assimulans* is known from a few small patches of coastal and lowland dry forest habitat (Magnacca 2005b, in litt., p. 2) in two locations on Maui in the lowland dry ecosystem; one location on Kahoolawe in the coastal ecosystem; and two locations on Lanai in the lowland dry ecosystem (Daly and Magnacca 2003, p. 58; Magnacca 2005b, in litt., p. 2). This species has likely been extirpated from Oahu because it has not been observed since Perkin's 1899 surveys, and was not found during recent surveys of potentially suitable habitat on Oahu at Kaena Point, Makapuu, and Kalaeloa (Daly and Magnacca 2003, p. 217; Magnacca 2005b, in litt., p. 2).

Habitat destruction and modification by urbanization and land use conversion lead to fragmentation of, and eventual loss, of foraging and nesting areas used by *Hylaeus assimulans.* Habitat destruction and modification by nonnative plants (*Asystasia gangetica* (Chinese violet), *Atriplex semibaccata, Cenchrus ciliaris* (buffelgrass), *Chloris barbata* (swollen fingergrass), *Digitaria insularis* (sourgrass), *Leucaena leucocephala, Melinis minutiflora, Pluchea indica* (Indian fleabane), *P. carolinensis, Prosopis pallida, Schinus terebinthifolius,* and *Verbesina encelioides* (golden crown-beard) adversely impact native plant species by modifying the availability of light, altering soil-water regimes, modifying nutrient cycling, altering the fire characteristics, and ultimately converting native dominated plant communities to nonnative plant communities, and results in removal of food sources and nesting sites for *H. assimulans* (Xerces Society 2009, p. 21; 76 FR 55170, September 6, 2011, p. 55184). Habitat modification and destruction by nonnative animals such as feral pigs, goats, axis deer, and cattle is considered one of the primary factors underlying destruction of native vegetation in the Hawaiian Islands, and these habitat changes also remove food sources and nesting sites of *H. assimulans* (Stone 1985, pp. 262–263; Cuddihy and Stone 1990, pp. 60–66, 73). Fire is a threat to *H. assimulans*, as it destroys native plant communities on which the species depends, and opens habitat for increased invasion by nonnative plants. Because of the greater frequency, intensity, and duration of fires that have resulted from the human alteration of landscapes and the introduction of nonnative plants, especially grasses, fires are now more destructive to the coastal and lowland dry ecosystems (Brown and Smith 2000, p. 172), and a single grass-fueled fire often kills most native trees and shrubs in the area (D'Antonio and Vitousek 1992, p. 74) and could destroy food and nesting resources for *H. assimulans*. The numbers of wildfires and the acreages involved are increasing in the main Hawaiian Islands; however, their occurrences and locations are unpredictable, and could affect habitat for yellow-faced bees at any time (Gima 1998, in litt.; County of Maui 2009, ch. 3, p. 3; Hamilton 2009, in litt.; Honolulu Advertiser 2010, in litt.; Pacific Disaster Center 2011, in litt.). Random, naturally occurring events such as hurricanes, tsunami, and drought modify and destroy habitat of *H. assimulans* by creating disturbed areas conducive to invasion by nonnative plants, eliminating food and nesting sources (Kitayama and Mueller-Dombois 1995, p. 671; Businger 1998, pp. 1–2; Magnacca 2015, in litt.). Predation by nonnative ants (the big-headed ant, the yellow crazy ant, *Solenopsis papuana*, and *S. geminata*) on *Hylaeus* egg, larvae, and pupal stages is a threat to *H. assimulans;* additionally, ants compete with *H. assimulans* for their nectar food source (Howarth 1985, p. 155; Hopper *et al.* 1996, p. 9; Holway *et al.* 2002, pp. 188, 209; Daly and Magnacca 2003, p. 9; Lach 2008, p. 155). Predation by nonnative western yellow jacket wasps is a threat to *H. assimulans* because the wasp is an aggressive, generalist predator, and occurs in great numbers in many habitat types, from sea level to over 8,000 ft (2,450 m), including areas where *H. assimulans* and other yellow-faced bees occur (Gambino *et al.* 1987, p. 169). Existing regulatory mechanisms and agency policies do not address the primary threats to the yellow-faced bees and their habitat from nonnative ungulates. Competition with nonnative bees (honeybees, carpenter bees, sweat bees, and alien *Hylaeus* bees) for nectar and pollen is a threat to *H. assimulans* (Magnacca 2007, p. 188; Graham 2015, in litt; Magnacca 2015, in litt.). The small number of populations and individuals of *H. assimulans* makes this species more vulnerable to extinction because of the higher risks from genetic bottlenecks, random demographic fluctuations, and localized catastrophes such as hurricanes and drought (Daly and Magnacca 2003, p. 3; Magnacca 2007, p. 173). Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *H. assimulans* described above.

The remaining populations of *Hylaeus assimulans* and its habitat are at risk. The known individuals are restricted to 5 locations: 2 on Maui, 1 on Kahoolawe, and 2 on Lanai, and is likely extirpated from Oahu. This species continues to be negatively affected by habitat destruction and modification by urbanization and land-use conversion, and by habitat destruction and removal of food and nesting sites by nonnative ungulates and nonnative plants. Habitat destruction by fire is a threat. Randomly occurring events such as hurricanes and drought modify habitat and remove food and nesting sources for *H. assimulans*. Predation by nonnative ants and wasps is a threat. Existing regulatory mechanisms and agency policies do not address the primary threats to the yellow-faced bees and their habitat from nonnative ungulates. Competition with nonnative bees for food and nesting sites is a threat. The small number of remaining populations limits this species' ability to adapt to environmental changes. The effects of climate change are likely to further exacerbate these threats. Because of these threats, we find that *H. assimulans* is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Yellow Faced Bee (*Hylaeus facilis*)

Historically, *Hylaeus facilis* was known from Maui, Lanai, Molokai, and Oahu, in dry shrubland to wet forest from sea level to 3,000 ft (1,000 m) (Gagne and Cuddihy 1999, p. 93; Daly and Magnacca 2003, pp. 81, 83). Perkins (1899, p. 77) remarked *H. facilis* was among the most common and widespread *Hylaeus* species on Oahu, Maui, Lanai, and Molokai (Magnacca 2007, p. 183). Although the species was collected in a wide range of habitat types, it likely prefers dry to mesic forest and shrubland (Magnacca 2005c, in litt., p. 2), which are increasingly rare and patchily distributed habitats (Smith 1985, pp. 227–233; Juvik and Juvik 1998, p. 124; Gagne and Cuddihy 1999, pp. 66–67, 75; Magnacca 2005c, in litt., p. 2). Researchers believe the wet forest site on Oahu where *H. facilis* was observed likely had a more open understory (more mesic conditions), and represented an outlier or residual population (Perkins 1899, p.76; Liebherr and Polhemus 1997; p. 347). *Hylaeus facilis* has almost entirely disappeared from most of its historical range (Maui, coastal and lowland mesic; Lanai, lowland dry and lowland mesic; and Oahu, coastal and lowland dry) (Daly and Magnacca 2003, p. 7; Magnacca 2007, p. 183). Between 1998 and 2006, 39 sites on Maui, Lanai, Molokai, and Oahu were surveyed, including 13 historical sites. *Hylaeus facilis* was absent from all 13 locations (Magnacca 2007, p. 183) and was not observed at 26 additional sites with potentially suitable habitat (Daly and Magnacca 2003, pp. 7, 81–82; Magnacca 2007, p. 183). Likely extirpated from Lanai, *H. facilis* is currently known from only two locations, one on Molokai in the coastal ecosystem, and one on Oahu in the coastal ecosystem (Daly and Magnacca 2003, pp. 81–82; Magnacca 2005c, in litt., p. 2). In addition, in 1990, a single individual was collected on Maui near Makawao at 1,500 ft (460 m); however, this site is urbanized and devoid of native plants, and it is likely this collection was a vagrant individual.

Habitat destruction and modification by urbanization and land use conversion lead to fragmentation of, and eventual loss of, foraging and nesting areas used by *Hylaeus facilis*. Habitat destruction and modification by nonnative plants adversely impacts native plant species by modifying the availability of light, altering soil-water regimes, modifying nutrient cycling, altering the fire characteristics, and ultimately converting native dominated plant communities to nonnative plant communities, and results in removal of food sources and nesting sites for the *H. facilis*. In addition to the nonnative plant species noted above that modify and destroy habitat of *H. assimulans*, *Urochloa mutica*, *Prosopis pallida*, *Psidium cattleianum*, and *Rubus* spp. are noted to negatively affect the habitat of *H. facilis* (Cuddihy and Stone 1990, p. 105; Hawaii Division of Forestry and Wildlife (DOFAW) 2007, pp. 20–22). Habitat modification and destruction by nonnative animals such as feral pigs, goats, axis deer, and cattle is considered one of the primary factors underlying destruction of native vegetation in the Hawaiian Islands, and these habitat changes also remove food sources and nesting sites for *H. facilis* (Stone 1985, pp. 262–263; Cuddihy and Stone 1990, pp. 60–66, 73). Fire is a threat to *H. facilis*, as it destroys native plant communities on which the species depends, and opens habitat for increased invasion by nonnative plants. Because of the greater frequency, intensity, and duration of fires that have resulted from the human alteration of landscapes and the introduction of nonnative plants, especially grasses, fires are now more destructive to the coastal and lowland dry ecosystems (Brown and Smith 2000, p. 172), and a single grass-fueled fire often kills most native trees and shrubs in the area (D'Antonio and Vitousek 1992, p. 74) and could destroy food and nesting resources for *H. facilis*. The numbers of wildfires and the acreages involved are increasing in the main Hawaiian Islands; however, their occurrences and locations are unpredictable, and could affect habitat for yellow-faced bees at any time (Gima 1998, in litt.; County of Maui 2009, ch. 3, p. 3; Hamilton 2009, in litt.; Honolulu Advertiser 2010, in litt.; Pacific Disaster Center 2011, in litt.). Random, naturally occurring events such as hurricanes, tsunami, and drought modify and destroy habitat of *H. facilis* by creating disturbed areas conducive to invasion by nonnative plants, eliminating food and nesting resources (Kitayama and Mueller-Dombois 1995, p. 671; Businger 1998, pp. 1–2; Magnacca 2015, in litt.). Predation by nonnative ants (the big-headed ant, the yellow crazy ant, *Solenopsis papuana*, and *S. geminata*) on *Hylaeus* egg, larvae, and pupal stages is a threat to *H. facilis;* additionally, ants compete with *H. facilis* for their nectar food source (Howarth 1985, p. 155; Hopper *et al.* 1996, p. 9; Holway *et al.* 2002, pp. 188, 209; Daly and Magnacca 2003, p. 9; Lach 2008, p. 155). Predation by nonnative western yellow jacket wasps is a threat to *H. facilis* because the wasp is an aggressive, generalist predator, and occurs in great numbers in many habitat types, from sea level to over 8,000 ft (2,450 m), including areas where *H. facilis* and other yellow-faced bees occur (Gambino *et al.* 1987, p. 169). Existing regulatory mechanisms and agency policies do not address the primary threats to the yellow-faced bees and their habitat from nonnative ungulates. Competition with nonnative bees (honeybees, carpenter bees, sweat bees, and alien *Hylaeus* bees) for nectar and pollen is a threat to *H. facilis* (Magnacca 2007, p. 188; Magnacca 2015, in litt.). The small number of populations and individuals of *H. facilis* makes this species more vulnerable to extinction because of the higher risks from genetic bottlenecks, random demographic fluctuations, and localized catastrophes such as hurricanes and drought (Daly and Magnacca 2003, p. 3; Magnacca 2007, p. 173). Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *H. facilis* described above.

The remaining populations of *Hylaeus facilis* and its habitat are at risk. The known individuals are restricted to one location on Molokai and one location on Oahu, and continue to be negatively affected by habitat destruction and modification by urbanization and land-use conversion, and by habitat destruction and removal of food and nesting sites by nonnative ungulates and nonnative plants. Habitat destruction by fire is a threat. Randomly occurring events such as hurricanes and drought modify habitat and remove food and nesting sources for *H. facilis*. Predation by nonnative ants and wasps is a threat. Existing regulatory mechanisms and agency policies do not address the primary threats to the yellow-faced bees and their habitat from nonnative ungulates. Competition with nonnative bees for food and nesting sites is a threat. The small number of remaining populations limits this species' ability to adapt to environmental changes. The effects of climate change are likely to further exacerbate these threats. Because of these threats, we find that *H. facilis* is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Yellow-Faced Bee (*Hylaeus hilaris*)

Historically, *Hylaeus hilaris* was known from coastal habitat on Maui, Lanai, and Molokai; and lowland dry habitat on Maui. It is believed to have occurred along much of the coast of these islands because its primary hosts, *H. anthracinus*, *H. assimulans*, and *H. longiceps* likely occurred throughout this habitat. First collected on Maui in 1879, *H. hilaris* has only been collected twice in the last 100 years. *Hylaeus hilaris* was absent from three of its historical population sites revisited by researchers between 1998 and 2006 (Magnacca 2007, p. 181). It was also not observed in 2003 at 10 additional sites with potentially suitable habitat (Daly and Magnacca 2003, pp. 103, 106). Currently, the only known population of *H. hilaris* is located on Molokai, in the coastal ecosystem (Daly and Magnacca 2003, pp. 103, 106; Magnacca 2005d, in litt., p. 2; Magnacca 2007, p. 181).

Because *Hylaeus hilaris* is an obligate parasite on *H. anthracinus*, *H. assimulans*, and *H. longiceps*, its occurrences are determined by the remaining populations of these three species. Habitat destruction and modification by urbanization and land use conversion leads to fragmentation of, and eventual loss of, foraging and nesting areas of *H. hilaris*, and of those *Hylaeus* species that *H. hilaris* is dependent upon. Habitat destruction and modification by nonnative plants adversely impacts native plant species by modifying the availability of light, altering soil-water regimes, modifying nutrient cycling, altering the fire characteristics, and ultimately converting native dominated plant communities to nonnative plant communities, and results in removal of food sources and nesting sites for the *Hylaeus* species that *H. hilaris* is dependent upon. Nonnative plant species that modify and destroy habitat of *H. hilaris* are noted in the description for *H. assimulans*, above. Habitat modification and destruction by nonnative animals such as feral pigs, goats, axis deer, and cattle is considered one of the primary factors underlying destruction of native vegetation in the Hawaiian Islands, and these habitat changes also remove food sources and nesting sites for the host species of *H. hilaris* (Stone 1985, pp. 262–263; Cuddihy and Stone 1990, pp. 60–66, 73). Fire is a threat to *H. hilaris*, as it destroys native plant communities, and opens habitat for increased invasion by nonnative plants. Because of the greater frequency, intensity, and duration of fires that have resulted from the human alteration of landscapes and the introduction of nonnative plants, especially grasses, fires are now more destructive to the coastal and lowland dry ecosystems (Brown and Smith 2000, p. 172), and a single grass-fueled fire often kills most native trees and shrubs in the area (D'Antonio and Vitousek

1992, p. 74) and could destroy food and nesting resources for *H. hilaris*. The numbers of wildfires and the acreages involved are increasing in the main Hawaiian Islands; however, their occurrences and locations are unpredictable, and could affect habitat for yellow-faced bees at any time (Gima 1998, in litt.; County of Maui 2009, ch. 3, p. 3; Hamilton 2009, in litt.; Honolulu Advertiser 2010, in litt.; Pacific Disaster Center 2011, in litt.). Random, naturally occurring events such as hurricanes, tsunami, and drought can modify and destroy habitat of *H. hilaris* by creating disturbed areas conducive to invasion by nonnative plants, eliminating food and nesting sources of its host species (Kitayama and Mueller-Dombois 1995, p. 671; Businger 1998, pp. 1–2; Magnacca 2015, in litt.). Predation by nonnative ants (the big-headed ant, the long-legged ant, *Solenopsis papuana*, and *S. geminata*) on *Hylaeus* egg, larvae, and pupal stages is a threat to *H. hilaris;* additionally, ants compete with the yellow-faced bees that *H. hilaris* is dependent on for their food resources (Howarth 1985, p. 155; Hopper *et al.* 1996, p. 9; Holway *et al.* 2002, pp. 188, 209; Daly and Magnacca 2003, p. 9; Lach 2008, p. 155). Predation by nonnative western yellow jacket wasps is a threat to *H. hilaris* because the wasp is an aggressive, generalist predator, and occurs in great numbers in many habitat types, from sea level to over 8,000 ft (2,450 m), including areas where *H. hilaris* and other yellow-faced bees occur (Gambino *et al.* 1987, p. 169). Existing regulatory mechanisms and agency policies do not address the primary threats to the yellow-faced bees and their habitat from nonnative ungulates. Competition with nonnative bees (honeybees, carpenter bees, sweat bees, and alien *Hylaeus* bees) for nectar and pollen is a threat to the host yellow-faced bees of *H. hilaris* (Magnacca 2007, p. 188; Graham 2015, in litt.; Magnacca 2015, in litt.). The small number of populations and individuals of *H. hilaris* makes this species more vulnerable to extinction because of the higher risks from genetic bottlenecks, random demographic fluctuations, and localized catastrophes such as hurricanes and drought (Daly and Magnacca 2003, p. 3; Magnacca 2007, p. 173). Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *H. hilaris* described above.

The remaining populations of *Hylaeus hilaris* and its habitat are at risk. There is one known occurrence on Molokai. *Hylaeus hilaris* and its host species continue to be negatively affected by habitat destruction and modification by urbanization and land-use conversion, and by habitat destruction and removal of food and nesting sites (for host species) by nonnative ungulates and nonnative plants. Habitat destruction by fire is a threat. Randomly occurring events such as hurricanes and drought modify habitat and remove food and nesting sources for *H. hilaris* and its host species. Predation by nonnative ants and wasps is a threat. Existing regulatory mechanisms and agency policies do not address the primary threats to the yellow-faced bees and their habitat from nonnative ungulates. Competition with nonnative bees for food and nesting sites is a threat. The small number of remaining populations limits this species' ability to adapt to environmental changes, especially because it is an obligate parasite of other rare *Hylaeus* bees. Because of these threats, we find that *H. hilaris* is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Yellow-Faced Bee (*Hylaeus kuakea*)

Because the first collection of *Hylaeus kuakea* was not made until 1997, its historical range is unknown (Magnacca 2005e, in litt., p. 2; Magnacca 2007, p. 184). Phylogenetically, *H. kuakea* belongs in a species-group primarily including species inhabiting mesic forests (Magnacca and Danforth 2006, p. 405). Only four individuals (all males) have been collected from two different sites in the Waianae Mountains of Oahu in the lowland mesic ecosystem (Magnacca 2007, p. 184). The species has never been collected in any other habitat type or area, including some sites that have been more thoroughly surveyed (Magnacca 2011, in litt.). Not all potentially suitable habitat has been surveyed due to the remote and rugged locations, small size, rareness, and distant spacing among large areas of nonnative forest (Smith 1985, pp. 227–233; Juvik and Juvik 1998, p. 124; Wagner *et al.* 1999, pp. 66–67, 75).

Habitat destruction and modification by feral pigs leads to fragmentation of, and eventual loss of, foraging and nesting areas of *Hylaeus kuakea*. Habitat destruction and modification by nonnative plants adversely impacts native plant species by modifying the availability of light, altering soil-water regimes, modifying nutrient cycling, altering the fire characteristics, and ultimately converting native dominated plant communities to nonnative plant communities, and results in removal of food sources and nesting sites for *H. kuakea*. Nonnative plant species that modify and destroy habitat of *H. kuakea* are noted in the descriptions for *H. assimulans* and *H. facilis*, above. Fire is a threat to *H. kuakea* because it destroys native plant communities and opens habitat for increased invasion by nonnative plants. Because of the greater frequency, intensity, and duration of fires that have resulted from the human alteration of landscapes and the introduction of nonnative plants, especially grasses, fires are now more destructive, including in lowland mesic areas (Brown and Smith 2000, p. 172), and a single grass-fueled fire often kills most native trees and shrubs in the area (D'Antonio and Vitousek 1992, p. 74) and could destroy food and nesting resources for *H. kuakea*. The numbers of wildfires and the acreages involved are increasing in the main Hawaiian Islands; however, their occurrences and locations are unpredictable, and could affect habitat for yellow-faced bees at any time (Gima 1998, in litt.; County of Maui 2009, ch. 3, p. 3; Hamilton 2009, in litt.; Honolulu Advertiser 2010, in litt.; Pacific Disaster Center 2011, in litt.). Random, naturally occurring events such as hurricanes and drought can modify and destroy habitat of *H. kuakea* by creating disturbed areas conducive to invasion by nonnative plants, eliminating food and nesting resources (Kitayama and Mueller-Dombois 1995, p. 671; Businger 1998, pp. 1–2). Predation by nonnative ants (the big-headed ant, the long-legged ant, *Solenopsis papuana*, and *S. geminata*) on *Hylaeus* egg, larvae, and pupal stages is a threat to *H. kuakea;* additionally, ants compete with *H. kuakea* for their nectar food source (Howarth 1985, p. 155; Hopper *et al.* 1996, p. 9; Holway *et al.* 2002, pp. 188, 209; Daly and Magnacca 2003, p. 9; Lach 2008, p. 155). Predation by nonnative western yellow jacket wasps is a threat to *H. kuakea* because the wasp is an aggressive, generalist predator, and occurs in great numbers in many habitat types, from sea level to over 8,000 ft (2,450 m), including areas where *H. kuakea* and other yellow-faced bees occur (Gambino *et al.* 1987, p. 169). Existing regulatory mechanisms and agency policies do not address the primary threats to the yellow-faced bees and their habitat from nonnative ungulates. Competition with nonnative bees (honeybees, carpenter bees, sweat bees, and alien *Hylaeus* bees) for nectar and pollen is a threat to *H. kuakea* (Magnacca 2007, p. 188; Graham 2015, in litt.; Magnacca 2015, in litt.). The small number of populations and individuals of *H. kuakea* makes this species more vulnerable to extinction because of the higher risks from genetic bottlenecks, random demographic fluctuations, and localized catastrophes such as hurricanes and drought (Daly and Magnacca 2003, p. 3; Magnacca 2007, p. 173). Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *H. kuakea* described above.

The remaining populations of *Hylaeus kuakea* and its habitat are at risk. The known individuals are restricted to mesic forest in one area of one island (Oahu), and continue to be negatively affected by habitat destruction and removal of food and nesting sites by nonnative ungulates and nonnative plants. Habitat destruction by fire is a threat. Randomly occurring events such as hurricanes and drought modify habitat and remove food and nesting sources for *H. kuakea.* Predation by nonnative ants and wasps is a threat. Existing regulatory mechanisms and agency policies do not address the primary threats to the yellow-faced bees and their habitat from nonnative ungulates. Competition with nonnative bees for food and nesting sites is a threat. The small number of remaining populations limits this species' ability to adapt to environmental changes. The effects of climate change are likely to further exacerbate these threats. Because of these threats, we find that *H. kuakea* is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Yellow-faced bee (*Hylaeus longiceps*)

Hylaeus longiceps is historically known from coastal and lowland dry shrubland habitat up to 2,000 ft (610 m) in numerous locations on the islands of Maui, Lanai, Molokai, and Oahu. Perkins (1899, p. 98) noted *H. longiceps* was locally abundant, and probably occurred throughout much of the leeward and lowland areas on these islands. *Hylaeus longiceps* is now restricted to small populations in patches of coastal and lowland dry habitat on the Maui, Lanai, Molokai, and Oahu (Magnacca 2005f, in litt., p. 2; Magnacca and King 2013, pp. 13, 16). Twenty-five sites that were either historical collecting localities or contained potentially suitable habitat for this species were surveyed between 1997 and 2008 (Magnacca and King 2013, p. 16). *Hylaeus longiceps* was observed at only seven of the surveyed sites: Three sites on Lanai (in the coastal and lowland dry ecosystems), two sites on Oahu (in the coastal ecosystem), and one site on each of the islands of Maui (in the coastal ecosystem) and Molokai (in the coastal ecosystem) (Daly and Magnacca 2003, p. 135; Magnacca and King 2013, pp. 11–12).

Most of the coastal and lowland habitat of *Hylaeus longiceps* has been developed or degraded, and is no longer suitable (Liebherr and Polhemus 1997, pp. 346–347; Magnacca 2007, pp. 186–188). Habitat destruction and modification by axis deer (Lanai) and urbanization (Maui and Molokai) leads to fragmentation of, and eventual loss of, foraging and nesting areas of *H. longiceps* (Daly and Magnacca 2003, pp. 217–229). Habitat modification and destruction by human impacts in areas accessible by four-wheel drive vehicles on Lanai is a threat because these vehicles can destroy plants used as food sources and destroy ground nesting sites for *H. longiceps* (Daly and Magnacca 2003, p. 135). Habitat destruction and modification by nonnative plants adversely affects native plant species used by *H. longiceps* as a food source by modifying the availability of light, altering soil-water regimes, modifying nutrient cycling, altering the fire characteristics, and ultimately converting native-dominated plant communities to nonnative plant communities. Nonnative plant species that modify and destroy habitat of *H. longiceps* are noted in the descriptions for *H. assimulans* and *H. facilis,* above. Fire is a threat to *H. longiceps* because it destroys native plant communities, and opens habitat for increased invasion by nonnative plants. Because of the greater frequency, intensity, and duration of fires that have resulted from the human alteration of landscapes and the introduction of nonnative plants, especially grasses, fires are now more destructive to the coastal and lowland dry ecosystems (Brown and Smith 2000, p. 172), and a single grass-fueled fire often kills most native trees and shrubs in the area (D'Antonio and Vitousek 1992, p. 74) and could destroy food and nesting resources for *H. longiceps.* The numbers of wildfires and the acreages involved are increasing in the main Hawaiian Islands; however, their occurrences and locations are unpredictable, and could affect habitat for yellow-faced bees at any time (Gima 1998, in litt.; County of Maui 2009, ch. 3, p. 3; Hamilton 2009, in litt.; Honolulu Advertiser 2010, in litt.; Pacific Disaster Center 2011, in litt.). Random, naturally occurring events such as hurricanes, tsunami, and drought modify and destroy habitat of *H. longiceps* by creating disturbed areas conducive to invasion by nonnative plants, eliminating food and nesting resources (Kitayama and Mueller-Dombois 1995, p. 671; Businger 1998, pp. 1–2; Magnacca 2015, in litt.). Predation by, and competition for food sources, by nonnative ants and the nonnative western yellow jacket wasp is a threat to *H. longiceps* (see *H. kuakea,* above) (Gambino *et al.* 1987, p. 169; Howarth 1985, p. 155; Hopper *et al.* 1996, p. 9; Holway *et al.* 2002, pp. 188, 209; Daly and Magnacca 2003, p. 9; Lach 2008, p. 155). Existing regulatory mechanisms and agency policies do not address the primary threats to the yellow-faced bees and their habitat from nonnative ungulates. Competition with nonnative bees (honeybees, carpenter bees, sweat bees, and alien *Hylaeus* bees) for nectar and pollen is a threat to *H. longiceps* (Magnacca 2007, p. 188; Graham 2015, in litt.; Magnacca 2015, in litt.). The small number of populations and individuals of *H. longiceps* makes this species more vulnerable to extinction because of the higher risks from genetic bottlenecks, random demographic fluctuations, and localized catastrophes such as hurricanes and drought (Daly and Magnacca 2003, p. 3; Magnacca 2007, p. 173). Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *H. longiceps* described above.

The remaining population of *Hylaeus longiceps* and its habitat are at risk. The known individuals are restricted to seven locations, three on Lanai, two on Oahu, and one each on Maui and Molokai, and continue to be negatively affected by habitat destruction and modification by urbanization and land-use conversion, by habitat destruction and removal of food and nesting sites by nonnative ungulates and nonnative plants, and by recreational use vehicles on Lanai. Habitat destruction by fire is a threat. Randomly occurring events such as hurricanes and drought may modify habitat and remove food and nesting sources for *H. longiceps.* Predation by nonnative ants and wasps is a threat. Existing regulatory mechanisms and agency policies do not address the primary threats to the yellow-faced bees and their habitat from nonnative ungulates. Competition with nonnative bees for food and nesting sites is a threat. The small number of remaining populations limits this species' ability to adapt to environmental changes. Because of these threats, we find that *H. longiceps* is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Yellow-Faced Bee (*Hylaeus mana*)

Hylaeus mana is known only from lowland mesic forest dominated by native *Acacia koa* in the Koolau Mountains of Oahu, at 1,400 ft (430 m). Few other *Hylaeus* species have been found in this type of forest on Oahu (Daly and Magnacca 2003, p. 138). This type of native forest is increasingly rare and patchily distributed because of competition and encroachment into habitat by nonnative plants (Smith 1985, pp. 227–233; Juvik and Juvik 1998, p. 124; Wagner *et al.* 1999, pp. 66–67, 75). Decline of this forest type could lead to decline in populations and numbers of *H. mana.* Three additional population sites were discovered on Oahu in 2012, including a new observation of the species at the original site (Magnacca and King 2013, pp. 17–18). The three new sites are within a narrow range of lowland mesic forest at 1,400 ft (430 m), bordered by nonnative plant habitat at lower elevations and wetter native forest habitat above (Magnacca and King 2013, pp. 17–18). *Hylaeus mana* was most often observed on *Santalum freycinetianum* var. *freycinetianum,* which suggests that *H. mana* may be closely associated with this plant species (Magnacca and King 2013, p. 18). Additional surveys may reveal more populations; however, the extreme rarity of this species, its absence from many survey sites, the fact that it was not discovered until very recently, and the limited range of its possible host plant, all suggest that few populations remain (Magnacca 2005g, in litt., p. 2; Magnacca and King 2013, pp. 17–18).

Habitat destruction and modification by feral pigs leads to fragmentation of, and eventual loss of, foraging and nesting areas of *Hylaeus mana* (Daly and Magnacca 2003, pp. 217–229). Habitat destruction and modification by nonnative plants adversely impacts native plant species used by *H. mana* as a food source by modifying the availability of light, altering soil-water regimes, modifying nutrient cycling, altering the fire characteristics, and ultimately converting native dominated plant communities to nonnative plant communities. Nonnative plant species that modify and destroy habitat of *H. mana* are noted in the descriptions for *H. assimulans* and *H. facilis,* above, and can outcompete native canopy species such as *Acacia koa,* the known preferred native canopy type of *H. mana* (GISD 2011, in litt.; State of Hawaii 2013, in litt. (S.C.R. No. 74)). Fire is a threat to *H. mana,* as it destroys native plant communities on which the species depends, and opens habitat for increased invasion by nonnative plants. Because of the greater frequency, intensity, and duration of fires that have resulted from the human alteration of landscapes and the introduction of nonnative plants, especially grasses, fires are now more destructive, including in lowland mesic ecosystems (Brown and Smith 2000, p. 172). A single grass-fueled fire often kills most native trees and shrubs in the area (D'Antonio and Vitousek 1992, p. 74) and could destroy food and nesting resources for *H. mana.* The numbers of wildfires and the acreages involved are increasing in the main Hawaiian Islands; however, their occurrences and locations are unpredictable, and could affect habitat for yellow-faced bees at any time (Gima 1998, in litt.; County of Maui 2009, ch. 3, p. 3; Hamilton 2009, in litt.; Honolulu Advertiser 2010, in litt.; Pacific Disaster Center 2011, in litt.). Random, naturally occurring events such as hurricanes and drought can modify and destroy habitat of *H. mana* by creating disturbed areas conducive to invasion by nonnative plants (Kitayama and Mueller-Dombois 1995, p. 671; Businger 1998, pp. 1–2). Predation and competition for food sources by nonnative ants and the nonnative western yellow jacket wasp are threats to *H. mana* (see *H. kuakea,* above) (Howarth 1985, p. 155; Gambino *et al.* 1987, p. 169; Hopper *et al.* 1996, p. 9; Holway *et al.* 2002, pp. 188, 209; Daly and Magnacca 2003, p. 9; Lach 2008, p. 155). Existing regulatory mechanisms and agency policies do not address the primary threats to the yellow-faced bees and their habitat from nonnative ungulates. Competition with nonnative bees (honeybees, carpenter bees, sweat bees, and alien *Hylaeus* bees) for nectar and pollen is a threat to *H. mana* (Magnacca 2007, p. 188; Graham 2015, in litt.; Magnacca 2015, in litt.). The small number of populations and individuals of *H. mana* makes this species more vulnerable to extinction because of the higher risks from genetic bottlenecks, random demographic fluctuations, and localized catastrophes such as hurricanes and drought (Daly and Magnacca 2003, p. 3; Magnacca 2007, p. 173). Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the threats to *H. mana* described above.

The remaining populations of *Hylaeus mana* and its habitat are at risk. The known individuals are restricted to three locations of native koa forest on Oahu, and continue to be negatively affected by habitat destruction and removal of food and nesting sites by nonnative ungulates and nonnative plants. Habitat destruction by fire is a threat. Randomly occurring events such as hurricanes and drought may modify habitat and remove food and nesting sources for *H. mana.* Predation by nonnative ants and wasps is a threat. Existing regulatory mechanisms and agency policies do not address the primary threats to the yellow-faced bees and their habitat from nonnative ungulates. Competition with nonnative bees for food and nesting sites is a threat. The small number of remaining populations limits this species' ability to adapt to environmental changes. The effects of climate change are likely to further exacerbate these threats. Because of these threats, we find that *H. mana* is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Orangeblack Hawaiian Damselfly (*Megalagrion xanthomelas*)

The orangeblack Hawaiian damselfly was once Hawaii's most abundant damselfly species likely because of its ability to use a variety of aquatic habitats for breeding sites. Historically, the orangeblack Hawaiian damselfly probably occurred on all of the main Hawaiian Islands (except Kahoolawe) in suitable aquatic habitat within the anchialine pool, coastal, lowland dry, and lowland mesic ecosystems (Perkins 1913, p. clxxviii; Zimmerman 1948, p. 379; Polhemus 1996, p. 30). Its historical range on Kauai is unknown. On Oahu, it was recorded from Honolulu, Kaimuki, Koko Head, Pearl City, Waialua, the Waianae Mountains, and Waianae (Polhemus 1996, pp. 31, 33). On Molokai, it was known from Kainalu, Meyer's Lake (Kalaupapa Peninsula), Kaunakakai, Mapulehu, and Palaau (Polhemus 1996, pp. 33–41). On Lanai, small populations occurred on Maunalei Gulch, and in ephemeral coastal ponds at the mouth of Maunalei Gulch drainage, at Keomuku, and in a mixohaline (brackish water) habitat at Lopa (Polhemus 1996, pp. 37–41; HBMP 2010). On Maui, this species was recorded from an unspecified locality in the west Maui Mountains (Polhemus 1996, pp. 41–42; Polhemus *et al.* 1999, pp. 27–29). On Hawaii Island, it was known from Hilo, Kona, and Naalehu (Polhemus 1996, pp. 42–47).

Currently, the orangeblack Hawaiian damselfly occurs on Oahu, Molokai, Lanai, Maui, and Hawaii Island. In 1994, on Oahu, a very small population was discovered in pools of an intermittent stream (Englund 2001, p. 256). On Molokai, populations occur at the mouths of two streams, and in wetlands on the south coast (Polhemus 1996, p. 47). On Lanai, a large population occurs in an artificial pond (Polhemus 1996, p. 47). The species is present on west Maui at a stream and near anchialine pools on east Maui (Polhemus *et al.* 1999, p. 29). Several large populations exist in coastal wetlands on Hawaii Island at 14 locations (Polhemus 1996, pp. 42–47; Orlando 2015, in litt.). The species is believed to be extirpated from Kauai (Asquith and Polhemus 1996, p. 91).

Past and present land use and water management practices, including agriculture, urban development, ground water development, and destruction of perched aquifer and surface water resources, and feral ungulates (pigs, goats, axis deer), modify and destroy habitat of the orangeblack Hawaiian damselfly (Harris *et al.* 1993, pp. 9–13; Meier *et al.* 1993, pp. 181–183). Nonnative plant species such as *Urochloa mutica* form dense, monotypic stands that can completely eliminate any open water habitat of the orangeblack Hawaiian damselfly (Smith 1985, p. 186). Stochastic events such as drought, flooding, and hurricanes can also modify and destroy habitat, and kill individuals. Predation of the orangeblack Hawaiian damselfly by nonnative fish and nonnative aquatic invertebrates on the orangeblack Hawaiian damselfly is a significant threat; predation by Jackson's chameleons (*Trioceros jacksonii*) may occur as well (Sailer 2015, in litt.). Hawaiian damselflies evolved with few, if any, predatory fish, and the reduced defensive and evasive behaviors of most of the fully aquatic species, including the orangeblack Hawaiian damselfly, makes them particularly vulnerable to predation by nonnative fish (Englund 1999, pp. 225–225, 235; Haines 2015, in litt.). The damselfly is not observed in any bodies of water that support nonnative fish (Henrickson 1988, p. 183; McPeek 1990a, pp. 92–96). Nonnative backswimmers (aquatic true bugs; Heteroptera) are voracious predators and frequently feed on prey much larger than themselves, such as tadpoles, small fish, and other aquatic invertebrates and may be a potential threat to damselfly's aquatic larvae (naiads) (Borror *et al.* 1989, p. 296). In addition, the nonnative bullfrog (*Rana catesbeiana, Lithobates catesbeianus*), found in ponds and along streams, is a generalist predator, and eats insects and crustaceans as well as a wide variety of small vertebrates (Bury and Whelan 1985, p. 4). Predation by the bullfrog is a threat to the orangeblack Hawaiian damselfly (Englund *et al.* 2007, pp. 215, 219; Haines 2015, in litt.). Also, caddisflies (*Trichoptera* spp.) compete with native aquatic invertebrates for resources and space (Flint *et al.* 2003, p. 38; Haines 2015, in litt.) and reduce prey abundance for orangeblack Hawaiian damselfly larvae.

Hawaii State law (State Water Code) does not provide for permanent or minimal instream flow standards, and channel modifications or revisions to flow standards can be undertaken at any time by the Water Commission, without regard for changes that degrade or destroy habitat, food resources, or aquatic life stages of the orangeblack Hawaiian damselfly. Therefore, existing regulatory mechansims do not adequately address the threat of modification and destruction of the aquatic habitat of the orangeblack Hawaiian damselfly (Hawaii Administrative Rule (HAR)-State Water Code, title 13, chapter 169–36; Tango 2010, in litt.).

The remaining populations and habitat of the orangeblack Hawaiian damselfly are at risk; numbers are decreasing on Oahu, Molokai, Lanai, Maui, and Hawaii Island, and both the species and its habitat continue to be negatively affected by modification and destruction by development and water management practices, drought, feral ungulates, and by nonnative plants, combined with predation by nonnative fish and other nonnative vertebrates. Competition with caddisflies is a potential threat to the orangeblack Hawaiian damselfly. The orangeblack damselfly was once the most common Hawaiian damselfly in the State, and occurred in any suitable aquatic habitat. Populations no longer occur on Kauai. The Oahu populations were described from seven locations, and this species now only occurs at one location. The populations on Molokai have declined from five to three. Populations on Lanai have declined from four to one in an artificial pond. On Maui, there are only two populations, one on east Maui, and one on west Maui. Of the 21 known populations on Hawaii Island, only 14 remain. Because of the dramatic decline in numbers and populations, and because of the ongoing threats described above, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Anchialine Pool Shrimp (*Procaris hawaiana*)

The shrimp family Procarididae is represented by a small number of species globally, with only two species within the genus *Procaris* (Magnacca 2015, in litt.). *Procaris hawaiana* is an endemic anchialine pool shrimp species known only from the islands of Maui and Hawaii. The second species, *P. ascensionis,* is restricted to similar habitat on Ascension Island in the South Atlantic Ocean. Of the anchialine pools on Hawaii Island, only 25 are known to contain *P. hawaiana.* During nocturnal-diurnal surveys conducted from 2009 to 2010, 19 pools within Manuka NAR were found to contain *P. hawaiana.* Five additional pools located on unencumbered State land adjacent to Manuka NAR also contained *P. hawaiana.* An additional separate pool also contains *P. hawaiana,* along with the endangered anchialine pool shrimp *Vetericaris chaceorum* (Holthuis 1973, pp. 12–19; Maciolek 1983, pp. 607–614; Brock 2004, pp. 30–57). On Maui, *P. hawaiana* occurs in two anchialine pools (Holthuis 1973, pp. 12–19; Maciolek 1983, pp. 607–614; Brock 2004, pp. 30–57).

Like other anchialine pool shrimp species, *Procaris hawaiana* inhabits extensive networks of water-filled interstitial spaces (cracks and crevices) leading to and from the open pools where they can be detected, a trait which has precluded accurate estimates of population size (Holthuis 1973, p. 36; Maciolek 1983, pp. 613–616). Surveys for many rare species of anchialine pool shrimp, including *P. hawaiana,* often involve baiting in likely habitat to determine presence or absence. Absence, and presumably extirpation, of shrimp species from suitable habitat is the best or only measure of species decline as population sizes are not easily determined or monitored (Holthuis 1973, pp. 7–12; Maciolek 1983, pp. 613–616), but owing to the potential for shrimp to move between pools through subterranean connections, the lack of sighting on one or several visits to a site is not definitive evidence that the species is extirpated (Kinzie 2015, in litt.). Extirpation of anchialine pool shrimp has been documented definitively in some cases; for example, *Halocaridina rubra* disappeared from an anchialine pool at Honokohau Harbor (Hawaii Island) as a result of the use of the pool for dumping of used oil, grease, and oil filters (Brock 2004, p. 14). To date, however, *P. hawaiana* is not known to have been extirpated from any of the pools where it has been documented to occur (Wada 2016, in litt.).

Habitat modification and destruction by human activities is a significant threat to *Procaris hawaiana*. It is estimated that up to 90 percent of existing anchialine pools in Hawaii have been destroyed by filling and bulldozing (Baily-Brock and Brock 1993, p. 354; Brock 2004, p. i). Anchialine pools are used as dumping pits for bottles, cans, and used oil and grease, and these activities are a known cause of the disappearance of other anchialine pool shrimp species from the pools. Trampling damage from use of anchialine pools for swimming and bathing has been documented (Brock 2004, pp. 13–17). Although a permit from the State is required to collect anchialine pool shrimp, unpermitted collection of shrimp is ongoing (Fuku-Bonsai 2015, in litt.). A single person with a handnet could do irreparable damage to a population of *P. hawaiana* (Yamamoto 2015, in litt.), but collection by permitted individuals is not prohibited at State Parks or City and County property where some anchialine pools occur. Predation by nonnative fish is a direct threat to *P. hawaiana*. Nonnative fish (tilapia, *Oreochromis mossambica*) also outcompete native herbivorous species of shrimp that serve as a prey-base for *P. hawaiana*, disrupting the delicate ecological balance in the anchialine pool system, and leading to decline of the pools and the shrimp inhabiting them (Brock 2004, pp. 13–17). Although anchialine pools within State of Hawaii NARs are provided some protection, these areas are remote and signage does not prevent human use and damage of the pools (see *Factor B*). The persistence of *P. hawaiana* is hampered by the small number of extant populations and the small geographic range of the known populations. The populations of *P. hawaiana* are at risk of extinction because of their increased vulnerability to loss of individuals from disturbance, habitat destruction, and the effects of invasive species and because of the reduction in genetic variability that may make the species less able to adapt to changes in the environment (Harmon and Braude 2010, pp. 125–128). In addition, large-scale water extraction from underground water sources negatively affects the habitat and *P. hawaiana* directly (Conry 2012, in litt.). A threat from development upslope of anchialine pool habitat is infiltration of waste water or application of fertilizer and pesticides that may enter the ground water system of the anchialine pools and consequently affect the pool's ecosystem health, food sources of the pool shrimp, or the pool shrimp directly (Kinzie 2015, in litt.; Yamamoto *et al.* 2015, pp. 75–83). Sea-level rise and coastal inundation resulting from the effects of climate change is a threat to *P. hawaiana* (Sakihara 2015, in litt.). Sea-level rise would increase surface connectivity between isolated anchialine pools, and exacerbate the spread of nonnative fish into pools not yet occupied by nonnative fish (Sakihara 2015, in litt.).

Procaris hawaiana and its habitat are at risk. There are a total of 700 known anchialine pools in the State of Hawaii. *Procaris hawaiana* is restricted to 25 anchialine pools out of 600 on Hawaii Island and to 2 anchialine pools on Maui. These 27 anchialine pools continue to be negatively affected by habitat destruction and modification by human use of the pools for bathing and for dumping of trash and nonnative fish; filling and bulldozing; water extraction; contamination; predation by and competition with nonnative fish; and collection for the aquarium trade. The small number of populations (27) limits this species' ability to adapt to environmental changes. Because of these threats, we find that this species is endangered throughout all of its range, and, therefore, find that it is unnecessary to analyze whether it is endangered or threatened in a significant portion of its range.

Distinct Population Segment (DPS) Analysis

Band-Rumped Storm-Petrel (Oceanodroma castro)

Under the Act, we have the authority to consider for listing any species, subspecies, or, for vertebrates, any distinct population segment (DPS) of these taxa if there is sufficient information to indicate that such action may be warranted. To guide the implementation of the DPS provisions of the Act, we, and the National Marine Fisheries Service (National Oceanic and Atmospheric Administration—Fisheries), published the Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (DPS Policy) in the **Federal Register** on February 7, 1996 (61 FR 4722). Under our DPS Policy, we use two elements to assess whether a population segment under consideration for listing may be recognized as a DPS: (1) The population segment's discreteness from the remainder of the species to which it belongs, and (2) the significance of the population segment to the species to which it belongs. If we determine that a population segment being considered for listing is a DPS, then the population segment's conservation status is evaluated based on the five listing factors established by the Act to determine if listing it as either endangered or threatened is warranted. In the proposed rule (80 FR 58820; September 30, 2015), we evaluated the Hawaii population of the band-rumped storm-petrel to determine whether it meets the definition of a DPS under our DPS Policy.

Discreteness

Under the DPS Policy, a population segment of a vertebrate taxon may be considered discrete if it satisfies either one of the following conditions: (1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors (quantitative measures of genetic or morphological discontinuity may provide evidence of this separation); or (2) it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act. The Hawaii population of the band-rumped storm-petrel meets the first criterion: it is markedly separated from other populations of this species by physical (geographic) and physiological (genetic) factors, as described below.

The band-rumped storm-petrel is widely distributed in the tropics and subtropics, with breeding populations in numerous island groups in the Atlantic and in Hawaii, Galapagos, and Japan in the Pacific (Harrison 1983, p. 274; Carboneras *et al.* 2014, p. 1 and Fig. 2). The geographic separation of these breeding populations is widely recognized, with strong genetic differentiation between the two ocean basins and among individual populations (Friesen *et al.* 2007a, p. 1768; Smith *et al.* 2007, p. 768). Whether individual populations merit taxonomic separation remains unclear, and further study is needed (Friesen *et al.* 2007b, p. 18591; Smith *et al.* 2007, p. 770; reviewed in Howell 2012, pp. 349, 369–370); some populations, such as those in the Galapagos and Cape Verde islands, may warrant full species status (Smith *et al.* 2007, p. 770). Like other storm-petrels, the band-rumped storm-petrel is a highly pelagic (open-ocean) seabird (Howell 2012, p. 349). In addition, like other species in the seabird order Procellariiformes, band-rumped storm-petrels exhibit strong philopatry, or fidelity to their natal sites

(Allan 1962, p. 274; Harris 1969, pp. 96, 113, 120; Harrison *et al.* 1990, p. 49; Smith *et al.* 2007, pp. 768–769). Both of these characteristics contribute to isolation of breeding populations, in spite of the absence of physical barriers such as land masses within ocean basins (Friesen *et al.* 2007a, pp. 1777–1778).

Band-rumped storm-petrels from Hawaii are likely to encounter individuals from other populations only very rarely. The approximate distances from Hawaii to other known breeding sites are much greater than the birds' average foraging range of 860 mi (1,200 km): 4,000 mi (6,600 km) to Japan and 4,600 mi (7,400 km) to Galapagos (the two other Pacific populations), and 7,900 mi (12,700 km) to Madeira, 7,300 mi (11,700 km) to the Azores, and 9,700 mi (15,600 km) to Ascension Island (in the Atlantic). Data from at-sea surveys of the eastern tropical Pacific conducted since 1988 show that the density of band-rumped storm-petrels attenuates north and northwest of Galapagos and that the species rarely occurs in a broad area southeast of Hawaii (Pitman, Ballance, and Joyce 2015, unpublished). This pattern suggests a gap in the at-sea distribution of this species, and low likelihood of immigration on an ecological timescale, between Hawaii and Galapagos. We are not aware of any data describing the at-sea distribution of this species between Hawaii and Japan, but the absence of breeding records from western Micronesia (Pyle and Engbring 1985, p. 59) indicates a distributional gap between these two archipelagoes as well. Other than occasional encounters in their foraging habitat, the vast expanses of ocean between Japan, Hawaii, and Galapagos provide for no other sources of potential connectivity between band-rumped storm-petrel populations in the Pacific, such as additional breeding sites.

Even those disparate breeding populations of pelagic seabirds that do overlap at sea may remain largely isolated otherwise and exhibit genetic differentiation (*e.g.,* Walsh and Edwards 2005, pp. 290, 293). Despite the birds' capacity to move across large areas of ocean, genetic differentiation among breeding populations of band-rumped storm-petrels is high (Friesen *et al.* 2007b, p. 18590; Smith *et al.* 2007, p. 768), even between populations nesting in different seasons on the same island (in Galapagos; Smith and Friesen 2007, p. 1599). Genetic analysis found low relatedness (1) between Atlantic and Pacific populations; (2) among Japan, Hawaii, and Galapagos populations; or (3) among Cape Verde, Ascension, and northeast Atlantic breeding populations (Smith *et al.* 2007, p. 768). Hawaiian birds have not been well-sampled for genetic analysis, but the few individuals from Hawaii included in a rangewide analysis showed that Hawaiian birds differed from all other populations, and were most closely related to birds from Japan (Friesen *et al.* 2007b, p. 18590).

We have determined that the Hawaii population of the band-rumped storm-petrel is discrete from the rest of the taxon because its breeding and foraging range are markedly separated from those of other populations. The Hawaii population is geographically isolated from populations in Japan and Galapagos, as well as from populations in very distant island groups in the central and western Atlantic Ocean. Molecular evidence indicates that the genetic structure of the species reflects the spatial or temporal separation of individual populations; the scant molecular data from Hawaii suggest that this holds for the Hawaii population as well.

Significance

Under our DPS Policy, once we have determined that a population segment is discrete, we consider its biological and ecological significance to the larger taxon to which it belongs. This consideration may include, but is not limited to: (1) Evidence of the persistence of the discrete population segment in an ecological setting that is unusual or unique for the taxon, (2) evidence that loss of the population segment would result in a significant gap in the range of the taxon, (3) evidence that the population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historical range, or (4) evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics. We have found substantial evidence that the Hawaii population of the band-rumped storm-petrel meets two of the significance criteria listed above: the loss of this population would result in a significant gap in the range of the taxon, and this population persists in a unique ecological setting. As described above, the physical isolation that defines the discreteness of Hawaii population is likely reflected in genetic differentiation from other populations, but at this time we lack sufficient data to consider genetic characteristics as an independent factor in our determination of the Hawaii population's significance to the rest of the taxon. Genetic patterns on an ocean-basin or species-wide scale, however, have implications for connectivity and potential gaps in the band-rumped storm-petrel's range (described below).

Dispersal between populations of seabird species with ranges fragmented by large expanses of ocean may play a vital role in the persistence of individual populations (Bicknell *et al.* 2012, p. 2872). No evidence currently exists of such dispersal among Pacific populations of band-rumped storm-petrels at frequencies or in numbers that would change the population status between years, for example, by providing immigrants that compensate for breeding failure or adult mortality resulting from predation, as has been hypothesized for Leach's storm-petrel in the Atlantic (Bicknell *et al.* 2012, p. 2872). Given the remnant population of band-rumped storm-petrels in Hawaii and recently documented decline in Japan (Biodiversity Center of Japan 2014, p. 1), we would not expect to see exchange on such short timescales. However, genetic evidence is suggestive of exchange between these two populations on an evolutionary timescale (Friesen *et al.* 2007b, p. 18590).

The loss of this population would result in a significant gap in the range of the band-rumped storm-petrel. As noted above, seabirds in the order Procellariiformes, including the band-rumped storm-petrel, exhibit very high natal site fidelity, and so are slow to recolonize extirpated areas or range-gaps (Jones 2010, p. 1214), and may lack local adaptations; they thus face a potentially increased risk of extinction with the loss of individual populations (Smith *et al.* 2007, p. 770). The Hawaii population of the band-rumped storm petrel constitutes the entire Central Pacific distribution of the species, located roughly half-way between the populations in Galapagos and Japan (see Figure 1, below), and its loss would create a gap of approximately 8,500 mi (13,680 km) between them and significantly reducing the likelihood of connectivity and genetic exchange. Such exchange would be reliant on chance occurrences, such as severe storms that could result in birds being displaced to the opposite side of the Pacific Ocean basin, and such chance dispersal events would not necessarily result in breeding.

BILLING CODE 4333–15–P

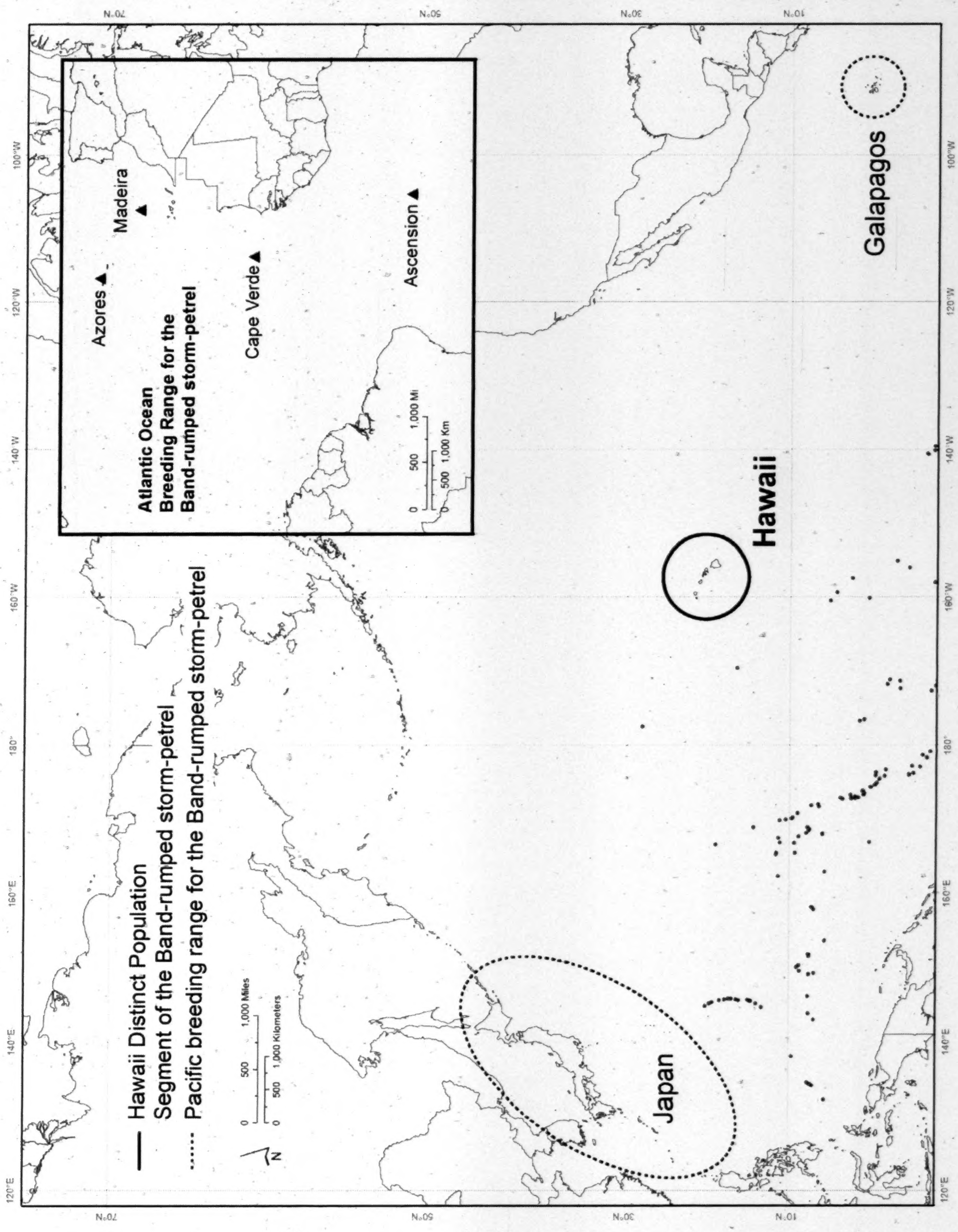

Hawaii Distinct Population Segment of the Band-rumped storm-petrel
Pacific breeding range for the Band-rumped storm-petrel
0 500 1,000 Miles
0 500 1,000 Kilometers
N
Atlantic Ocean Breeding Range for the Band-rumped storm-petrel
Azores
Madeira
Cape Verde
Ascension
0 500 1,000 Mi
0 500 1,000 Km
Japan
Hawaii
Galapagos
70°N
50°N
30°N
10°N
120°E
140°E
160°E
180°
160°W
140°W
120°W
100°W

Figure 1. Location of the Hawaii Distinct Population Segment of the band-rumped storm-petrel and the two other breeding locations for the species in the Pacific Ocean. Atlantic breeding locations also provided for context.

BILLING CODE 4333–15–C

The Hawaii population of the band-rumped storm-petrel is significant also because it persists in a unique ecological setting. This is the only population of the species known to nest at high-elevation sites (above 6,000 ft (1,800 m)) (Banko *et al.* 1991, pp. 651–653; Athens *et al.* 1991, p. 95). In prehistory, the species likely nested in lowland habitats and more accessible habitats in Hawaii as well as in the high-elevation and otherwise remote areas where the species is found today; archaeological evidence suggests that band-rumped storm-petrels were once sufficiently common at both high (5,260 and 6,550 ft (1,600 and 2,000 m)) and low elevations on Hawaii Island to be used as a food source by humans (Ziegler pers. comm. *in* Harrison *et al.* 1990, pp. 47–48; Athens *et al.* 1991, pp. 65, 78–80; Banko *et al.* 1991, p. 650). In lowland areas, the species was common enough for the Hawaiians to name it and to identify it by its call (Harrison *et al.* 1990, p. 47; Banko *et al.* 1991, p. 650). In addition to the impacts of harvest by humans in prehistory, seabirds in Hawaii, including the band-rumped storm-petrel, were negatively affected by the proliferation of nonnative predators such as rats and pigs, and, later, cats and mongoose, and by loss of habitat (reviewed in Duffy 2010, pp. 194–196). Predation and habitat loss combined likely led to the extirpation of the band-rumped storm-petrel from coastal and lowland habitats and other accessible nesting areas, as occurred in the endangered Hawaiian petrel (*Pterodroma sandwichensis*) and threatened Newell's shearwater (*Puffinus newelli*), which have similar nesting habits and life histories (Olson and James 1982, p. 43; Slotterback 2002, p. 6; Troy *et al.* 2014, pp. 315, 325–326). The band-rumped storm-petrel's persistence in sites such as the Southwest Rift Zone (6,900 ft (2,100 m)) on Mauna Loa (Hawaii Island) has required them to surmount physiological challenges posed by nesting in high-elevation conditions (cold temperatures, low humidity, and less oxygen). They may possess special adaptations for this, such as reduction in porosity and other eggshell modifications to reduce the loss of water and carbon dioxide during incubation at high elevation (Rahn *et al.* 1977, p. 3097; Carey *et al.* 1982, p. 716; Carey *et al.* 1983, p. 349). In sum, the remnant distribution of band-rumped storm-petrel breeding sites in only the most remote and rugged terrain in Hawaii reflects the conditions necessary for the species' persistence in Hawaii (relatively undisturbed habitat in areas least accessible to predators) and also reflects unique adaptations that facilitate the species' persistence in high-elevation areas.

We have determined that the Hawaii population of band-rumped storm-petrel is significant to the rest of the taxon. Its loss would result in a gap in the range of the species of more than 8,500 mi (13,680 km), reducing and potentially precluding connectivity between the two remaining populations in the Pacific Basin. In addition, the Hawaii population nests at high elevation on some islands, constituting a unique ecological setting represented nowhere else in the species' breeding range.

DPS Conclusion

We have evaluated the Hawaii population of band-rumped storm-petrel to determine if it meets the definition of a DPS, considering its discreteness and significance as required by our policy. We have found that this population is markedly separated from other populations by geographic distance, and this separation is likely reflected in the population's genetic distinctiveness. The Hawaii population is significant to the rest of the species because its loss would result in a significant gap in the species' range; Hawaii is located roughly half-way between the other two populations in the Pacific Ocean, and little or no evidence exists of current overlap at sea between the Hawaii population and either the Japan or Galapagos populations. The Hawaii population of band-rumped storm-petrel also nests at high elevation in Hawaii—conditions at high elevation constitute an ecological setting unique to the species. We conclude that the Hawaii population of band-rumped storm-petrel is a distinct vertebrate population segment under our February 7, 1996, DPS Policy (61 FR 4722), and that it warrants review for listing under the Act. Therefore, we have incorporated the Hawaii DPS of the band-rumped storm-petrel in our evaluation of threats affecting the other 48 species addressed in this rule (summarized above; see also Summary of Factors Affecting the 49 Species From the Hawaiian Islands, below).

Summary of Factors Affecting the 49 Species From the Hawaiian Islands

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations (50 CFR part 424), set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination. Each of these factors is discussed below.

In considering factors that might constitute threats to a species, we must look beyond the exposure of the species to a factor to evaluate whether the species responds to the factor in a way that causes impacts to the species or is likely to cause impacts in the future. If a species responds negatively to such exposure, the factor may be a threat and, during the status review, our aim is to determine whether impacts are or will be of an intensity or magnitude to place the species at risk. The factor is a threat if it drives, or contributes to, the risk of extinction of the species such that the species warrants listing as an endangered or threatened species as those terms are defined by the Act. This does not necessarily require empirical proof of a threat. The combination of exposure and some corroborating evidence of how the species is likely affected could suffice. In sum, the mere identification of factors that could affect a species negatively is not sufficient to compel a finding that listing is appropriate; we require evidence that these factors act on the species to the point that the species meets the definition of an endangered or threatened species.

If we determine that the threats posed to a species by one or more of the five listing factors are, or are likely to become, of such magnitude and/or intensity that the species meets the definition of either endangered or threatened under section 3 of the Act, that species may then be listed as endangered or threatened. The Act defines an endangered species as "in danger of extinction throughout all or a significant portion of its range," and a threatened species as "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." The threats to each of the individual 49 species are summarized in Table 2, and discussed in detail below.

We acknowledge that the specific threats to the individual species in this final rule are not all completely understood. Scientific study of each of the 49 species is limited because of their rarity and the challenging logistics associated with conducting field work in Hawaii (areas are typically remote, difficult to access, challenging work environments, and expensive to survey in a comprehensive manner). However, information is available on many of the threats that act on Hawaiian ecosystems, and, for some ecosystems, these threats are well studied and understood. Each of the native species that occurs in Hawaiian ecosystems suffers from exposure to those threats to differing degrees. For the purposes of our listing determination, the best available scientific information leads us to conclude that the threats that act at the ecosystem level also act on each of the species that occurs in those ecosystems. In some cases we have additionally identified species-specific threats, such as loss of host plants.

The following threats affect the 49 species in one or more of the ecosystems addressed in this rule:

(1) Modification and destruction of habitat, including streams, ponds, and anchialine pools, by urban development and water extraction. Human activities also contribute to increased sedimentation in anchialine pools.

(2) Habitat destruction and modification by feral ungulates including pigs, goats, axis deer, black-tailed deer, mouflon, sheep, and cattle. The disturbance of soils by these animals causes erosion and creates fertile seedbeds for nonnative plants, leading to further habitat degradation. Ungulates also trample seedlings.

(3) Habitat destruction and modification by nonnative plants. Nonnative plants modify availability of light, alter soil-water regimes, modify nutrient cycling, alter fire regimes, and ultimately convert native dominated plant communities to nonnative plant communities. They also cause or contribute to loss of host plants used for food and nesting by the yellow-faced bees.

(4) Habitat destruction by wildfires caused naturally or by humans. Fires also destroy the native plant seedbank, and contribute to habitat conversion of native forest to nonnative grasslands (grass/fire cycle).

(5) Habitat destruction and modification, or direct damage and death, by stochastic events including drought, erosion, flooding, tree falls, rock falls, landslides, hurricanes, and tsunamis.

(6) Illegal collection of anchialine pool shrimp for personal use or commercial trade.

(7) Herbivory or defoliation of native plants by ungulates, rats, slugs, and black twig borers, which have been observed to contribute to the decline or death of 35 the 39 plant species (except for *Cyperus neokunthianus, Cyrtandra hematos, Lepidium orbiculare,* and *Stenogyne kaalae* ssp. *sherffii*). Herbivory also destroys seeds and fruit and contributes to lack of reproduction in the wild and low genetic diversity compounding the decline of native plants.

(8) Predation of the band-rumped storm-petrel by rats, barn owls, cats, and mongoose.

(9) Predation of the orangeblack Hawaiian damselfly by bullfrogs, backswimmers, Jackson's chameleons, and nonnative fish.

(10) Predation of the anchialine pool shrimp by nonnative fish.

(11) Predation of *Hylaeus* bees by ants and wasps.

(12) Competition for food and nesting sites of the *Hylaeus* yellow-faced bees by nonnative ants, wasps, and bees, and competition for food and habitat of the orangeblack Hawaiian damselfly by caddisflies. Competition for space and food resources of the anchialine pool shrimp by nonnative fish.

(13) Injury and mortality of the band-rumped storm-petrel caused by artificial lighting, communication towers, and power lines.

(14) Injury and mortality of the band-rumped storm-petrel by the activities of fisheries and encounters with marine debris.

(15) Low numbers and/or no reproduction of all 49 species exacerbated by one or more of the above threats, combined with inability of the species to adapt to sea-level rise or other factors associated with climate change.

Existing regulatory mechanisms do not ameliorate these threats for any of the 49 species such that listing is not warranted. Each of the threats listed above is discussed in more detail below, and summarized in Table 2.

TABLE 2—SUMMARY OF PRIMARY THREATS IDENTIFIED FOR EACH OF THE 49 HAWAIIAN ISLANDS SPECIES

Species	Ecosystem	Factor A					Factor B	Factor C			Factor D	Factor E	
		Agriculture and urban development	Ungulates	Non-native plants	Fire	Stochastic events	Over-utilization	Predation/herbivory by ungulates	Predation/herbivory by other NN vertebrates	Predation/herbivory by NN invertebrates	Inadequate existing regulatory mechanisms	Other species-specific threats	Climate change
PLANTS:													
Asplenium diellaciniatum	MM		P, G, BTD	X				X			X	LN	X.
Calamagrostis expansa	MW		P	X				X	R		X	LN	X, Ft.
Cyanea kauaulaensis	LW			X		E, F, L			R	S	X	LN, NR	X.
Cyclosorus boydiae	LW, MW	X, WE	P	X		DR, F, L		X			X	LN	X, Ft.
Cyperus neokunthianus	LW		P	X							X	LN	X.
Cyrtandra hematos	MW		P, G	X							X	HY, LN, NR.	X, Ft.
Deparia kaalaana	LM, LW		P	X		DR, F		X		S	X	LN	X.
Dryopteris glabra var. *pusilla*	MW		P, BTD	X		L			R	S	X	LN	X, Ft.
Exocarpos menziesii	LM, MM, MD		G, M, SH	X	X			X			X	LN	X, Ft.
Festuca hawaiiensis	MD		G, SH	X	X			X			X	LN	X, Ft.
Gardenia remyi	LM, LW		P, G, D	X		L		X	R		X	LN, NR	X, Ft.
Huperzia stemmermanniae	MW		P, G, D, C	X		DR		X			X	LN	X, Ft.
Hypolepis hawaiiensis var. *mauiensis*	MW			X						S	X	LN	X, Ft.
Joinvillea ascendens ssp. *ascendens*	LM, LW, MW, MM.		P, G, D, BTD.	X	X	L		X	R		X	LN, NR	X, Ft.
Kadua fluviatilis	LM, LW		P, G	X		L		X			X	LN	X, Ft.
Kadua haupuensis	LM		P	X		L			R		X	LN	X.
Labordia lorenciana	MM		P, G, BTD	X	X	F, L, TF		X	R	BTB	X	LN, NR	X.
Lepidium orbiculare	LM		P, G	X		L					X	LN	X.
Microlepia strigosa var. *mauiensis*	LM, MW, MM		P, G	X				X			X	HY, LN	X.
Myrsine fosbergii	LM, LW, MW		P, G	X				X			X	HY, LN	X, Ft.
Nothocestrum latifolium	LD, LM, DC		P, G, D, BTD, M, C.	X	X			X		BTB	X	LN, NR	X, Ft.
Ochrosia haleakalae	LM, MM, DC		P, G, C	X	X			X	R	S	X	LN, NR	X, Ft.
Phyllostegia brevidens	LW, MW, WC		P	X		E, L		X		S	X	LN	X, Ft.
Phyllostegia helleri	LW, MW, WC		P, G	X		L			R		X	LN	X, Ft.
Phyllostegia stachyoides	MW, MM		P, G, D	X		DR, E, F, L, RF.		X	R	S	X	LN	X, Ft.
Portulaca villosa	CO, LD, MD		G, D, M, C.	X	X	L, RF		X			X	LN	X, Ft.
Pritchardia bakeri	LM		P	X		HUR			R		X	LN	X.
Pseudognaphalium sandwicensium var. *molokaiense*	CO		G, D	X		L, RF		X			X	LN	X, Ft.
Ranunculus hawaiensis	MM, MD, SA		P, M, C	X		DR, E		X			X	LN	X, Ft.
Ranunculus mauiensis	MW, MM, WC		P, G, D, BTD, C.	X	X	DR, E, L		X	R	S	X	LN	X, Ft.
Sanicula sandwicensis	MM, MD, SA		P, G	X	X	DR, E, F		X	R		X	LN	X, Ft.
Santalum involutum	LM, LW		P, G	X	X			X	R		X	LN	X.
Schiedea diffusa ssp. *diffusa*	LW, MW		P	X					R	S	X	LN	X.
Schiedea pubescens	LW, MW, MM, WC.		P, G, D, C	X	X	DR, E, F		X	R	S	X	LN	X, Ft.
Sicyos lanceoloideus	LM, MM, DC		P, G, BTD	X	X	DR		X			X	LN	X, Ft.
Sicyos macrophyllus	MW, MM, MD		P, M, C	X	X			X	R		X	LN	X, Ft.
Solanum nelsonii	CO		D, C	X	X	DR, E, F, TS		X	R		X	LN, SL	X, Ft.
Stenogyne kaalae ssp. *sherffii*	LW		P	X							X	LN	X, Ft.
Wikstroemia skottsbergiana	LW		P, G	X		L			R		X	LN	X.
ANIMALS:													
Band-rumped storm-petrel (*Oceanodroma castro*)	CO, SA, DC, WC		G	X		E, L, HUR			R, O, CA, MO.		X	LI, ST, H, LN.	X.
Orangeblack Hawaiian damselfly (*Megalagrion xanthomelas*)	AP, CO, LD, LM	X, WE	P, G, D	X		DR, F, HUR			FS, BF, JC	BS	X	LN, CD	X.
Anchialine pool shrimp (*Procaris hawaiana*)	AP	X, WE					X		FS		X	FS, H, LN, RU, SD, SL.	X.
Yellow-faced bee (*Hylaeus anthracinus*)	CO, LD	X	P, G, D, SH, C.	X	X	DR, HUR, TS.				A, W,	X	LN, W, B, LHP.	X.
Yellow-faced bee (*Hylaeus assimulans*)	CO, LD	X	P, G, D, M, C.	X	X	DR, HUR, TS.				A, W	X	LN, W, B, LHP.	X.
Yellow-faced bee (*Hylaeus facilis*)	CO, LD, LM	X	P, G, D, C	X	X	DR, HUR, TS.				A, W	X	LN, W, B, LHP.	X.

Yellow-faced bee (*Hylaeus hilaris*)	CO, LD	X	P, G, D, C	X	X	DR, HUR, TS.				A, W	X	LN, W, B, LHP.	X.
Yellow-faced bee (*Hylaeus kuakea*)	LM		P	X	X	DR, HUR				A, W	X	LN, W, B, LHP.	X.
Yellow-faced bee (*Hylaeus longiceps*)	CO, LD	X	D	X	X	DR, HUR, TS.				A, W	X	LN, W, B, LHP, RU.	X.
Yellow-faced bee (*Hylaeus mana*)	LM		P	X	X	DR, HUR				A, W	X	LN, W, B, LHP.	X.

Factor A = Habitat Modification; Factor B = Overutilization; Factor C = Disease or Predation; Factor D = Inadequacy of Regulatory Mechanisms: the Xs in this column indicate that existing regulatory mechanisms do not ameliorate the threats to the species such that listing is not warranted (we do not identify Factor D, in and of itself, as a threat to the species); Factor E = Other Species-Specific Threats.

AP = Anchialine Pools; CO = Coastal; LD = Lowland Dry; LM = Lowland Mesic; LW = Lowland Wet; MW = Montane Wet; MM = Montane Mesic; MD = Montane Dry; SA = Subalpine; DC = Dry Cliff; WC = Wet Cliff.

A = Ants, B = Bees (*competition*); BF = Bullfrog; BS = Backswimmer; BTB = Black Twig Borer; BTD = Black-tailed Deer; C = Cattle; CA = Cats; CD = Caddisflies; D = Axis Deer; ; FS = Fish; G = Goats; JC = Jackson's Chameleons; M = Mouflon; MO = Mongoose; O = Barn Owls; P = Pigs; R = Rats; S = Slugs; SH = Sheep; W = Wasps (*competition, predation*).

DR = Drought; E = Erosion; F = Flooding; Ft = assessed in Fortini *et al.* (2013) climate change vulnerability analysis; H = Human (*fisheries, marine debris, contamination*); HUR = Hurricanes; HY = Hybridization; L = Landslides; LHP = Loss of Host Plants; LI = Lights; LN = Low Numbers; NR = No Regeneration; RF = Rockfalls; RU = Recreational Use (*swimming, fishing, dumping trash and nonnative fish*); SD = Sedimentation; SL = Sea Level Rise; ST = Structures; TF = Tree Fall; TS = Tsunami; WE = Water Extraction.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Their Habitat or Range

The Hawaiian Islands are located over 2,000 mi (3,200 km) from the nearest continent. This isolation has allowed the few plants and animals transported to the islands by wind, water, or birds to evolve into many varied and endemic species. The only native terrestrial mammals on the Hawaiian Islands include two bat taxa, the Hawaiian hoary bat (*Lasiurus cinereus semotus*), and an extinct, unnamed insectivorous bat (Ziegler 2002, p. 245). The native plants of the Hawaiian Islands therefore evolved in the absence of mammalian predators, browsers, or grazers, and subsequently, many native species lost unneeded defenses against threats typical of continental environments such as herbivory and competition with aggressive, weedy plant species (Loope 1992, p. 11; Gagne and Cuddihy 1999, p. 45; Wagner *et al.* 1999, pp. 3–6). For example, Carlquist (*in* Carlquist and Cole 1974, p. 29) notes, "Hawaiian plants are notably nonpoisonous, free from armament, and free from many characteristics thought to be deterrents to herbivores (oils, resins, stinging hairs, coarse texture)." In addition, species restricted to highly specialized habitats (*e.g.*, Hawaiian damselflies) or food and nesting sources (*e.g.*, Hawaiian yellow-faced bees) are particularly vulnerable to changes in their habitat (Carlquist and Cole 1974, pp. 28–29; Loope 1992, pp. 3–6).

Habitat Destruction and Modification by Agriculture and Urban Development

Past land use practices such as agriculture or urban development have resulted in little or no native vegetation below 2,000 ft (600 m) throughout the Hawaiian Islands (TNC 2006). These land use practices negatively affect the anchialine pool, coastal, lowland dry, and lowland mesic ecosystems, including streams and wetlands that occur within these areas. Hawaii's agricultural industries (*e.g.*, sugar cane, pineapple) have been declining in importance, and large tracts of former agricultural lands are being converted into residential areas or left fallow (TNC 2007). In addition, Hawaii's population has increased almost 10 percent in the past 10 years, further increasing demands on limited land and water resources in the islands (Hawaii Department of Business, Economic Development and Tourism 2013, in litt.).

Development and urbanization of anchialine pool, coastal, lowland dry, and lowland mesic ecosystems on Oahu, Molokai, Maui, Lanai, and Hawaii Island are a threat to some species:

- On Oahu, the plant *Cyclosorus boydiae,* the orangeblack Hawaiian damselfly, and the yellow-faced bees *Hylaeus anthracinus, H. assimulans, H. facilis,* and *H. longiceps.*
- On Molokai, the orangeblack Hawaiian damselfly and the yellow-faced bees *Hylaeus anthracinus, H. facilis, H. hilaris, and H. longiceps.*
- On Maui, the plant *Cyclosorus boydiae,* the orangeblack Hawaiian damselfly, the anchialine pool shrimp *Procaris hawaiana,* and the yellow-faced bees *Hylaeus anthracinus, H. assimulans, H. facilis, H. hilaris, and H. longiceps.*
- On Lanai, the orangeblack Hawaiian damselfly, and the yellow-faced bees *Hylaeus anthracinus, H. assimulans, H. facilis, H. hilaris, and H. longiceps.*
- On Hawaii Island, the orangeblack Hawaiian damselfly, the anchialine pool shrimp *Procaris hawaiana,* and the yellow-faced bee *Hylaeus anthracinus.* (Daly and Magnacca 2003, pp. 55, 173; Palmer 2003, p. 88; Magnacca 2007, p. 188; Magnacca and King 2013, pp. 22–25).

Although we are unaware of any comprehensive, site-by-site assessment of wetland development in Hawaii (Erikson and Puttock 2006, p. 40), Dahl (1990, p. 7) estimated that at least 12 percent of lowland to upper-elevation wetlands in Hawaii had been converted to non-wetland habitat by the 1980s. If only coastal plain (below 1,000 ft (300 m)) marshlands and wetlands are considered, it is estimated that 30 percent were developed or converted to agricultural use (Kosaka 1990, in litt.). Records show the modification and reduction in area of these marshlands and wetlands that provided habitat for many damselfly species, including the orangeblack Hawaiian damselfly (Englund 2001, p. 256; Rees and Reed 2013, Fig 2S). Once modified, these areas then lack the aquatic habitat features that the orangeblack Hawaiian damselfly requires for essential life-history needs, such as pools of intermittent streams, ponds, and coastal springs (Polhemus 1996 pp. 30–31, 36). Although the filling of wetlands is regulated by section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*), the loss of riparian or wetland habitats utilized by the orangeblack Hawaiian damselfly may still occur due to Hawaii's population growth and development, with concurrent demands on limited developable land and water resources. The State's Commission of Water Resource Management (CWRM) recognizes the need to update the 2008 water resource protection plan, and an update is currently under development (CWRM 2014, in litt.). In addition, marshes have been slowly filled and converted to meadow habitat as a result of sedimentation from increased storm water runoff from upslope development, the accumulation of uncontrolled growth of invasive vegetation, and blockage of downslope drainage (Wilson Okamoto & Associates, Inc. 1993, pp. 3–4–3–5). Agriculture and urban development have thus contributed to habitat destruction and modification, and continue to be a threat to the habitat of the orangeblack Hawaiian damselfly and the fern, *Cyclosorus boydiae.*

On Hawaii Island, it is estimated that up to 90 percent of the anchialine pools have been destroyed or altered by human activities, including bulldozing and filling of pools (Brock 2004, p. i; Bailey-Brock and Brock 1993, p. 354). Dumping of trash and nonnative fish has affected anchialine pools on this island (Brock 2004, pp. 13–17) (see *Factor E. Other Natural or Manmade Factors Affecting Their Continued Existence,* below). Brock also noted that garbage like bottles and cans appear to have no net negative impact, while the dumping of used oil, oil filters, and grease has resulted in the disappearance of the anchialine pool shrimp *Halaocaridina rubra* from a pool adjacent to Honokohau Harbor on Hawaii Island. Lua O Palahemo (where *Procaris hawaiana* occurs) on Hawaii Island is accessible to the public, and dumping has occurred there (Brock 2004, pp. 13–17). We are not aware of any dumping activities within the two Maui anchialine pools known to be occupied by *P. hawaiana;* however, this threat remains a possibility (Brock 2004, pp. 13–17).

Destruction and modification of *Hylaeus* habitat by urbanization and land use conversion, including agriculture, has led to the fragmentation of foraging and nesting habitat of these species. In particular, because native host plant species are known to be essential to the yellow-faced bees for foraging of nectar and pollen, any further loss of this habitat may reduce their long-term chances for recovery. Additionally, further destruction and modification of *Hylaeus* habitat is also likely to facilitate the introduction and spread of nonnative plants within these areas (see "Habitat Destruction and Modification by Nonnative Plants," below).

Habitat Destruction and Modification by Nonnative Ungulates

Nonnative ungulates have greatly affected the native vegetation, as well as the native fauna, of the Hawaiian

Islands. Impacts to the native species and ecosystems accelerated following the arrival of Captain James Cook in 1778. The Cook expedition and subsequent explorers intentionally introduced a European race of pigs (*i.e.*, boars) and other livestock such as goats to serve as food sources for seagoing explorers (Tomich 1986, pp. 120–121; Loope 1998, p. 752). The mild climate of the islands, combined with lack of competitors or predators, led to the successful establishment of large populations of these feral mammals, to the detriment of native Hawaiian species and ecosystems (Cox 1992, pp. 116–117). The presence of introduced mammals is considered one of the primary factors underlying the modification and destruction of native vegetation and habitats of the Hawaiian Islands (Cox 1992, pp. 118–119). All of the 11 ecosystems on the main islands (except Kahoolawe) are currently affected by habitat destruction resulting from the activities of various combinations of nonnative ungulates, including pigs (*Sus scrofa*), goats (*Capra hircus*), axis deer (*Axis axis*), black-tailed deer (*Odocoileus hemionus columbianus*), sheep (*Ovis aries*), mouflon (*Ovis gmelini musimon*) and mouflon-sheep hybrids, and cattle (*Bos taurus*). Habitat destruction or modification by ungulates is a threat to 37 of the 39 plant species, the band-rumped storm-petrel, the orangeblack Hawaiian damselfly, and the seven yellow-faced bees (see Table 2).

Pigs (*Sus scrofa*)

The destruction or modification of habitat by pigs is currently a threat to four of the ecosystems (lowland mesic, lowland wet, montane wet, and montane mesic) in which these species occur. Feral pigs are known to cause deleterious impacts to ecosystem processes and functions throughout their worldwide distribution (Campbell and Long 2009, p. 2319). Pigs have been described as having the most pervasive and disruptive nonnative influences on the unique ecosystems of the Hawaiian Islands and are widely recognized as one of the greatest current threats (Aplet *et al.* 1991. p. 56; Anderson and Stone 1993, p. 195; Anderson *et al.* 2007, in litt.). Introduced European pigs hybridized with smaller, domesticated Polynesian pigs, became feral, and invaded forested areas, especially mesic and wet forests, from low to high elevations; they are present on all the main Hawaiian Islands except Lanai and Kahoolawe, where they have been eradicated (Tomich 1986, pp. 120–121; Munro (1911–1930) 2007, p. 85). By the early 1900s, feral pigs were already recognized as a serious threat to these areas, and an eradication project was conducted by the Hawaii Territorial Board of Agriculture and Forestry, which removed 170,000 pigs from forests Statewide (Diong 1982, p. 63).

Feral pigs are extremely destructive and have both direct and indirect impacts on native plant communities. While rooting in the earth in search of invertebrates and plant material, pigs directly affect native plants by disturbing and destroying vegetative cover and by trampling plants and seedlings. It has been estimated that at a conservative rooting rate of 2 square yards (sq yd) (1.7 square meters (sq m)) per minute and only 4 hours of foraging per day, a single pig could disturb over 1,600 sq yd (1,340 sq m) (or approximately 0.3 acres (ac) (0.1 hectares (ha)) of groundcover per week (Anderson *et al.* 2007, in litt.). Feral pigs are a major vector for the establishment and spread of invasive nonnative plant species, such as *Passiflora tarminiana* and *Psidium cattleianum*, by dispersing seeds carried on their hooves and coats and in their feces (which also serve to fertilize disturbed soil) (Diong 1982, pp. 169–170; Matson 1990, p. 245; Siemann *et al.* 2009, p. 547). Pigs also feed directly on native plants such as Hawaiian tree ferns. Pigs preferentially eat the core of tree-fern trunks, and these cored trunks then fill with rainwater and serve as breeding sites for introduced mosquitoes that spread avian malaria, with devastating consequences for Hawaii's native forest birds (Baker 1975, p. 79). Additionally, rooting pigs contribute to erosion, especially on slopes, by clearing vegetation and creating large areas of disturbed soil (Smith 1985, pp. 190, 192, 196, 200, 204, 230–231; Stone 1985, pp. 254–255, 262–264; Medeiros *et al.* 1986, pp. 27–28; Scott *et al.* 1986, pp. 360–361; Tomich 1986, pp. 120–126; Cuddihy and Stone 1990, pp. 64–65; Aplet *et al.* 1991, p. 56; Loope *et al.* 1991, pp. 1–21; Gagne and Cuddihy 1999, p. 52; Nogueira-Filho *et al.* 2009, pp. 3677–3682; Dunkell *et al.* 2011, pp. 175–177). The resulting erosion alters native plant communities by damaging individual plants, contributing to watershed degradation, and changing nutrient availability for plants; erosion also affects aquatic animals by increasing sedimentation in streams and pools (Vitousek *et al.* 2009, pp. 3074–3086; Nogueira-Filho *et al.* 2009, p. 3681; Cuddihy and Stone 1992, p. 667). The following 15 plants are at risk from erosion and landslides resulting from the activities of feral pigs: *Cyclosorus boydiae*, *Dryopteris glabra* var. *pusilla*, *Gardenia remyi*, *Joinvillea ascendens* ssp. *ascendens*, *Kadua fluviatilis*, *K. haupuensis*, *Labordia lorenciana*, *Lepidium orbiculare*, *Phyllostegia brevidens*, *P. helleri*, *P. stachyoides*, *Ranunculus hawaiensis*, *R. mauiensis*, *Sanicula sandwicensis*, and *Schiedea pubescens*. Thirty-two of the 39 plants (all except for *Cyanea kauaulaensis*, *Exocarpos menziesii*, *Festuca hawaiiensis*, *Hypolepis hawaiiensis* var. *mauiensis*, *Portulaca villosa*, *Pseudognaphalium sandwicensium* var. *molokaiense*, and *Solanum nelsonii*) are at risk of habitat destruction and modification by feral pigs, and the orangeblack Hawaiian damselfly and six of the seven yellow-faced bees (all except *Hylaeus longiceps*) are at risk of habitat destruction and modification by feral pigs (see Table 2).

Goats (*Capra hircus*)

Feral goats currently destroy and modify habitat in 10 of the 11 ecosystems (coastal, lowland dry, lowland mesic, lowland wet, montane wet, montane mesic, montane dry, subalpine, dry cliff, and wet cliff) in which these species occur. Goats, native to the Middle East and India, were successfully introduced to the Hawaiian Islands in the late 1700s. Actions to control feral goat populations began in the 1920s (Tomich 1986, pp. 152–153). However, goats still occupy a wide variety of habitats on all the main islands (except for Kahoolawe; see below), where they consume native vegetation, trample roots and seedlings, strip tree bark, accelerate erosion, and promote the invasion of nonnative plants (van Riper and van Riper 1982, pp. 34–35; Stone 1985, p. 261; Kessler 2010, pers. comm.). Kahoolawe was negatively affected by ungulates beginning in 1793, with introduction of goats and the addition of sheep (up to 15,000) and cattle (about 900) by ranchers between 1858 and 1941, with the goat population estimated to be as high as 50,000 individuals by 1988 (KIRC 2014, in litt.; KIRC 2015, in litt.). Beginning in 1941, the U.S. military used the entire island as a bombing range, and in 1994, control of Kahoolawe was returned to the State and the Kahoolawe Island Reserve Commission. The remaining ungulates were eradicated in 1993 (McLeod 2014, in litt.). Because they are able to access extremely rugged terrain, and have a high reproductive capacity (Clark and Cuddihy 1980, pp. C–19–C2–20; Culliney 1988, p. 336; Cuddihy and Stone 1990, p. 64), goats are believed to have completely eliminated some plant species from certain islands (Atkinson and Atkinson 2000, p. 21). Goats are highly destructive to native vegetation and contribute to erosion by: (1) Eating young trees and young shoots of plants before they become established; (2) creating trails that damage native vegetative cover; (3) destabilizing substrate and creating gullies that convey water; and (4) dislodging stones from ledges that results in rockfalls and landslides that damage or destroy native vegetation below (Cuddihy and Stone 1990, pp. 63–64). Feral goats forage along some cliffs where band-rumped storm-petrels nest on Kauai, and may trample nests and increase erosion (Scott *et al.* 1986, pp. 8, 352–357; Tomich 1986, pp. 152–153). The band-rumped storm-petrel and the following 12 plants are at risk from landslides or erosion caused by feral goats: *Gardenia remyi, Joinvillea ascendens* ssp. *ascendens, Kadua fluviatilis, Labordia lorenciana, Lepidium orbiculare, Phyllostegia helleri, P. stachyoides, Portulaca villosa, Pseudognaphalium sandwicensium* var. *molokaiense, Ranunculus mauiensis, Sanicula sandwicensis,* and *Schiedea pubescens.* Twenty-four of the 39 plants (all except for *Calamagrostis expansa, Cyanea kauaulaensis, Cyclosorus boydiae, Cyperus neokunthianus, Deparia kaalaana, Dryopteris glabra* var. *pusilla, Hypolepis hawaiiensis* var. *mauiensis, Kadua haupuensis, Phyllostegia brevidens, Pritchardia bakeri, Ranunculus hawaiensis, Schiedea diffusa* ssp. *diffusa, Sicyos macrophyllus, Solanum nelsonii,* and *Stenogyne kaalae* ssp. *sherffii*), the band-rumped storm-petrel, the orangeblack Hawaiian damselfly, and four of the yellow-faced bees (*Hylaeus anthracinus, H. assimulans, H. facilis,* and *H. hilaris*) are at risk of habitat destruction and modification by feral goats.

Axis Deer (*Axis axis*)

Axis deer destroy and modify 6 of the 11 ecosystems (coastal, lowland dry, lowland mesic, lowland wet, montane wet, and montane mesic) in which these species are found. Axis deer were introduced to the Hawaiian Islands for hunting opportunities on Molokai in 1868, on Lanai in 1920, and on Maui in 1959 (Hobdy 1993, p. 207; Erdman 1996, pers. comm. *in* Waring 1996, in litt., p. 2; Hess 2008, p. 2). Axis deer are primarily grazers, but also browse numerous palatable plant species including those grown as commercial crops (Waring 1996, p. 3; Simpson 2001, in litt.). They prefer the low, openly vegetated areas for browsing and grazing, but during episodes of drought (*e.g.*, from 1998 to 2001 on Maui (Medeiros 2010, pers. comm.)), axis deer move into urban and forested areas in search of food (Waring 1996, p. 5; Nishibayashi 2001, in litt.). Like goats, axis deer are highly destructive to native vegetation and contribute to erosion by eating young trees and young shoots of plants before they can become established. Other axis deer impacts include stripping bark from mature trees, creating trails, promoting erosion by destabilizing substrate, creating gullies that convey water, and dislodging stones from ledges that can result in rockfalls and landslides that directly damage vegetation (Cuddihy and Stone 1990, pp. 63–64).

On Molokai, axis deer likely occur at all elevations from sea level to almost 5,000 ft (1,500 m) at the summit area (Kessler 2011, pers. comm.). The most current population estimate for axis deer on the island of Molokai is between 4,000 and 5,000 individuals (Anderson 2003, p. 119). Little management for deer control has been implemented on Molokai, and this figure from more than a decade ago is likely an underestimate of the axis deer population on this island today (Scott *et al.* 1986, p. 360; Anderson 2003, p. 30; Hess 2008, p. 4). On Lanai, axis deer were reported to number approximately 6,000 to 8,000 individuals in 2007 (The Aloha Insider 2008, in litt; WCities 2010, in litt.). On Maui, five adult axis deer were released east of Kihei in 1959 (Hobdy 1993, p. 207; Hess 2008, p. 2). In 2013, the Maui Axis Deer Working Group estimated that there may be 8,000 deer on southeast Maui alone, based on helicopter surveys (Star Advertiser 2015, in litt.; Hawaii News Now 2014, in litt.) According to Medeiros (2010, pers. comm.) axis deer can be found in all but high-elevation ecosystems (subalpine and alpine) and montane bogs on Maui, and are increasing in numbers at such high rates that native forests are changing in unprecedented ways. Additionally, Medeiros (2010, pers. comm.) asserted that native plants will only survive in habitat that is fenced or otherwise protected from the browsing and trampling effects of axis deer. Kessler (2010, pers. comm.) and Hess (2010, pers. comm.) reported the presence of axis deer up to 9,000 ft (2,700 m) on Maui, and Kessler suggests that no ecosystem is safe from the negative impacts of these animals. Montane bogs are also susceptible to impacts from axis deer. As the native vegetation is removed by browsing and trampling, the soil dries out, and nonnative plants invade. Eventually, the bog habitat and its associated native plants and animals are replaced by grassland or shrubland dominated by nonnative plants (Mitchell *et al.* 2005, p. 6–32).

While axis deer are allowed as game animals on these three islands, the State does not permit their introduction to other Hawaiian Islands. In 2010–2011, axis deer were illegally introduced to Hawaii Island as a game animal (Kessler 2011, pers. comm.; Aila 2012, in litt.), and deer have now been observed across the southern portion of the island including in Kohala, Kau, Kona, and Mauna Kea (HDLNR 2011, in litt.). The Hawaii Department of Lands and Natural Resources (HDLNR) Division of Forestry and Wildlife (HDOFAW) has developed a response-and-removal plan, including a partnership now underway with the Hawaii Department of Agriculture (HDOA), the Big Island Invasive Species Committee (BIISC), Federal natural resource management agencies, ranchers, farmers, private landowners, and concerned citizens (Big Island.com, June 6, 2011). Also, in response to the introduction of axis deer to Hawaii Island, the Hawaii Invasive Species Council drafted House Bill 2593 to amend House Revised Statutes (H.R.S.) 91, which allows agencies to adopt emergency rules in the instances of imminent peril to public health, including to livestock and poultry health (BigIsland.com 2011, in litt.; Martin 2012, in litt.). This emergency rule became permanent on June 21, 2012, when House Bill 2593 was enacted into law as Act 194 (State of Hawaii 2012, in litt.).

The following 16 species in this rule are at risk from the activities of axis deer: *Gardenia remyi, Huperzia stemmermanniae, Joinvillea ascendens* ssp. *ascendens, Nothocestrum latifolium, Phyllostegia stachyoides, Portulaca villosa, Pseudognaphalium sandwicensium* var. *molokaiense, Ranunculus mauiensis, Schiedea pubescens, Solanum nelsonii,* the orangeblack Hawaiian damselfly, and five of the yellow-faced bees (*Hylaeus anthracinus, H. assimulans, H. facilis, H. hilaris,* and *H. longiceps*).

Black-Tailed Deer (*Odocoileus hemionus columbianus*)

Black-tailed deer destroy and modify habitat in 5 of the 11 ecosystems (lowland mesic, lowland wet, montane wet, montane mesic, and dry cliff) in which these species occur. The black-tailed deer is one of nine subspecies of mule deer (Natural History Museum 2015, in litt.). Black-tailed deer were first introduced to Kauai in 1961, for the purpose of sport hunting (Tomich 1986, pp. 131–134). Currently, these deer are only known from the western side of the island, where they feed on a variety of native (*e.g., Acacia koa* and *Coprosma* spp.) and nonnative plants (van Riper and van Riper 1982, pp. 42–46; Tomich 1986, p. 134). In addition to their direct impacts on native plants (browsing), black-tailed deer likely affect native plants indirectly by serving as a primary vector for the spread of introduced plants by carrying their seeds or other propagules on their coats and hooves and in feces. Black-tailed deer have been noted as a cause of habitat alteration in the Kauai ecosystems (NTBG 2007, in litt.; HBMP 2010). Seven of the 39 plants (*Asplenium diellaciniatum, Dryopteris glabra* var. *pusilla, Joinvillea ascendens* ssp. *ascendens, Labordia lorenciana, Nothocestrum latifolium, Ranunculus mauiensis,* and *Sicyos lanceoloideus*) are at risk of habitat destruction and modification by black-tailed deer.

Sheep (*Ovis aries*)

Four of the ecosystems on Hawaii Island (lowland dry, lowland mesic, montane mesic, and montane dry) in which these species occur are currently threatened by habitat destruction and modification due to the activities of feral sheep. Sheep were introduced to Hawaii Island in 1791, when Captain Vancouver brought five rams and two ewes from California (Tomich 1986, pp. 156–163). Soon after, stock was brought from Australia, Germany, and the Mediterranean for sheep production (Tomich 1986, pp. 156–163; Cuddihy and Stone 1990, pp. 65–66), and by the early 1930s, herds reached close to 40,000 individuals (Scowcroft and Conrad 1992, p. 627). Capable of acquiring the majority of their water needs by consuming vegetation, sheep can inhabit dry forests in remote regions of the mountains of Mauna Kea and Mauna Loa, including the saddle between the two volcanoes. Feral sheep browse and trample native vegetation and have decimated large areas of native forest and shrubland on Hawaii Island (Tomich 1986, pp. 156–163; Cuddihy and Stone 1990, pp. 65–66). Browsing results in the erosion of top soil that alters moisture regimes and micro-environments, leading to the loss of native plants and animals (Tomich 1986, pp. 156–163; Cuddihy and Stone 1990, pp. 65–66). In addition, nonnative plant seeds are dispersed into native forest by adhering to sheep's wool coats (DOFAW 2002, p. 3). In 1962, game hunters intentionally crossbred feral sheep with mouflon sheep and released them on Mauna Kea, where they have done extensive damage to the montane dry ecosystem (Tomich 1986, pp. 156–163). Over the past 30 years, attempts to protect the vegetation of Mauna Kea and the saddle area between the two volcanoes have been only sporadically effective (Hess 2008, pp. 1, 4). Currently, a large population of sheep (and mouflon hybrids) extends from Mauna Kea into the saddle and northern part of Mauna Loa, including State forest reserves, where they trample and browse all vegetation, including endangered plants (Hess 2008, p. 1). One study estimated as many as 2,500 mouflon within just the Kau district of the Kahuku Unit (Volcanoes National Park) in 2006 (Hess *et al.* 2006, p. 10). Two of the 39 plants, *Exocarpos menziesii* and *Festuca hawaiiensis,* and the yellow-faced bee *Hylaeus anthracinus,* are reported to be at risk of habitat destruction and modification by feral sheep (see Table 2).

Mouflon (*Ovis gmelini musimon*)

Mouflon destroy and modify habitat in 6 of the 11 ecosystems on Maui, Lanai, and Hawaii Island (lowland dry, lowland mesic, montane mesic, montane dry, subalpine, and dry cliff) in which these species occur. Native to central Asia, mouflon were introduced to the islands of Lanai and Hawaii in the 1950s as game species, and are now widely established on these islands (Tomich 1986, pp. 163–168; Cuddihy and Stone 1990, p. 66; Hess 2008, p. 1). Due to their high reproductive rate, the original population of 11 mouflon on the island of Hawaii increased to more than 2,500 individuals in 36 years, even though they were hunted for game (Hess 2008, p. 3). Mouflon have decimated vast areas of native shrubland and forest through grazing, browsing, and bark stripping (Stone 1985, p. 271; Cuddihy and Stone 1990, pp. 63, 66; Hess 2008, p. 3). Mouflon also create trails and pathways through vegetation, resulting in soil compaction and increased runoff and erosion. In some areas, the interaction of browsing and soil compaction has led to a shift from native forest to grassy scrublands (Hess 2008, p. 3). Mouflon only gather in herds when breeding, thus complicating control techniques and hunting efficiency (Hess 2008, p. 3; Ikagawa 2011, in litt.). Currently, many of the current and proposed fence exclosures on Hawaii Island constructed to protect rare species and habitat are designed to exclude feral pigs, goats, and sheep and are only 4 ft (1.3 m) in height; a fence height of at least 6 ft (2 m) is necessary to exclude mouflon (Ikagawa 2011, in litt.). Five of the 39 plant species (*Exocarpos menziesii, Nothocestrum latifolium, Portulaca villosa, Ranunculus hawaiensis,* and *Sicyos macrophyllus*), and the yellow-faced bee *Hylaeus assimulans,* are at risk from habitat destruction and modification resulting from the activities of mouflon (see Table 2).

Cattle (*Bos taurus*)

Cattle destroy and modify habitat in 7 of the 11 ecosystems on Maui and Hawaii Island (coastal, lowland dry, lowland mesic, lowland wet, montane wet, montane mesic, and montane dry) in which these species occur. Cattle, the wild progenitors of which were native to Europe, northern Africa, and southwestern Asia, were introduced to the Hawaiian Islands in 1793, and large feral herds (as many as 12,000 on the island of Hawaii) developed as a result of restrictions on killing cattle decreed by King Kamehameha I (Cuddihy and Stone 1990, p. 40). While small cattle ranches were developed on Kauai, Oahu, Molokai, west Maui, and Kahoolawe, very large ranches of tens of thousands of acres were created on east Maui and Hawaii Island (Stone 1985, pp. 256, 260; Broadbent 2010, in litt.). Feral cattle can be found today on the islands of Molokai, Maui, and Hawaii. Feral cattle eat native vegetation, trample roots and seedlings, cause erosion, create disturbed areas into which alien plants invade, and spread seeds of alien plants carried in their feces and on their bodies. The forest in areas grazed by cattle rapidly degrades into grassland pasture, and plant cover remains reduced for many years following removal of cattle from an area. Increased nitrogen availability through the feces of cattle contributes to the ingress of nonnative plant species (Kohala Mountain Watershed Partnership (KMWP) 2007, pp. 54–55; Laws *et al.* 2010, in litt.). Furthermore, several alien grasses and legumes purposely introduced for cattle forage have become invasive weeds (Tomich 1986, pp. 140–150; Cuddihy and Stone 1990, p. 29). According to Kessler (2011, pers. comm.) approximately 300 individuals roam east Maui as high as the subalpine ecosystem (*i.e.,* to 9,800 ft (3,000 m)), and feral cattle are occasional observed on west Maui. Feral cattle (more than 100 individuals) are reported from remote regions of Hawaii Island, including the back of Pololu and Waipio Valleys in the Kohala Mountains, and the Kona Unit of the Hakalau Forest National Wildlife Refuge (NWR) (KMWP 2007, p. 55; USFWS 2010, pp. 3–15, 4–86). Nine of the 39 plant species (*Huperzia stemmermanniae, Nothocestrum latifolium, Ochrosia haleakalae, Portulaca villosa, Ranunculus hawaiensis, R. mauiensis, Schiedea pubescens, Sicyos macrophyllus,* and *Solanum nelsonii*) and four of the yellow-faced bees (*Hylaeus anthracinus, H. assimulans, H. facilis,* and *H. hilaris*) are currently at risk of habitat destruction or modification due to the activities of feral cattle.

In summary, 37 of the 39 plant species (all except *Cyanea kauaulaensis* and *Hypolepis hawaiiensis* var. *mauiensis*), and 9 of the 10 animals (except for the anchialine pool shrimp *Procaris hawaiana*), are at risk of habitat destruction and modification by ungulates including pigs, goats, axis deer, black-tailed deer, sheep, mouflon, and cattle (see Table 2). The effects of these nonnative animals include the destruction of vegetative cover, trampling of plants and seedlings, direct consumption of native vegetation, soil disturbance and sedimentation (erosion and landslides), dispersal of nonnative plant seeds by animals, alteration of soil nitrogen availability, and creation of open, disturbed areas conducive to further invasion by nonnative pest plant species. All of these impacts also can lead to the conversion of a native plant community to one dominated by nonnative species (see "Habitat Destruction and Modification by Nonnative Plants," below). In addition, because these animals inhabit terrain that is often steep and remote, foraging and trampling contributes to severe erosion of watersheds and degradation of streams and wetlands (Cuddihy and Stone 1990, p. 59; Dunkell *et al.* 2011, pp. 175–194).

Habitat Destruction and Modification by Nonnative Plants

Ten of the 11 ecosystems (excluding anchialine pool ecosystem) and the species in this rule that are associated with them are currently at risk of habitat destruction and modification by nonnative plants. Native vegetation on all of the main Hawaiian Islands has undergone extreme alteration because of past and present land management practices, including ranching, deliberate introduction of nonnative plants and animals, and agriculture (Cuddihy and Stone 1990, pp. 27, 58). The original native flora of Hawaii (present before human arrival) consisted of about 1,000 taxa, 89 percent of which are endemic (Wagner *et al.* 1999, pp. 3–6). Over 800 plant taxa have been introduced to the Hawaiian Islands. These were brought to Hawaii for food or for cultural reasons, to reforest areas destroyed by grazing feral and domestic animals, or for horticultural or agricultural purposes; some were introduced unintentionally (Scott *et al.* 1986, pp. 361–363; Cuddihy and Stone 1990, p. 73). Individual descriptions of 114 nonnative plant species that negatively affect the 49 species are provided in our proposed rule (80 FR 58820, September 30, 2015; see pp. 58869–58881). Fourteen of these nonnative plants are included in the Hawaii Noxious Weed List (Hawaii Department of Agriculture HAR 1981-title 4, subtitle 6, chapter 68).

Nonnative plants adversely affect native habitat in Hawaii by (1) modifying the availability of light, (2) altering soil-water regimes, (3) modifying nutrient cycling, and (4) altering fire regimes of native plant communities (*i.e.,* the "grass/fire cycle" that converts native-dominated plant communities to nonnative plant communities; see below) (Smith 1985, pp. 180–181; Cuddihy and Stone 1990, p. 74; D'Antonio and Vitousek 1992, p. 73; Vitousek *et al.* 1997, p. 6). The contribution of nonnative plants to the extinction of native species in the lowland and upland habitats of Hawaii is well-documented (Vitousek *et al.* 1987 *in* Cuddihy and Stone 1990, p. 74). The most commonly observed effect of nonnative plants on native species is displacement through competition. Competition occurs for water or nutrients, or it may involve allelopathy (chemical inhibition of growth of other plants), shading, or precluding sites for seedling establishment (Vitousek *et al.* 1987 *in* Cuddihy and Stone 1990, p. 74).

Alteration of fire regimes represents an ecosystem-level change caused by the invasion of nonnative plants, primarily grasses (D'Antonio and Vitousek 1992, p. 73). Grasses generate standing dead material that burns readily, and grass tissues with large surface-to-volume ratios dry out quickly, contributing to flammability (D'Antonio and Vitousek 1992, p. 73). The finest size classes of grass material ignite and spread fires under a broader range of conditions than do woody fuels or even surface litter (D'Antonio and Vitousek 1992, p. 73). The grass life form allows rapid recovery following fire because there is little above-ground vegetative structure. Grasslands also support a microclimate in which surface temperatures are hotter, contributing to drier vegetative conditions that favor fire (D'Antonio and Vitousek 1992, p. 73). In summary, nonnative plants directly and indirectly affect the 39 plants and 9 of the 10 animals in this rule (except the anchialine pool shrimp) by destroying and modifying their habitat, by removing their native host plants, or by direct competition.

Habitat Destruction and Modification by Fire

Seven of the 11 ecosystems (coastal, lowland dry, lowland mesic, montane mesic, montane dry, subalpine, and dry cliff) and the species in this rule that are associated with them are at risk of destruction and modification by fire. Fire is an increasing, human-exacerbated threat to native species and ecosystems in Hawaii. The pre-settlement fire regime in Hawaii was characterized by infrequent, low-severity events, as few natural ignition sources existed (Cuddihy and Stone 1990, p. 91; Smith and Tunison 1992, pp. 395–397). It is believed that prior to human colonization fuel was sparse in wet plant communities and only seasonally flammable in mesic and dry plant communities. The only ignition sources were volcanism and lightning (Baker *et al.* 2009, p. 43). Although Vogl (1969, *in* Cuddihy and Stone 1990, p. 91) proposed that naturally occurring fires may have been important in the development of some of the original Hawaiian flora, Mueller-Dombois (1981, *in* Cuddihy and Stone 1990, p. 91) asserts that most natural vegetation types of Hawaii would not carry fire before the introduction of alien grasses. Smith and Tunison (*in* Cuddihy and Stone 1990, p. 91) state that native plant fuels typically have low flammability. Existing fuel loads were often discontinuous, and rainfall in many areas on most islands was moderate to high. Fires inadvertently or intentionally set by the Polynesian settlers probably contributed to the initial decline of native vegetation in the drier plains and foothills. These early settlers practiced slash-and-burn agriculture that created open lowland areas suitable for the opportunistic invasion and colonization of nonnative, fire-adapted grasses (Kirch 1982, pp. 5–6, 8; Cuddihy and Stone 1990, pp. 30–31). Beginning in the late 18th century, Europeans and Americans introduced plants and animals that further degraded native Hawaiian ecosystems. Ranching and the creation of pasturelands in particular created highly fire-prone areas of nonnative grasses and shrubs (D'Antonio and Vitousek 1992, p. 67). Although fires were infrequent in mountainous regions, extensive fires have recently occurred in lowland dry and lowland mesic areas, leading to grass/fire cycles that convert native dry forest and native wet forest to nonnative grassland (D'Antonio and Vitousek 1992, p. 77).

Because of the greater frequency, intensity, and duration of fires that have resulted from the human alteration of landscapes and the introduction of nonnative plants, especially grasses, fires are now more destructive to native Hawaiian ecosystems (Brown and Smith 2000, p. 172), and a single grass-fueled fire often kills most native trees and shrubs in the area (D'Antonio and Vitousek 1992, p. 74). Fire destroys dormant seeds of native plants, as well as individual plants and animals themselves, even in steep, inaccessible areas or near streams and ponds. Successive fires remove habitat for native species by altering microclimate conditions, creating conditions more favorable to nonnative plants. Nonnative grasses (*e.g., Cenchrus setaceus;* fountain grass), many of which may be fire-adapted, produce a high fuel load that allow fire to burn areas that would not otherwise burn easily, regenerate quickly after fire, and establish rapidly in burned areas (Fujioka and Fujii 1980 *in* Cuddihy and Stone 1990, p. 93; D'Antonio and Vitousek 1992, pp. 70, 73–74; Tunison *et al.* 2002, p. 122). Native woody plants may recover to some degree, but fire tips the competitive balance toward nonnative species (National Park Service 1989 *in* Cuddihy and Stone 1990, p. 93). During a post-burn survey on Hawaii Island, in an area of native *Diospyros* forest with undergrowth of the nonnative grass *Pennisetum setaceum* [*Cenchrus setaceus*], Takeuchi (1991, p. 2) noted that "no regeneration of native canopy is occurring within the Puuwaawaa burn area." Takeuchi also stated that "burn events served to accelerate a decline process already in place, compressing into days a sequence which would ordinarily have taken decades" (Takeuchi 1991, p. 4), and concluded that, in addition to increasing the number of fires, the nonnative *Pennisetum* acted to suppress establishment of native plants after a fire (Takeuchi 1991, p. 6).

For many decades, fires have affected rare or endangered species and their habitats on Molokai, Lanai, and Maui (Gima 1998, in litt.; Hamilton 2009, in litt.; Honolulu Advertiser 2010, in litt.; Pacific Disaster Center 2011, in litt.). These three islands experienced approximately 1,290 brush fires between 1972 and 1999 that burned a total of 64,250 ac (26,000 ha) (County of Maui 2009, ch. 3, p. 3; Pacific Disaster Center 2011, in litt.). Between 2000 and 2003, the annual number of wildfires on these islands jumped from 118 to 271; of these, several burned more than 5,000 ac (2,023 ha) each (Pacific Disaster Center 2011, in litt.). On Molokai, between 2003 and 2004, three wildfires each burned 10,000 ac (4,050 ha) (Pacific Disaster Center 2011, in litt.). From August through early September 2009, a wildfire burned approximately 8,000 ac (3,237 ha), including 600 ac (243 ha) of the remote Makakupaia section of the Molokai Forest Reserve, a small portion of The Nature Conservancy's (TNC's) Kamakou Preserve, and encroached on Onini Gulch, Kalamaula, and Kawela (Hamilton 2009, in litt.). Species at risk because of wildfire on Molokai include the plants *Joinvillea ascendens* ssp. *ascendens, Nothocestrum latifolium, Portulaca villosa, Ranunculus mauiensis, Schiedea pubescens,* and *Solanum nelsonii,* and the yellow-faced bees *Hylaeus anthracinus, H. facilis, H. hilaris,* and *H. longiceps.*

Several wildfires have occurred on Lanai in the last decade. In 2006, a wildfire burned 600 ac (243 ha) between Manele Road and the Palawai Basin, about 3 mi (4 km) south of Lanai City (The Maui News 2006, in litt.). In 2007, a brush fire at Mahana burned about 30 ac (12 ha), and in 2008, another 1,000 ac (405 ha) were burned by wildfire in the Palawai Basin (The Maui News 2007, in litt.; KITV Honolulu 2008, in litt.). Species at risk because of wildfire on Lanai include *Exocarpos menziesii, Nothocestrum latifolium, Portulaca villosa, Schiedea pubescens;* and the yellow-faced bees *Hylaeus anthracinus, H. assimulans, H. facilis, H. hilaris,* and *H. longiceps.*

On west Maui, wildfires burned more than 8,650 ac (3,501 ha) between 2007 and 2010 (Honolulu Advertiser 2010, in litt.; Shimogawa 2010, in litt.). These fires encroached into the West Maui Forest Reserve, on the ridges of Olowalu and Kealaloloa, which is habitat for several endangered plants. In 2007, on east Maui, a fire consumed over 600 ac (240 ha), increasing invasion of the area by nonnative plants (*Pinus* spp.) (Pacific Disaster Center 2007, in litt.; The Maui News 2011, in litt.). Species at risk because of wildfire on west and east Maui include the plants *Festuca hawaiiensis, Joinvillea ascendens* ssp. *ascendens, Nothocestrum latifolium, Ochrosia haleakalae, Portulaca villosa, Ranunculus mauiensis, Sanicula sandwicensis, Schiedea pubescens, Sicyos macrophyllus,* and *Solanum nelsonii,* and the yellow-faced bees *Hylaeus anthracinus, H. assimulans, H. facilis, H. hilaris,* and *H. longiceps.*

Several recent fires on Oahu in the Waianae Mountain range have affected rare and endangered species. Between 2004 and 2005, wildfires burned more than 360 ac (146 ha) in Honouliuli Preserve, habitat of more than 90 rare and endangered plants and animals (TNC 2005). In 2006, a fire at Kaena Point State Park burned 60 ac (24 ha), and encroached on endangered plants in Makua Military Training Area. In 2007, there was a significant fire at Kaukonahua that crossed 12 gulches, eventually encompassing 5,655 ac (2,289 ha) that negatively affected eight endangered plant species and their habitat (*Abutilon sandwicense, Bonamia menziesii, Colubrina oppositifolia, Eugenia koolauensis, Euphorbia haeleeleana, Hibiscus brackenridgei* ssp. *mokuleianus, Nototrichium humile,* and *Schiedea hookeri*) (U.S. Army Garrison 2007b, Appendices pp. 1–5). This fire provided ingress for nonnative ungulates (cattle, goats, and pigs) into previously undisturbed areas, and opened dense native vegetation to the invasive grass *Urochloa maxima* (*Panicum maximum,* guinea grass), also a food source for cattle and goats. The grass was observed to generate blades over 2 ft (0.6 m) in length only 2 weeks following the fire (U.S. Army Garrison 2007b, Appendices pp. 1–5). In 2009, two smaller fires burned 200 ac (81 ha) at Manini Pali (Kaena Point State Park) and almost 4 ac (1.5 ha) at Makua Cave. Both of these fires burned into area designated as critical habitat, although no individual plants were directly affected (U.S. Army Natural Resource Program 2009, Appendix 2, 17 pp.). Most recently, in 2014, two fires affected native forest, one in the Oahu Forest National Wildlife Refuge (350 ac, 140 ha), on the leeward side of the Koolau Mountains (DLNR 2014, in litt.), and one above Makakilo, in the Waianae Mountains, just below Honouliuli FR, that burned more than 1,000 ac (400 ha) (KHON 2014, in litt.). The Makakilo fire took over 2 weeks to contain. Species at risk because of wildfire on Oahu include the plants *Joinvillea ascendens* ssp. *ascendens, Nothocestrum latifolium, Portulaca villosa, Ranunculus mauiensis,* and *Sicyos lanceoloideus,* and the yellow-faced bees *Hylaeus anthracinus, H. assimulans, H. facilis, H. kuakea, H. longiceps,* and *H. mana.*

In 2012, on Kauai, a wildfire that was possibly started by an unauthorized camping fire burned 40 ac (16 ha) in the Na Pali-Kona Forest Reserve on Milolii Ridge, forcing closure of a hiking trail. Fortunately, several endangered and threatened plants in the adjacent Kula NAR were not impacted (KITV 2012, in litt.). The same year, another wildfire burned over 650 ac (260 ha) on Hikimoe Ridge, and threatened the Puu Ka Pele section of Waimea Canyon State Park (Hawaii News Now 2012, in litt.; Star Advertiser 2012, in litt.). Species at risk of because wildfire on Kauai include the plants *Joinvillea ascendens* ssp. *ascendens, Labordia lorenciana, Nothocestrum latifolium, Ranunculus mauiensis, Santalum involutum,* and *Sicyos lanceoloideus.*

In the driest areas on the island of Hawaii, wildfires are exacerbated by the uncontrolled growth of nonnative grasses such as *Cenchrus setaceus* (Fire Science Brief 2009, in litt.). Since its introduction to the island in 1917, this grass now covers more than 200 square mi (500 square km) of the leeward areas of the island (Joint Fire Science Brief (JFSB) 2009, in litt.). In the past 50 years, three wildfires on the leeward side encompassed a total of 30,000 ac (12,140 ha) (JFSB 2009, in litt.). These wildfires traveled great distances at rates of 4 to 8 miles per hour (mph) (7 to 12 kilometers per hour (kph)), burning 2.5 ac (1 ha) to 6 ac (2.5 ha) per minute (the equivalent of 6 to 8 football fields per minute) (Burn Institute 2009, p. 4). Between 2002 and 2003, three successive lava-ignited wildfires in the east rift zone of Hawaii Volcanoes National Park affected native forests in lowland dry, lowland mesic, and lowland wet ecosystems (JFSB 2009, p. 3), cumulatively burning an estimated 11,225 ac (4,543 ha) (Wildfire News, June 9, 2003; JFSP 2009, p. 3). These fires destroyed over 95 percent of the canopy cover and encroached upon forest areas that were previously thought to have low susceptibility to wildfires. After the fires, nonnative ferns were observed in higher elevation rainforest where they had not previously been seen, and were believed to inhibit the recovery of the native *Metrosideros polymorpha* (ohia) trees (JFSP 2003, pp. 1–2). Nonnative grasses invaded the burn area, increasing the risk of fire encroaching into the surrounding native forest (Ainsworth 2011, in litt.). Extreme drought conditions also contributed to the number and intensity of wildfires on Hawaii Island (Armstrong and Media 2010, in litt.; Loh 2010, in litt.). This "extreme" drought classification for Hawaii was recently lifted to "moderate"; however, drier than average conditions persist, and another extreme drought event may occur (NOAA 2015, in litt.). In addition, El Niño conditions in the Pacific (see "Climate Change" under Factor E, below), a half-century of decline in annual rainfall, and intermittent dry spells have contributed to the conditions favoring wildfires in all the main Hawaiian Islands (Marcus 2010, in litt.). Species at risk because of wildfire on Hawaii Island include the plants *Exocarpos menziesii, Festuca hawaiiensis, Joinvillea ascendens* ssp. *ascendens, Ochrosia haleakalae, Portulaca villosa, Ranunculus mauiensis, Sanicula sandwicensis, Sicyos macrophyllus,* and *Solanum nelsonii,* and the yellow-faced bee *Hylaeus anthracinus.*

In summary, fire is a threat to 14 plant species and their habitat (*Exocarpos menziesii, Festuca hawaiiensis, Joinvillea ascendens* ssp. *ascendens, Labordia lorenciana, Nothocestrum latifolium, Ochrosia haleakalae, Portulaca villosa, Ranunculus mauiensis, Sanicula sandwicensis, Santalum involutum, Schiedea pubescens, Sicyos lanceoloideus, S. macrophyllus,* and *Solanum nelsonii*), and all seven yellow-faced bees because these species and their habitat are located in or near areas that were burned previously, or in areas considered at risk because of fire due to the cumulative and compounding effects of drought and the presence of highly flammable nonnative grasses.

Habitat Destruction and Modification by Hurricanes

Ten of the 11 ecosystems (all except the anchialine pool ecosystem) where these species occur are at risk of habitat destruction and modification by hurricanes. Hurricanes exacerbate the impacts of other threats such as habitat destruction and modification by ungulates and competition with nonnative plants. By destroying native vegetation, hurricanes open the forest canopy, modify the availability of light, and create disturbed areas conducive to invasion by nonnative pest species (see "Habitat Destruction and Modification by Nonnative Plants", above) (Asner and Goldstein 1997, p. 148; Harrington *et al.* 1997, pp. 539–540). In addition, hurricanes adversely affect native Hawaiian stream habitat by defoliating and toppling vegetation, thus loosening the surrounding soil and increasing erosion. Along with catastrophic flooding, this soil and vegetative debris can be washed into streambeds (by hurricane-induced rain or subsequent rain storms), resulting in the scouring of stream bottoms and channels (Polhemus 1993a, 88 pp.). Natural disasters such as hurricanes can be particularly devastating to Hawaiian plant and animal species that persist in low numbers and in restricted ranges (Mitchell *et al.* 2005, p. 4–3).

Hurricanes affecting Hawaii were only rarely reported from ships in the area from the 1800s until 1949. Between 1950 and 1997, 22 hurricanes passed near or over the Hawaiian Islands, 5 of which caused serious damage (Businger 1998, pp. 1–2). In November 1982, Hurricane Iwa struck the Hawaiian Islands with wind gusts exceeding 100 miles per hour (mph) (160 kilometers per hour (kmh)), causing extensive damage, especially on the islands of Kauai, Niihau, and Oahu (Businger 1998, pp. 2, 6). Many forest trees were destroyed (Perlman 1992, pp. 1–9), which opened the canopy and facilitated the invasion of native forest by nonnative plants (Kitayama and Mueller-Dombois 1995, p. 671). Hurricanes therefore exacerbate the threats posed by nonnative plants, as described in "Habitat Destruction and Modification by Nonnative Plants," above. In September 1992, Hurricane Iniki, a category 4 hurricane with maximum sustained winds of 130 mph (209 kmh, 113 knots), passed directly over the island of Kauai and close to the island of Oahu, causing significant damage to Kauai and along Oahu's southwestern coast (Blake *et al.* 2007, pp. 20, 24). Biologists documented damage to the habitat of six endangered plant species on Kauai, and one plant on Oahu. Polhemus (1993a, pp. 86–87) documented the extirpation of the scarlet Kauai damselfly (*Megalagrion vagabundum*) (a species related to *M. xanthomelas*), from the entire Hanakapiai Stream system on the island of Kauai as a result of the impacts of Hurricane Iniki. Damage by future hurricanes will further alter the remaining native-plant dominated habitat for rare plants and animals in native ecosystems of Kauai, Oahu, and other Hawaiian Islands (Bellingham *et al.* 2005, p. 681) (see "Climate Change" under *Factor E. Other Natural or Manmade Factors Affecting Their Continued Existence,* below).

In summary, hurricanes exacerbate other habitat threats, such as competition with nonnative plants, as well as result in direct habitat destruction. This is a particular problem for the plant *Pritchardia bakeri,* the band-rumped storm-petrel, the orangeblack Hawaiian damselfly, and all seven yellow-faced bees.

Habitat Modification and Destruction Due to Landslides, Rockfalls, Treefall, Flooding, Erosion, Drought, and Tsunamis

Habitat destruction and modification by landslides, rockfalls, treefall, flooding, erosion, and drought (singly or in combination) is a threat to all 11 ecosystems in which these species occur. Landslides, rockfalls, treefall, flooding, and erosion change native plant and animal communities by destabilizing substrates, damaging or destroying individual plants, and altering hydrological patterns. In the open sea near Hawaii, rainfall averages 25 to 30 inches (in) (630 to 760 millimeters (mm)) per year, yet the islands may receive up to 15 times this amount in some places, caused by orographic features (topography) (Wagner *et al.* 1999, adapted from Price (1983) and Carlquist (1980), pp. 38–39). During storms, rain may fall at rates of 3 in (76 mm) per hour or more, and sometimes may reach nearly 40 in (1,000 mm) in 24 hours, resulting in destructive flash-flooding in streams and narrow gulches (Wagner *et al.* 1999, adapted from Price (1983) and Carlquist (1980), pp. 38–39). Due to the steep topography in many mountainous areas on the Hawaiian Islands, disturbance caused by introduced ungulates exacerbates erosion and increases the potential for landslides, rockfalls, or flooding, which in turn damages or destroys native plants and disturbs habitat of the band-rumped storm-petrel (see Table 2). These events could eliminate one or more isolated occurrences of species that persist in low numbers and a limited geographic range, resulting in reduced redundancy and resilience of the species.

Landslides, rockfalls, treefall, flooding, and erosion are threats to 20 plant species (*Cyanea kauaulaensis, Cyclosorus boydiae, Deparia kaalaana, Dryopteris glabra* var. *pusilla, Gardenia remyi, Joinvillea ascendens* ssp. *ascendens, Kadua fluviatilis, K. haupuensis, Labordia lorenciana, Lepidium orbiculare, Phyllostegia brevidens, P. helleri, P. stachyoides, Portulaca villosa, Pseudognaphalium sandwicensium* var. *molokaiense, Ranunculus hawaiensis, R. mauiensis, Sanicula sandwicensis, Schiedea pubescens,* and *Solanum nelsonii*) and to the band-rumped storm-petrel and the orangeblack Hawaiian damselfly. Landslides, rockfalls, and erosion can directly affect nests and nesting habitat of the band-rumped storm-petrel. Destabilization of cliff habitat leads to additional landslides and alteration of hydrological patterns, affecting the availability of soil moisture. Landslides also destroy and modify riparian and stream habitat by direct physical damage, and create disturbed areas leading to invasion by nonnative plants, as well as damaging or destroying plants directly. *Kadua haupuensis, Labordia lorenciana, Lepidium orbiculare, Phyllostegia brevidens,* and *P. helleri* are known only from a few individuals in single occurrences on cliffs or steep-walled stream valleys, and one landslide could extirpate a species by direct destruction. Monitoring data presented by the Plant Extinction Prevention Program (PEPP) and botanical surveys suggest that flooding is a likely threat to eight plant species, *Cyanea kauaulaensis, Cyclosorus boydiae, Deparia kaalaana, Labordia lorenciana, Phyllostegia stachyoides, Sanicula sandwicensis, Schiedea pubescens,* and *Solanum nelsonii,* as some individuals occur on stream banks (Wood *et al.* 2007, p. 198; PEPP 2011, pp. 162–164; Oppenheimer and Lorence 2012, pp. 20–21; PEPP 2013, p. 54; PEPP 2014, pp. 95, 142). The naiad life stage of the orangeblack Hawaiian damselfly would be destroyed by flooding if an individual is carried out of suitable habitat or into areas occupied by nonnative fish.

Drought is reported to be a threat to 10 plants (*Cyclosorus boydiae, Deparia kaalaana, Huperzia stemmermanniae, Phyllostegia stachyoides, Ranunculus hawaiensis, R. mauiensis, Sanicula sandwicensis, Schiedea pubescens, Sicyos lanceoloideus,* and *Solanum nelsonii*), the orangeblack Hawaiian damselfly (directly or by desiccation of streams and ponds), and all seven yellow-faced bees (Magnacca 2007, pp. 181, 183; Polhemus 2008, p. 26; Chu *et al.* 2010, pp. 4887, 4891, 4898; PEPP 2011, pp. 162–164; Fortini *et al.* 2013, p. 2; PEPP 2013, p. 177; PEPP 2014, pp. 140–142, 154–156, 162, 166–167). Between 1860 and 2002, there were 49 periods of drought on Oahu, 30 periods of drought on Molokai, Lanai, and Maui, and at least 18 serious or severe drought events on Hawaii Island (Giambelluca *et al.* 1991, pp. 3–4; Hawaii Commission on Water Resource Management (CWRM) 2009, in litt.; Hawaii Civil Defense 2011, pp. 14–1–14–12). The most severe drought events over the past 15 years were associated with the El Niño phenomenon (Hawaii Civil Defense 2011, p. 14–3). In 1998, the city of Hilo had the lowest January total rainfall (0.014 in) ever observed for any month since records have been kept, with average rainfall being almost 10 in for January (Hawaii Civil Defense 2011, p. 14–3). Currently, the State remains under abnormally dry to moderate drought conditions, with the onset of another El Niño event (U.S. Drought Monitor 2015, in litt., National Weather Service 2015, in litt.). Drought events dry up streams, irrigation ditches, and reservoirs, and deplete groundwater supplies (Hawaii CWRM 2009, in litt.). Recent episodes of drought have driven axis deer farther into forested areas in search of food, increasing their negative impacts on native vegetation from herbivory, bark stripping, and trampling (see *Factor C. Disease or Predation,* below) (Waring 1996, in litt; Nishibayashi 2001, in litt.). Drought events could eliminate one or more isolated populations of a species that currently persists in low numbers and a limited geographic range, resulting in reduced redundancy and resilience of the species or extinction.

Tsunamis destroy and modify habitat for species in Northwestern Hawaiian Islands and in low-lying coastal areas of the main Hawaiian Islands. Tsunamis in Hawaii are caused by earthquakes, submarine landslides, and volcanic eruptions that may occur within the archipelago or in distant parts of the Pacific. These events disturb the ocean's surface, and gravity combined with the water's motion produces a series of long-period waves that travel quickly and can reach heights of 32 ft (10 m) or more when reaching land. Major tsunamis occur worldwide about once every 10 years, on average, and almost 60 percent of those occur in the Pacific Ocean (Pacific Tsunami Warning Center, *http://ptwc.weather.gov/ptwc/faq.php#8,* accessed June 2016). In 2011, a tsunami caused by an earthquake in Japan reached Hawaii and the Northwestern Hawaiian Islands. This tsunami swept over Midway Atoll's Eastern Island and Kure Atoll's Green Island, where it inundated plants, spread plastic debris, killed thousands of seabirds, and destroyed seabird nesting areas as it traveled about 500 ft (150 m) inland (DOFAW 2011, in litt.; Starr 2011, in litt.; USFWS 2011, in litt.). This threat could occur at any time and negatively affect occurrences and habitat of the plant *Solanum nelsonii* and the yellow-faced bees *Hylaeus anthracinus, H. assimulans, H. facilis, H. hilaris,* and *H. longiceps.*

Habitat Destruction and Modification by Water Extraction

Freshwater habitats on all the main Hawaiian Islands have been severely altered and degraded because of past and present land and water management practices, including agriculture, urban development, and development of ground water, perched aquifer, and surface water resources (Harris *et al.* 1993, p. 11; Meier *et al.* 1993, p. 181). Extensive modification of lentic (standing water) habitat in the Hawaiian Islands began about 1100 A.D. with a rapid increase in the human population (Harris *et al.* 1993, p. 9; Kirch 1982, pp. 5–6). Hawaiians cultivated *Colocasia esculenta* (kalo, taro) by creating shallow, walled ponds, or *loi,* in marshes and riparian areas (Meier *et al.* 1993, p. 181; Handy and Handy 1972, p. 58). By 1778, virtually all valley bottoms with permanent stream flow and most basin marshes were converted to taro cultivation (Handy and Handy 1972, pp. 396, 411). Hawaiians also modified wetlands by constructing fishponds, many of which were primarily fresh water, fed by streams or springs (Meier *et al.* 1993, p. 181). Despite this habitat modification by early Hawaiians, many areas of extensive marshland remained intact and were used by the native damselflies. Over time, however, many of the wetlands formerly used for taro were drained and filled for dry-land agriculture or development (Stone 1989, p. 129; Meier *et al.* 1993, pp. 181–182). In addition, marshes are slowly filled and converted to meadow habitat due to increased sedimentation resulting from increased storm water runoff from upslope development and blockage of downslope drainage (Wilson Okamoto and Associates, Inc. 1993, p. 3–5). Presently the most significant threat to the remaining natural ponds and marshes in Hawaii, habitat for the orangeblack Hawaiian damselfly, is the nonnative grass species *Urochloa mutica.* This sprawling, perennial grass was first observed on Oahu in 1924, and now occurs on all the main islands (O'Connor 1999, p. 1504). This species forms dense, monotypic stands that can completely eliminate any open water by layering of its trailing stems (Smith 1985, p. 186).

Similar to the loss of wetlands in Hawaii, the loss of streams has been significant and began with the early Hawaiians who modified stream systems by diverting water to irrigate taro. However, these Hawaiian-made diversions were closely regulated and were not permitted to take more than half the stream flow, and were typically used to flood taro *loi* only periodically (Handy and Handy 1972, pp. 58–59). The advent of sugarcane plantations in 1835 led to more extensive stream diversions. These systems were typically designed to tap water at upper elevation sources (above 980 ft (300 m)) by means of concrete weirs. All or most of the stream flow was diverted into fields or reservoirs (Takasaki *et al.* 1969, p. 65; Harris *et al.* 1993, p. 10). By the 1930s, major water diversions had been developed on all the main islands, and currently one-third of Hawaii's perennial streams are diverted (Harris *et al.* 1993, p. 10). In addition to diverting water for agriculture and domestic water supply, streams have been diverted for use in producing hydroelectric power (Hawaii Stream Assessment 1990, p. 96). Surface flow has also been diverted into channels, and the perched aquifers which fed the streams have been tapped by means of tunnels (Stearns and Vaksvik 1935, pp. 365, 378–434; Stearns 1985, p. 291, 301–303). Many of these aquifers are the sources of springs, which contribute flow to streams. The draining of these aquifers causes springs to become dry (Stearns and Vaksvik 1935, pp. 380, 388; USGS 2000, in litt.). Most remaining streams that are not already diverted have been, and continue to be, seriously degraded by the activities of feral ungulates and by nonnative plants. Channelization has not been restricted to lower reaches, and it results in the loss of riparian vegetation, increasing flow velocity, illumination, and water temperature (Parrish *et al.* 1984, pp. 83–84). These conditions make the channels unsuitable as habitat for the orangeblack Hawaiian damselfly.

Water extraction (*e.g.,* withdrawal of subsurface fresh water for development and human use) from underground fresh water sources increases salinity levels of anchialine pools and negatively affect the anchialine pool shrimp, *Procaris hawaiana,* which relies on the delicate balance of mixohaline (brackish water) habitats (Conry 2012, in litt.; National Park Service 2016, in litt.). Water extraction also negatively affects the plant *Cyclosorus boydiae* and the orangeblack Hawaiian damselfly by degrading or destroying habitat for these species (Harris *et al.* 1993, pp. 9–13; Medeiros *et al.* 1993, p. 88; Meier *et al.* 1993, pp. 181–183; Palmer 2003, p. 88).

Habitat Destruction and Modification by Climate Change

Climate change affects the habitat of the 49 species. Discussion of climate change impacts is included in our complete discussion of climate change under *Factor E. Other Natural or Manmade Factors Affecting Their Continued Existence,* below.

Summary of Factor A

Destruction and modification of the habitat of each of the 49 species addressed in this rule is occurring throughout the entire range of each of the species. These impacts include the effects of agriculture and urban development, introduced ungulates, nonnative plants, fire, hurricanes, landslides, rockfalls, treefall, flooding, erosion, drought, tsunamis, and water extraction.

Habitat destruction and modification by agriculture and urban development is an ongoing and serious threat to the plant *Cyclosorus boydiae,* the orangeblack Hawaiian damselfly, the anchialine pool shrimp *Procaris hawaiana,* and the yellow-faced bees *Hylaeus anthracinus, H. assimulans, H. facilis, H. hilaris,* and *H. longiceps.* Conversion of wetland and other aquatic habitat (*i.e.,* water extraction) for agriculture and urban development is ongoing, is expected to continue into the future, and affects the orangeblack Hawaiian damselfly by removing habitat required for hunting and breeding. Water extraction affects the orangeblack Hawaiian damselfly because it (1) Reduces the amount and distribution of stream habitat; (2) reduces stream flow and habitat; and (3) leads to an increase in water temperature, which causes physiological stress to the damselfly naiads. Water extraction affects the delicate balance of the anchialine pool ecosystem, including salinity and biota, negatively affecting the anchialine pool shrimp, *Procaris hawaiana.* Loss of stream-course habitat affects *Cyclosorus boydiae* because this is the only habitat where this riparian species occurs.

The threat of habitat destruction and modification by ungulates is ongoing as ungulates currently occur in all ecosystems on which these species depend except the anchialine pool system. Introduced ungulates pose a threat to 37 of the 39 plants (except for *Cyanea kauaulaensis* and *Hypolepis hawaiiensis* var. *mauiensis*), and 9 of the 10 animal species (all except for the anchialine pool shrimp) in this rule that occur in these 10 ecosystems because ungulates: (1) Directly affect the species by trampling and grazing (see Factor C discussion, below); (2) increase soil disturbance and erosion; (3) create open, disturbed areas conducive to nonnative plant invasion by dispersing fruits and seeds, which results in conversion of a native-dominated plant community to a nonnative-dominated plant community; and (4) increase marsh and stream disturbance and sedimentation, which negatively affects these aquatic habitats.

Habitat destruction and modification by nonnative plants is a serious and ongoing current threat to all 39 plant species because nonnative plants: (1) Adversely affect microhabitat by modifying the availability of light; (2) alter soil-water regimes; (3) modify nutrient cycling processes; (4) alter fire ecology, leading to incursions of fire-tolerant nonnative plant species into native habitat; (5) outcompete, and possibly directly inhibit (through allelopathy) the growth of native plant species; and (6) alter habitat and substrate such that erosion leading to rockfalls and landslides may increase. Each of these processes can convert native-dominated plant communities to nonnative plant communities (Cuddihy and Stone 1990, p. 74; Vitousek 1992, pp. 33–35).

The threat of habitat destruction and modification by fire to 14 plant species (*Exocarpos menziesii, Festuca hawaiiensis, Joinvillea ascendens* ssp. *ascendens, Labordia lorenciana, Nothocestrum latifolium, Ochrosia haleakalae, Portulaca villosa, Ranunculus mauiensis, Sanicula *sandwicensis, Santalum involutum, Schiedea pubescens, Sicyos lanceoloideus, S. macrophyllus,* and *Solanum nelsonii*) and all seven yellow-faced bee species is serious and ongoing because fires occur frequently and damage and destroy native vegetation, including dormant seeds, seedlings, and juvenile and adult plants, including host plants for the bees. Many nonnative, invasive plants, particularly fire-tolerant grasses, create more destructive fires, invade burned areas, and can out-compete native plants and inhibit their regeneration (D'Antonio and Vitousek 1992, pp. 70, 73–74; Tunison *et al.* 2002, p. 122). Successive fires that burn farther and farther into native habitat destroy the ecosystem and its components upon which these species depend.

Habitat destruction and modification by natural disasters such as hurricanes represent a serious threat to the plant *Pritchardia bakeri,* the band-rumped storm-petrel, the orangeblack Hawaiian damselfly, and all seven yellow-faced bee species. Hurricanes open the forest canopy, modifying available light and creating disturbed areas that are conducive to invasion by nonnative plants (Asner and Goldstein 1997, p. 148; Harrington *et al.* 1997, pp. 346–347). The discussion under "Habitat Destruction and Modification by Nonnative Plants" provides additional information related to canopy gaps, light availability, and the establishment of nonnative plant species. In addition, hurricanes cause mortality of birds, including adults and chicks drowned when nest sites are flooded (Schreiber 2002, p. 186; Hass *et al.* 2012, pp. 252–253). Hurricanes also destroy nesting habitat, a particular problem for species like storm-petrels that return to the same nest site each year (Schreiber 2002, p. 186). These hurricane impacts are likely for the band-rumped storm-petrel. Finally, hurricanes can alter and directly damage streams and wetlands used by the orangeblack Hawaiian damselfly (Polhemus 1993a, pp. 86–87). The impacts from hurricanes can be particularly devastating to these species because they persist in low numbers in restricted ranges and are therefore less resilient to such disturbances. A single destructive hurricane holds the potential of driving to extinction species that persist as one or several small, isolated populations.

Landslides, rockfalls, treefalls, flooding, and erosion (singly or combined) are a threat to 20 plant species (*Cyanea kauaulaensis, Cyclosorus boydiae, Deparia kaalaana, Dryopteris glabra* var. *pusilla, Gardenia remyi, Joinvillea ascendens* ssp. *ascendens, Kadua fluviatilis, K. haupuensis, Labordia lorenciana, Lepidium orbiculare, Phyllostegia brevidens, P. helleri, P. stachyoides, Portulaca villosa, Pseudognaphalium sandwicensium* var. *molokaiense, Ranunculus hawaiensis, R. mauiensis, Sanicula sandwicensis, Schiedea pubescens,* and *Solanum nelsonii*), the band-rumped storm-petrel, and the orangeblack Hawaiian damselfly by destabilizing substrates, damaging and killing individuals, altering hydrological patterns, and destroying or modifying habitat—all resulting in changes to native plant and animal communities. Drought is a threat to 10 plant species (*Cyclosorus boydiae, Deparia kaalaana, Huperzia stemmermanniae, Phyllostegia stachyoides, Ranunculus hawaiensis, R. mauiensis, Sanicula sandwicensis, Schiedea pubescens, Sicyos lanceoloideus,* and *Solanum nelsonii*), the orangeblack Hawaiian damselfly (directly or by desiccation of streams and ponds), and all seven yellow-faced bee species (and the host plants upon which all seven yellow-faced bees depend).

Habitat destruction and modification by over-washing of low-lying areas by tsunamis is a threat to coastal species, including *Solanum nelsonii, Hylaeus anthracinus, H. assimulans, H. facilis, H. hilaris,* and *H. longiceps.*

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Plants

We are not aware of any threats to the 39 plant species that would be attributed to overutilization for commercial, recreational, scientific, or educational purposes.

Animals

Anchialine Pool Shrimp

Illegal collection is a threat to the anchialine pool shrimp *Procaris hawaiana* because of inadequate monitoring and enforcement at the pools where this species occurs. All terrestrial and aquatic invertebrates (including anchialine pool shrimp) are protected under (1) the State of Hawaii Revised Statutes (1993) chapter 195D–4-f license; and (2) DLNR chapter 124: Indigenous Wildlife, Endangered and Threatened Wildlife, and Introduced Wild Birds. Collection of plants and animals is prohibited in the State Natural Area Reserves (NARs) Ahihi-Kinau (Maui) and Manuka (Hawaii Island), but enforcement of prohibitions is insufficient to prevent illegal collecting at these remote sites. Collection is not prohibited in State Parks or City and County property where some anchialine pools occur, and is not expressly prohibited at Lua O Palahemo (Hawaii Island), and thus no regulatory protection of these shrimp exists at the remaining five anchialine pools outside of Manuka NAR that are known to contain *P. hawaiana.* A Native Invertebrate Research and Collecting permit issued by DLNR's Division of Forestry and Wildlife is required to collect anchialine pool shrimp for research or commercial purposes, and the commercial market is supported by legal, permitted collection. We expect that permit holders, whether they are collecting for scientific or commercial purposes, adhere to the conditions of their permit and do not pose a threat to *P. hawaiana.* However, we consider illegal collection of this anchialine pool shrimp, *P. hawaiana,* to be an ongoing threat because, despite the prohibition on collecting within the NARs and the permitting process for collection elsewhere, collection can occur at any time owing to insufficient patrolling or other monitoring or enforcement at the pools where *P. hawaiana* occurs.

Factor C. Disease or Predation

Disease

We are not aware of any current threats to the 49 species that would be attributable to disease. Disease may be a potential threat to the yellow-faced bee *Hylaeus anthracinus,* as pathogens carried by nonnative bees, wasps, and ants could be transmitted through shared food sources (Graham 2015, in litt.); however, we have no evidence of this type of disease transmission at this time.

Predation

Hawaii's plants and animals evolved in nearly complete isolation from continental influence. Successful, natural colonization of these remote volcanic islands is infrequent, and many organisms never succeeded in establishing populations. As an example, Hawaii lacks native ants and conifers, has very few families of birds, and has only had two native species of land mammal, both insectivorous bats (Loope 1998, p. 748; Ziegler 2002, pp. 244–245). In the absence of grazing or browsing mammals, plants that became established did not need mechanical or chemical defenses against mammalian herbivory such as thorns, prickles, and toxins. Because the evolutionary pressure to either produce or maintain such defenses was lacking, Hawaiian plants either lost or never developed these adaptations (Carlquist 1980, p. 173). Likewise, native Hawaiian birds and insects experienced no evolutionary pressure to develop defense mechanisms against mammalian or invertebrate predators that were not historically present on the islands. The native flora and fauna are thus particularly vulnerable to the impacts of introduced nonnative species, as discussed below.

Introduced Ungulates

In addition to the habitat impacts discussed above (see "Habitat Destruction and Modification by Introduced Ungulates" under *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Their Habitat or Range*), grazing and browsing (predation) by introduced ungulates are a threat to the following 27 plant species in this proposal (see Table 2, above): *Asplenium diellaciniatum* (black-tailed deer); *Calamagrostis expansa* (pigs), *Cyclosorus boydiae* (pigs), *Deparia kaalaana* (pigs), *Exocarpos menziesii* (goats, mouflon, sheep), *Festuca hawaiiensis* (goats, sheep), *Gardenia remyi* (pigs, goats, axis deer), *Huperzia stemmermanniae* (goats, axis deer, cattle), *Joinvillea ascendens* ssp. *ascendens* (pigs, goats, axis deer, black-tailed deer), *Kadua fluviatilis* (pigs, goats), *Labordia lorenciana* (goats, black-tailed deer), *Microlepia strigosa* var. *mauiensis* (pigs), *Myrsine fosbergii* (pigs, goats), *Nothocestrum latifolium* (pigs, goats, axis deer, black-tailed deer, mouflon, cattle), *Ochrosia haleakalae* (goats, cattle), *Phyllostegia brevidens* (pigs), *P. stachyoides* (pigs, goats), *Portulaca villosa* (goats, axis deer, mouflon), *Pseudognaphalium sandwicensium* var. *molokaiense* (axis deer), *Ranunculus hawaiensis* (pigs, mouflon, cattle), *R. mauiensis* (pigs, goats, axis deer, black-tailed deer, cattle), *Sanicula sandwicensis* (goats), *Santalum involutum* (goats), *Schiedea pubescens* (axis deer, cattle), *Sicyos lanceoloideus* (goats, black-tailed deer), *S. macrophyllus* (mouflon, cattle), and *Solanum nelsonii* (axis deer, cattle).

Feral Pigs

We have direct evidence of ungulate damage to some of the 39 plant species, but for many, due to their remote locations or lack of study, ungulate damage is presumed based on the known presence of these introduced ungulates in the areas where these species occur and the results of studies involving similar species or ecosystems conducted in Hawaii and elsewhere (Diong 1982, p. 160; Mueller-Dombois and Spatz, 1975, pp. 1–29; Hess 2008, 4 pp.; Weller *et al.* 2011, p. 8). For example, in a study conducted by Diong (1982, p. 160) on Maui, feral pigs were observed browsing on young shoots, leaves, and fronds of a wide variety of plants, of which over 75 percent were endemic species. A stomach-content analysis in this study showed that most of the pigs' food source consisted of the endemic *Cibotium* (hapuu, tree fern). Pigs were observed to fell native plants and remove the bark from standing plants of species in the genera *Cibotium, Clermontia, Coprosma, Hedyotis* [*Kadua*], *Psychotria,* and *Scaevola,* resulting in larger trees and shrubs dying after a few months of repeated feeding (Diong 1982, p. 144). Beach (1997, pp. 3–4) found that feral pigs in Texas spread disease and parasites, and their rooting and wallowing behavior led to spoilage of watering holes and loss of soil through leaching and erosion. Rooting activity by pigs also decreased the survivability of some plant species through disruption at root level of mature plants and seedlings (Beach 1997, pp. 3–4; Anderson *et al.* 2007, in litt.). In Hawaii, pigs dig up forest ground cover consisting of delicate and rare species of orchids, ferns, mints, lobeliads, and other taxa, including their roots, tubers, and rhizomes (Stone and Anderson 1988, p. 137). The following plants are particularly at risk of herbivory by feral pigs: *Calamagrostis expansa* on Maui and Hawaii Island (HBMP 2010); *Cyclosorus boydiae* on Oahu (HBMP 2010); *Deparia kaalaana* on Maui (HBMP 2010); *Gardenia remyi* on Hawaii Island (PEPP 2011, pp. 113–114; PEPP 2012, p. 102), west Maui (HBMP 2010), Molokai (HBMP 2010) and Kauai (HBMP 2010); *Joinvillea ascendens* ssp. *ascendens* on Hawaii Island (PEPP 2011, pp. 120–121; PEPP 2012, p. 113; HBMP 2010), Kauai (PEPP 2014, p. 109; HBMP 2010), Maui (HBMP 2010), Molokai (HBMP 2010), and Oahu (HBMP 2010); *Kadua fluviatilis* on Kauai (HBMP 2010) and Oahu (HBMP 2010); *Microlepia strigosa* var. *mauiensis* on Maui (Bily 2009, in litt.; Oppenheimer 2007, in litt.); *Myrsine fosbergii* on Kauai (HBMP 2010); *Nothocestrum latifolium* on Maui (PEPP 2011, p. 140; HBMP 2010) and Molokai (HBMP 2010); *Phyllostegia brevidens* on Maui and Hawaii Island (PEPP 2014, p. 36); *P. stachyoides* on Molokai (PEPP 2014, pp. 140–141); *Ranunculus hawaiensis* on Hawaii Island (HBMP 2010); and *R. mauiensis* on Kauai (PEPP 2011, p. 161; PEPP 2013, p. 177; PEPP 2014, p. 156; HBMP 2010), Maui (PEPP 2011, p. 144; PEPP 2013, pp. 177–178; PEPP 2014, p. 155; HBMP 2010), and Molokai (HBMP 2010). Feral pigs occur in 10 of the 11 ecosystems (all except anchialine pool) discussed here; the results of the studies described above suggest that foraging by pigs can directly damage and destroy these plants through herbivory. Feral pigs may also consume native host plants of the yellow-faced bees *Hylaeus anthracinus, H. assimulans, H. facilis, H. hilaris, H. kuakea, H. longiceps,* and *H. mana.*

Feral Goats

Feral goats are able to forage in extremely rugged terrain and are instrumental in the decline of native vegetation in many areas of the Hawaiian Islands (Cuddihy and Stone 1990, p. 64; Clarke and Cuddihy 1980, p. C–20; van Riper and van Riper 1982, pp. 34–35; Tomich 1986, pp. 153–156). Feral goats consume a variety of plants for food and have been observed to browse on (but are not limited to) native plant species in the following genera: *Argyroxiphium, Canavalia, Chamaesyce, Erythrina, Plantago, Schiedea,* and *Stenogyne* (Cuddihy and Stone 1990, p. 64; Warren 2004, p. 462; Wood 2007, pers. comm.). A study conducted on the island of Hawaii demonstrated that native *Acacia koa* seedlings are unable to survive due to browsing and grazing by goats (Spatz and Mueller-Dombois 1973, p. 874). If goats remained in the area in high numbers, mature trees eventually died and with them the root systems that supported suckers and vegetative reproduction. When feral goats were excluded by fences for 3 years, there was a positive height-growth response of *A. koa* suckers (Spatz and Mueller-Dombois 1973, p. 873). Another study at Puuwaawaa on Hawaii Island demonstrated that prior to management actions in 1985, regeneration of endemic shrubs and trees in a goat-grazed area was almost totally lacking, contributing to the invasion of forest understory by exotic grasses and weeds. After the removal of goats, *A. koa* and native *Metrosideros* seedlings were observed germinating by the thousands (HDLNR 2002, p. 52). Based on these studies, and other comparisons of fenced and unfenced areas, it is clear that goats devastate native Hawaiian ecosystems (Loope *et al.* 1988, p. 277). Because feral goats occur in 10 of the 11 ecosystems (all except anchialine pool) discussed in this proposal, the results of the studies described above indicate that goats likely also alter these ecosystems and directly damage or destroy native plants. Browsing or grazing by feral goats poses a particular threat to the following plant species: *Exocarpos menziesii* on Hawaii Island (NTBG Herbarium Database 2014, in litt.), *Festuca hawaiiensis* on Hawaii Island (Wood 2001b, in litt.), *Gardenia remyi* on Kauai (PEPP 2011, p. 114; PEPP 2013, p. 107; Kishida 2011, in litt.), *Huperzia stemmermanniae* on Hawaii Island (HBMP 2010), *Joinvillea ascendens* ssp. *ascendens* on Kauai (PEPP 2010, p. 80), *Kadua fluviatilis* on Kauai (HBMP 2010), *Labordia lorenciana* on Kauai (PEPP 2011, p. 124; PEPP 2013, p. 126), *Myrsine fosbergii* on Kauai (HBMP 2010), *Nothocestrum latifolium* on Maui (HBMP 2010), *Ochrosia haleakalae* on Maui and Hawaii Island (HBMP 2010), *Phyllostegia stachyoides* on Molokai (HBMP 2010), *Portulaca villosa* on Hawaii Island (PEPP 2012, p. 140), *Ranunculus mauiensis* on Kauai and Maui (PEPP 2011, p. 161; PEPP 2012, p. 144; PEPP 2013, pp. 177–178; PEPP 2014, pp. 155–156; Kishida 2011, in litt.), *Sanicula sandwicensis* on Maui (PEPP 2011, p. 163), and *Sicyos lanceoloideus* on Kauai (PEPP 2012, p. 154; PEPP 2013, p. 189). In addition, browsing by feral goats may also damage or destroy native host plants of the yellow-faced bees *Hylaeus anthracinus, H. assimulans, H. facilis,* and *H. hilaris.*

Axis Deer

Axis deer are known to consume a wide range of forage items throughout their native range and in areas where they have been introduced (Anderson 1999, p. 3). Although they prefer to graze on grass, axis deer have been documented to eat over 75 species of plants, including all plant parts (Anderson 1999, p. 3). They exhibit a high degree of opportunism regarding their choice of forage, and consume progressively less palatable plants until no edible vegetation remains (Dinerstein 1987, *in* Anderson 1999, p. 5; Medeiros 2010, pers. comm.). Axis deer on Maui follow a cycle of grazing and browsing in open lowland grasslands during the rainy season (November through March) and then migrating to the lava flows of montane mesic forest during the dry summer months to graze and browse on many native plant species, for example, *Abutilon menziesii* (kooloaula, listed endangered), *Erythrina sandwicensis* (wiliwili), and *Sida fallax* (Medeiros 2010, pers. comm.). During the El Niño drought cycles from 1988 through 2001, Maui experienced an 80 to 90 percent decline in native shrub species caused by axis deer browsing on and girdling young saplings (Medeiros 2010, pers. comm.). On Lanai, grazing by axis deer has been reported as a major threat to the endangered *Gardenia brighamii* (nanu), and Swedberg and Walker (1978, *in* Anderson 2003, pp. 124–25) reported that the native plants *Osteomeles anthyllidifolia* (uulei) and *Leptecophylla tameiameiae* (pukiawe) comprised more than 30 percent of axis deer rumen volume. During the driest summer months, axis deer are observed in coastal areas in search of food (Medeiros 2010, pers. comm.). Because axis deer occur in 10 of the 11 ecosystems on Molokai, Lanai, and Maui (all except anchialine pool), the results from the studies above, in addition to direct observations from field biologists, suggest that axis deer can also alter these ecosystems and directly damage or destroy native plants. Browsing or grazing by axis deer poses a threat to the following plant species: *Gardenia remyi* on Molokai (HBMP 2010), *Huperzia stemmermanniae* on Maui (HBMP 2010), *Joinvillea ascendens* ssp. *ascendens* on Maui (PEPP 2014, pp. 108–109), *Nothocestrum latifolium* on Lanai (PEPP 2012, p. 129), *Portulaca villosa* on Lanai (HBMP 2010), *Pseudognaphalium sandwicensium* var. *molokaiense* on Molokai (Wood 2005c, in litt.; Kallstrom 2008, in litt.; MNTF 2010), *Ranunculus mauiensis* on Maui (PEPP 2013, p. 178; PEPP 2014, pp. 154–155), *Schiedea pubescens* on Molokai and Lanai (Wood 2004, in litt.; Rowland 2006, in litt.; Oppenheimer 2001, in litt.), and *Solanum nelsonii* on Molokai (PEPP 2012, p. 156; PEPP 2013, pp. 190–191; PEPP 2014, p. 167). Axis deer may also damage or destroy native host plants of the yellow-faced bees *Hylaeus anthracinus, H. assimulans, H. facilis, H. hilaris,* and *H. longiceps.*

Black-Tailed Deer

Black-tailed deer are extremely adaptable, and in their native range (U.S. Pacific coast) inhabit every principal ecosystem including open grasslands, agricultural land, shrubland, woodland, mountain forests, semi-deserts, and high mountain ecosystems (NRCS 2005, in litt.). Their home range size varies in the continental United States, but has been estimated to from 1 to 4 sq mi (2.5 to 10 km) and sometimes as large as 30 sq mi (78 sq km), with adults defending small areas when caring for fawns (NRCS 2005, in litt.). We do not know their home range size on Kauai; however, the island is only 562 sq mi (1,456 sq km) in size. Black-tailed deer are primarily browsers, but as they have a smaller rumen compared to other browsers in relation to their body size, they must select the most nutritious plants and parts of plants (Mule Deer Foundation 2011, in litt.). Their diet consist of a diversity of living, wilted, dry, or decaying vegetation, including leaves, needles, succulent stems, fruits, nuts, shrubs, herbaceous undergrowth, domestic crops, and grasses (NRCS 2005, in litt.). Black-tailed deer consume native vegetation on the island of Kauai (van Riper and van Riper 1982, pp. 42–43; Stone 1985, pp. 262–263; Tomich 1986, pp. 132–134; Cuddihy and Stone 1990, p. 67). In the 1990s, it was estimated there were about 350 animals in and near Waimea Canyon; however, in 2013, the population was estimated to be 1,000 to 1,200 animals in public hunting areas (not including private lands), and was expanding into the southern and eastern sections of the island (Mule Deer Working Group 2013, in litt.). According to State records, black-tailed deer are feeding largely on the introduced species *Psidium cattleianum* and *Rubus rosifolius,* as well as the native species *Alyxia stellata* (maile), *Dodonaea viscosa* (aalii), *Dianella sandwicensis* (ukiuki), *Coprosma* sp. (pilo), and *Acacia koa* (Cuddihy and Stone 1990, p. 67). Browsing by black-tailed deer is a threat to the Kauai plant species *Asplenium diellaciniatum, Joinvillea ascendens* ssp. *ascendens, Labordia lorenciana, Nothocestrum latifolium, Ranunculus mauiensis,* and *Sicyos lanceoloideus.*

Mouflon and Sheep

Mouflon, feral domestic sheep, and mouflon-sheep hybrids browse native vegetation on Lanai and Hawaii Island. Domestic sheep have been raised on Kauai, Lanai, Kahoolawe, and Hawaii, but today sheep farming only occurs on Hawaii Island on Mauna Kea and Hualalai (Pratt and Jacobi *in* Pratt *et al.* 2009, p. 151). Sheep browse (eating shoots, leaves, flowers, and bark) on the native *Sophora chrysophylla* (mamane), the primary food source of the endangered forest bird, the palila (*Loxioides bailleui*) (Scowcroft and Sakai 1983, p. 495). Feral sheep reductions were initiated in palila habitat; however, even after most were removed, tree bark stripping continued and some mamane populations did not recover (Pratt and Jacobi *in* Pratt *et al.* 2009, p. 151). On Hawaii Island, vegetation browsing by mouflon led to the decline of the largest population of the endangered *Argyroxiphium kauense* (kau silversword, Mauna Loa silversword, or ahinahina), reducing it from a "magnificent population of several thousand" (Degener *et al.* 1976, pp. 173–174) to fewer than 2,000 individuals in a period of 10 years (unpublished data *in* Powell 1992, p. 312). Mamane is also preferred browse for mouflon, and according to Scowcroft and Sakai (1983, p. 495), mouflon eat the shoots, leaves, flowers, and bark of this species. Mouflon are also reported to strip bark from native koa trees and to seek out the native plants *Geranium* *cuneatum* (hinahina) and *Silene hawaiiensis,* and Lanai occurrences of *Gardenia brighamii* (Benitez *et al.* 2008, p. 57; Mehrhoff 1993, p. 11). While mouflon were introduced to Lanai and Hawaii Island as game mammals, a private game ranch on Maui has added mouflon to its stock, and it is likely that over time some individuals may escape (Hess 2010, pers. comm.; Kessler 2010, pers. comm.). Browsing and grazing by mouflon, feral domestic sheep, and mouflon-sheep hybrids poses a threat to the plant species *Exocarpos menziesii* on Hawaii Island (Keitt and Island Conservation 2008, pp. 90, 92; NPS 2013, pp. i, 124); *Festuca hawaiiensis* on Hawaii Island (Oppenheimer 2001, in litt.; HBMP 2007, in litt.); *Nothocestrum latifolium* on Lanai (PEPP 2012, p. 129); *Portulaca villosa* on Lanai (HBMP 2010); *Ranunculus hawaiensis* on Hawaii Island (HBMP 2010); and *Sicyos macrophyllus* on Hawaii Island (HBMP 2010). Because feral sheep and mouflon occur in all of the described ecosystems except for the anchialine pool ecosystem, the data from studies above suggest that in addition to consuming the host plants of the yellow-faced bees *Hylaeus anthracinus* and *H. assimulans* on Lanai, herbivory by feral sheep and mouflon also may consume host plants of the other species on Lanai: *H. facilis, H. hilaris,* and *H. longiceps.*

Feral Cattle

Grazing by cattle is considered one of the most important factors in the destruction of Hawaiian forests (Baldwin and Fagerlund 1943, pp. 118–122). Feral cattle are currently found only on the islands of Molokai, Maui, and Hawaii (Tomich 1986, pp. 140–144; de Sa *et al.* 2013, 29 pp.). Cattle consume tree seedlings and browse saplings (Cuddihy 1984, p. 16). In Hawaii Volcanoes National Park (Hawaii Island), Cuddihy reported that there were twice as many native plant species as nonnatives in areas that had been fenced to exclude cattle (Cuddihy 1984, pp. 16, 34). Loss of the native sandalwood forest on Lanai is attributed to cattle (Skottsberg 1953 *in* Cuddihy 1984, p. 16). Browsing and grazing by feral cattle poses a threat to the following plant species: *Huperzia stemmermanniae* on Maui and Hawaii Island (Medeiros *et al.* 1996b, p. 96); *Nothocestrum latifolium* on Molokai and Maui (HBMP 2010); *Ochrosia haleakalae* on Maui (HBMP 2010); *Ranunculus hawaiensis* on Hawaii Island (HBMP 2010); *R. mauiensis* on Maui and Hawaii Island (PEPP 2012, p. 144; PEPP 2013, p. 178; PEPP 2014, pp. 154–155; HBMP 2010); *Schiedea pubescens* on Maui (Wood 2005d, in litt.; HBMP 2010); *Sicyos macrophyllus* on Hawaii Island (PEPP 2010, p. 111; HBMP 2010); and *Solanum nelsonii* on Molokai (Wood 1999, in litt.; HBMP 2010). Because feral cattle occur in 6 of the 11 ecosystems (lowland dry, lowland mesic, lowland wet, montane wet, montane mesic, and subalpine) in which these species occur on Molokai, Maui, and Hawaii Island, the results from the studies cited above, in addition to direct observations from field biologists, indicate that grazing by feral cattle can directly damage or destroy these plants.

Blackbuck

The blackbuck antelope (*Antelope cervicapra*) is an endangered species from India brought to a private game reserve on Molokai about 15 years ago from an Indian zoo (Kessler 2010, pers. comm.). According to Kessler (2010, pers. comm.), a few individuals escaped captivity and established a wild population of unknown size on the low, dry plains of western Molokai. Blackbuck primarily use grassland habitat for grazing. In India, foraging consumption and nutrient digestibility are high in the moist winter months and low in the dry summer months (Jhala 1997, pp. 1348, 1351). Although most plant species are grazed intensely when they are green, some are grazed only after they are dry (Jhala 1997, pp. 1348, 1351). Because the foraging dynamics of blackbuck antelope in Hawaii and possible habitat effects are unknown at this time, we do not currently consider this ungulate a threat to the four native plant species known from dry areas on Molokai: *Gardenia remyi, Nothocestrum latifolium, Portulaca villosa,* and *Pseudognaphalium sandwicensium* var. *molokaiense,* or to the yellow-faced bees *Hylaeus anthracinus, H. facilis, H. hilaris,* and *H. longiceps* (which rely on host plants that ungulates consume).

Other Introduced Vertebrates

Rats

Three species of introduced rats occur in the Hawaiian Islands. Studies of Polynesian rat (*Rattus exulans*) DNA suggest they first appeared in the islands along with emigrants from the Marquesas Islands (French Polynesia) in about 400 A.D., with a second introduction around 1100 A.D. (Ziegler 2002, p. 315). The black rat (*R. rattus*) and the Norway rat (*R. norvegicus*) arrived in the islands more recently, as stowaways on ships sometime in the late 19th century (Atkinson and Atkinson 2000, p. 25). The Polynesian rat and the black rat are primarily found in rural and remote areas of Hawaii, in dry to wet habitats, while the Norway rat is typically found in urban areas or agricultural fields (Tomich 1986, p. 41). The black rat is widely distributed throughout the main Hawaiian Islands and can be found in a range of ecosystems and as high as 9,000 ft (2,700 m), but it is most common at low- to mid-elevations (Tomich 1986, pp. 38–40). Sugihara (1997, p. 194) found both the black and Polynesian rats up to 7,000 ft (2,000 m) on Maui, but found the Norway rat only at lower elevations. Rats are omnivorous and eat almost any type of food (Nelson 2012, in litt.). Rats occur in 7 of the 11 ecosystems (coastal, lowland mesic, lowland wet, montane wet, montane mesic, montane dry, and wet cliff), and predation or herbivory by rats is a threat to 19 plants (*Calamagrostis expansa* (Maui and Hawaii Island; HBMP 2010), *Cyanea kauaulaensis* (Maui; PEPP 2012, pp. 71–72; PEPP 2014, p. 73), *Dryopteris glabra* var. *pusilla* (Kauai; Wood 2015, in litt.); *Gardenia remyi* (Kauai, Molokai, Maui, and Hawaii Island; Wood 2004, in litt.; HBMP 2010); *Joinvillea ascendens* ssp. *ascendens* (Kauai, Oahu, Molokai, Maui, and Hawaii Island; PEPP 2014, p. 109), *Kadua haupuensis* (Kauai; Lorence *et al.* 2010, p. 140), *Labordia lorenciana* (Kauai; Wood *et al.* 2007, p. 198), *Ochrosia haleakalae* (Maui; Oppenheimer 2015, in litt.), *Phyllostegia helleri* (Kauai; HBMP 2010), *P. stachyoides* (Molokai, Maui, and Hawaii Island; PEPP 2012, p. 133; PEPP 2013, pp. 158–159; PEPP 2014, pp. 140–142), *Pritchardia bakeri* (Oahu; Hodel 2012, pp. 42, 73), *Ranunculus mauiensis* (Kauai, Oahu, Molokai, Maui, and Hawaii Island; HBMP 2010), *Sanicula sandwicensis* (Maui and Hawaii Island; PEPP 2012, p. 148), *Santalum involutum* (Kauai; Harbaugh *et al.* 2010, pp. 835–836), *Schiedea diffusa* ssp. *diffusa* (Molokai, Maui; HBMP 2010), *S. pubescens* (Molokai, Lanai, and Maui; Wood 2005d, in litt.; HBMP 2010), *Sicyos macrophyllus* (Maui and Hawaii Island; Pratt 2008, in litt.), *Solanum nelsonii* (NWHI, Niihau, Molokai, Maui, and Hawaii Island; PEPP 2012, p. 156; PEPP 2014, p. 167), and *Wikstroemia skottsbergiana* (Kauai; Mitchell *et al.* 2005, in litt.)) and to the band-rumped storm-petrel (Lehua, Kauai, Maui, Kahoolawe, Lanai, and Hawaii Island; Pyle and Pyle 2009, in litt.).

Rat Impacts on Plants: Rats affect native plants by eating fleshy fruits, seeds, flowers, stems, leaves, roots, and other plant parts (Atkinson and Atkinson 2000, p. 23), and by stripping bark and cutting small branches (twig cutting) in search of moisture and nutrients, with detrimental impacts to plants' vigor and regeneration (Abe and Umeno 2011, pp. 27–39; Nelson 2012, pp. 1–4, 8–9). Studies in New Zealand have demonstrated that differential regeneration as a consequence of rat predation alters species composition of forested areas (Cuddihy and Stone 1990, pp. 68–69). Rats have caused declines or even the total elimination of island plant species (Campbell and Atkinson 1999 *in* Atkinson and Atkinson 2000, p. 24). In the Hawaiian Islands, rats may consume as much at 90 percent of the seeds produced by some native plants, and in some cases prevent regeneration of forest species completely (Cuddihy and Stone 1990, pp. 68–69). Hawaiian plants with fleshy fruit, such as *Cyanea* and *Pritchardia,* are particularly susceptible to rat predation (Cuddihy and Stone 1990, pp. 67–69). Predation of seeds by rats poses a serious and ongoing threat to all the Hawaiian *Pritchardia* palms, including *P. bakeri,* because rats are able to consume every seed in a fruiting stalk, preventing successful reproduction (Hodel 2012, pp. 42, 73). Fossil pollen records indicate that *Pritchardia* palms were once among the dominant species of coastal, lowland, and interior forests of Hawaii (Burney *et al.* 2001, pp. 630–631; Chapin *et al.* 2007, p. 21); today, complete coverage by all age classes of *Pritchardia* occurs only on small islets currently unoccupied by rats (Athens 2009, p. 1498). Because rats occur in seven of the ecosystems in which these species occur, the results from these studies, in addition to direct observations by field biologists, suggest that predation by rats can directly damage or destroy native plants.

Rat Impacts on the Band-Rumped Storm-Petrel: Introduced predators are the most serious threat facing the band-rumped storm-petrel. Rats occur on all the main Hawaiian Islands, and populations are also high on Lehua; however, attempts to control rats on Lehua are ongoing (Parkes and Fisher 2011, 48 pp.). Ground-, crevice-, and burrow-nesting seabirds, as well as their eggs and young, are highly susceptible to predation by rats; storm-petrels are the most susceptible of seabirds to rat predation and have experienced population-level impacts and extirpation as a result (Simons 1984, p. 1073; Jones *et al.* 2008, pp. 20–21). Evidence from the islands of Hawaii and Maui show that the Hawaiian petrel, a much larger seabird that nests in some of the same areas as the band-rumped storm-petrel, suffers huge losses to introduced predators (Johnston 1992, in litt.; Hodges and Nagata 2001, pp. 308–310; Hu *et al.* 2001, p. 234). The effects of introduced predators on the breeding success of the band-rumped storm-petrel are probably similar to the documented effects on the breeding success of Hawaiian petrels because these birds are similarly vulnerable. Population modeling showed that consistent predation of Hawaiian petrels, where reproductive success was reduced to 35 percent and adult survival was 80 percent, could drive a population to extinction in 20 to 30 years (Simons 1984, pp. 1071–1073). Rat bones were collected from a band-rumped storm-petrel nest on a sheer cliff on Kauai, and two live rats were observed moving along small rock ledges in the same area (Wood *et al.* 2002, p. 8), demonstrating that even remote and otherwise inaccessible nest sites are not safe from these predators. Because rats are present in all three ecosystems in which the band-rumped storm-petrel occurs (coastal, dry cliff, and wet cliff), predation by rats likely results in decreases in the numbers and populations of the band-rumped storm-petrel. We do not anticipate a reduction of this threat in the near future.

Barn Owl Impacts on the Band-Rumped Storm-Petrel

Two species of owls, the native pueo (*Asio flammeus sandwichensis*) and the introduced barn owl (*Tyto alba*), are known to prey on native Hawaiian birds. For example, between 1996 and 1998, 10 percent of nest failures of the puaiohi (small Kauai thrush, *Myadestes palmeri*), an endangered forest bird, on Kauai were attributed to owls (Snetsinger *et al.* 1994, p. 47; Snetsinger *et al.* 2005, pp. 72, 79). The band-rumped storm petrel only comes to land after dark, and likely avoids predation by the pueo, which hunts in daylight (Hawaii DOFAW 2005). The nonnative barn owl, however, is a nocturnal hunter and may prey on the storm-petrel. Barn owls were introduced to Kauai, Oahu, Molokai, and Hawaii Island between 1958 and 1963, to control rats and mice in sugar cane plantations, and now they occur on all of the main islands (USFWS 2013, p. 9). Barn owls are well-known predators of storm-petrels and other seabirds on islands (LeCorre and Jouventin 1997, p. 215; Velarde et al. 2007, p. 286; Guerra *et al.* 2014, p. 182; Ringler *et al.* 2015, p. 79). Direct impacts of barn owls on band-rumped storm-petrels in Hawaii are not well documented, but evidence and numerous anecdotal reports exist of barn owls preying on seabirds in the main Hawaiian islands, including the threatened Newell's shearwater and endangered Hawaiian petrel, and including on Kauai and Lehua, where band-rumped storm-petrels are known to nest (summarized in USFWS 2013, pp. 11–12). Because barn owls occur throughout the range of the band-rumped storm-petrel in Hawaii, they are likely to be predators of these seabirds.

Cat Impacts on the Band-Rumped Storm-Petrel

Cats (*Felis catus*) were introduced to Hawaii in the early 1800s, and are present on all the main Hawaiian Islands (Tomich 1986, p. 101). Cats are notorious for their predation on birds (Tomich 1986, p. 102). Native mammalian carnivores are absent from oceanic islands because of their low dispersal ability, but once introduced, are significant predators on seabird colonies and terrestrial birds that have no innate defenses against predation by these animals (Scott *et al.* 1986, p. 363; Ainley *et al.* 1997, p. 24; Ziegler 2002, p. 243; Hess and Banko 2006, in litt.; Nogales *et al.* 2013, p. 804). Cats may have contributed to the extinction of the Hawaiian rail (*Porzana sandwichensis*) (Stone 1985 *in* Stone and Scott 1985, p. 266). Although cats are more common at lower elevations, there are populations in areas completely isolated from human presence, including montane forests and alpine areas of Maui and Hawaii Island (Lindsey *et al. in* Pratt *et al.* 2009, p. 277; Scott *et al.* 1986, p. 363). Examination of the stomach contents of feral cats at Hakalau Forest NWR (Hawaii Island) found native and introduced birds to be the most common prey item (Banko *et al.* 2004, p. 162). Cats are believed to prey on roosting or incubating adult band-rumped storm-petrels and young, as evidenced by carcasses found in Hawaii Volcanoes National Park depredated by cats (Hu, pers. comm. *in* Slotterback 2002, in litt.; Hess *et al.* 2008, pp. 11, 14). Predation by cats is well known for the endangered Hawaiian petrel, which has some accessible and well-studied nesting areas; this species shares life-history and evolutionary traits with the band-rumped storm-petrel that make both vulnerable to nonnative mammalian predators. We expect the band-rumped storm-petrel to experience impacts of cat predation similar to those documented in the Hawaiian petrel. On Mauna Loa (Hawaii Island), feral cats were major predators of Hawaiian petrels (Hu *et al.* 2001, p. 234), and on Haleakala (Maui), almost half of the known mortalities of Hawaiian petrels between 1964 and 1996 were attributed to cats (Natividad Hodges and Nagata 2001, p. 312; Hu *et al.* 2001, p. 234). Population modeling of the Hawaiian petrel indicated that the petrel population would be unable to withstand any level of predation for long, and even with seemingly low levels of predation, the petrel population would be reduced by half in fewer than 30 years (Simons 1984, p. 1073). The band-rumped storm petrel is smaller in size than the petrel, but also nests in burrows and rock-crevices, lacks co-evolved predator avoidance behavior, and has a lengthy incubation and fledgling period, making this species highly vulnerable to predation by introduced mammals. Because feral cats occur in all four ecosystems in which the band-rumped storm petrel occurs, they are likely to be significant predators of these birds.

Mongoose Impacts on the Band-Rumped Storm-Petrel

The small Indian mongoose (*Herpestes auropunctatus*) was introduced to Hawaii in 1883, to control rodents in sugar cane plantations (Tomich 1986, pp. 95–96). This species quickly became widespread on Oahu, Molokai, Maui, and Hawaii Island, from sea level to elevations as high as 7,000 ft (2,130 m) (Tomich 1986, pp. 93–94). Mongooses have been sighted, and two captured, on Kauai, but it is still uncertain if the species is established there or how large populations might be (Kauai Invasive Species Committee 2013, in litt.; The Garden Island 2012, in litt.; Hess *et al.* in Pratt *et al.* 2009, p. 429). Mongooses are omnivorous, are known to prey on Hawaiian birds and their eggs, and are considered a likely factor in the decline of the endangered Hawaiian goose (nene, *Branta sandvicensis*) (Tomich 1986, p. 97). They are known or suspected predators on other Hawaiian birds, including the Hawaiian crow (alala, *Corvus hawaiiensis*), Hawaiian duck (koloa, *Anas wyvilliana*), Hawaiian coot (alae keokeo, *Fulica alai*), Hawaiian stilt (aeo, *Himantopus mexicanus knudseni*), Hawaiian gallinule (ula, *Gallinula chloropus sandvicensis*), Hawaiian petrel, and Newell's shearwater. Bird extinctions in other areas are attributed to mongooses, such as the loss of the barred-wing rail (*Nesoclopeus poecilopterus*) in Fiji, and the Jamaica petrel (*Pterodroma caribbaea*) (Hays and Conant 2007, p. 6). Birds extirpated from islands occupied by mongooses retain their populations on islands known to be mongoose-free (Hays and Conant 2007, p. 7). In Hawaii, mongooses occur in habitat types where they are not found within their natural range, and they have no predators and few communicable diseases or parasites. Because mongooses occur in all four ecosystems in which the band-rumped storm petrel occurs, they are likely to be significant predators of the band-rumped storm-petrel.

Nonnative Fish Impacts on the Orangeblack Hawaiian Damselfly

Predation by nonnative fishes is a threat to the orangeblack Hawaiian damselfly. Similar to the aquatic insects, Hawaii has a low diversity of freshwater fishes, with only five native species in two families (gobies (Gobiidae) and sleepers (Eleotridae)) that occur on all the main islands (Devick 1991, p. 196). Information on these five species indicates that the Hawaiian damselflies probably experienced limited natural predation pressure from these native fishes (Kido 1997, p. 493; Englund 1999, p. 236). Conversely, fish predation has been an important factor in the evolution of behavior in damselfly naiads in continental systems (Johnson 1991, p. 13). Some species of damselflies, including the native Hawaiian species, are not adapted to coexist with some fish species, and are found only in bodies of water without fish (Henrikson 1988, pp. 179–180; McPeek 1990a, pp. 92–93). The naiads of these species tend to occupy more exposed positions and engage in conspicuous foraging behavior that makes them susceptible to predation by fishes (Macan 1977, p. 47; McPeek 1990b, p. 1722). The introduction of nonnative fishes has been implicated in the extirpation of a species related to the orangeblack Hawaiian damselfly, the endangered Pacific Hawaiian damselfly (*Megalagrion pacificum*), from Oahu, Kauai, and Lanai, and from many streams on the remaining islands where it occurs (Moore and Gagne 1982, pp. 1–4). More than 70 species of fish have been introduced into Hawaiian freshwater habitats (Devick 1991, p. 189; Englund and Eldredge *in* Staples and Cowie 2001, p. 32; Englund 2004, in litt., p.27). The impact of fish introductions prior to 1900 cannot be assessed because this predates the initial collection of damselflies in Hawaii (Perkins 1913, p. clxxvi). In 1905, two species, the mosquito fish (*Gambusia affinis*) and the sailfin molly (*Poecilia latipinna*), were introduced for biological control of mosquitoes (Van Dine 1907, pp. 6–9). In 1922, three additional species were established for mosquito control, the green swordtail (*Xiphophorus helleri*), the moonfish (*Xiphophorus maculatus*), and the guppy (*Poecilia reticulata*). By 1935, the orangeblack Hawaiian damselfly was found only in waters without introduced fishes (Williams 1936, p. 289; Zimmerman 1948b, p. 341; Polhemus 1993b, p. 591; Englund 1998, p. 235). Beginning about 1980, a large number of new fish introductions began in Hawaii, originating primarily from the aquarium fish trade (Devick 1991, p. 189). This recent wave of fish introductions on Oahu corresponded with the drastic decline and range reduction of other Hawaiian damselfly species: The endangered oceanic Hawaiian damselfly (*Megalagrion oceanicum*), the endangered crimson Hawaiian damselfly (*M. leptodemas*), and the endangered blackline Hawaiian damselfly (*M. nigrohamatum nigrolineatum*). Currently, these damselflies are found only in drainages or higher parts of stream systems where nonnative fish are not yet established (Englund and Polhemus 1994, pp. 8–9; Englund 2004, in litt., p. 27). In summary, Hawaiian damselflies evolved with few, if any, predatory fishes and the lack of defensive behavior makes the orangeblack Hawaiian damselfly particularly vulnerable to, and are threatened by, predation by nonnative fish.

Nonnative Fish Impacts on the Anchialine Pool Shrimp

In Hawaii, the introduction of nonnative fishes into anchialine pools and the ensuing predation by nonnative fishes is considered the greatest threat to native shrimp within anchialine pool systems (Bailey-Brock and Brock 1993, p. 354). These impacts are discussed further under *Factor E. Other Natural or Manmade Factors Affecting Their Continued Existence,* below.

Bullfrog Impacts on the Orangeblack Hawaiian Damselfly

Native to the eastern United States and the Great Plains region, the bullfrog (*Rana catesbeiana, Lithobates catesbeiana*), was first introduced to Hawaii in 1899, to help control insects, and has become established on all the main Hawaiian Islands (Bryan 1931, pp. 62–63; Bury and Whelan 1985, p. 1; Lever 2003, p. 203). The bullfrog is flexible in both habitat and food requirements (McKeown 1996, pp. 24–27; Bury and Whelan 1984, pp. 3–7; Lever 2003, pp. 203–204), and can utilize any water source within a temperature range of 60 to 75 degrees Fahrenheit (°F) (16 to 24 degrees Celsius (°C)) (DesertUSA 2008). Englund *et al.* (2007, pp. 215, 219) found a strong correlation between the presence of bullfrogs and the absence of Hawaiian damselflies in their study of streams on all the main Hawaiian Islands. Because bullfrogs are omnivorous feeders and occur in the same habitat as the orangeblack Hawaiian damselfly, we consider predation by bullfrogs a threat to the orangeblack Hawaiian damselfly.

Introduced Invertebrates

Slugs

Herbivory by nonnative slugs is a threat to 10 of the 39 plant species (*Cyanea kauaulaensis* (Maui); *Deparia kaalaana* (Maui), *Dryopteris glabra* var. *pusilla* (Kauai), *Hypolepis hawaiiensis* var. *mauiensis* (Maui), *Ochrosia haleakalae* (Maui, Hawaii Island), *Phyllostegia brevidens* (Maui), *P. stachyoides* (Molokai, Maui), *Ranunculus mauiensis* (Kauai, Maui), *Schiedea diffusa* ssp. *diffusa* (Maui), and *S. pubescens* (Molokai, Maui)) through mechanical damage, destruction of plant parts, and mortality (see Table 2) (Joe 2006, p. 10; HBMP 2010; PEPP 2011, pp. 149, 170; PEPP 2012, pp. 71–72, 117–118, 133, 144–145, 153; PEPP 2013, pp. 54, 67, 91, 125–126, 158–159, 177–178, 185; Oppenheimer and Bustamente 2014, p. 106; PEPP 2014, pp. 73, 112–114, 136, 141–142, 154–156, 159, 162–163). Slugs are known to damage individuals of *Cyanea* and *Cyrtandra* species in the wild (Wood 2001, in litt.; Sailer and Kier 2002, in litt.; PEPP 2007, p. 38; PEPP 2008, pp. 23, 29, 52–53, 57). Information in the U.S. Army's 2005 "Status Report for the Makua Implementation Plan" indicates that herbivory by slugs can be a threat to all species of *Cyanea*, and can result in up to 80 percent seedling mortality (U.S. Army Garrison 2005, p. 3–51). Slug damage has also been reported on other Hawaiian plants including *Argyroxiphium grayanum* (greensword), *Alsinidendron* sp., *Hibiscus* sp., *Schiedea kaalae* (maolioli), *Solanum sandwicense* (popolo aiakeakua), and *Urera* sp. (Gagne 1983, pp. 190–191; Sailer 2006, pers. comm. *in* Joe 2006, pp. 28–34). Joe and Daehler (2008, p. 252) found that native Hawaiian plants are more vulnerable to slug damage than nonnative plants. In particular, they found that individuals of the endangered plants *Cyanea superba* and *Schiedea obovata* had 50 percent higher mortality when exposed to slugs as compared to individuals that were within exclosures without slugs. Because slugs are reported in five ecosystems (lowland mesic, lowland wet, montane wet, montane mesic, and wet cliff) on all the main Hawaiian Islands, the data from the studies cited above, in addition to direct observations by field biologists, indicate that slugs can directly damage or destroy native plants.

Black Twig Borers

The black twig borer (*Xylosandrus compactus*) is known to infest a wide variety of common plant taxa, including rare native plant species (Davis 1970, p. 39; Extension Entomology and US–CTAHR Integrated Pest Management Program 2006, p. 1). This insect pest burrows into branches, introduces a pathogenic fungus as food for its larvae, and lays its eggs (Davis 1970, p. 39). Twigs, branches, and entire plants can be damaged or killed from an infestation (Extension Entomology and UH–CTAHR Integrated Pest Management Program 2006, in litt.). On the Hawaiian Islands, the black twig borer has many hosts, disperses easily, and is probably present at most elevations up to 2,500 ft (762 m) (Howarth 1985, pp. 152–153). The black twig borer is reported as a threat to *Labordia lorenciana* and *Nothocestrum latifolium* (Ching-Harbin 2015, in litt.; Kishida 2015, in litt.).

Backswimmers

Backswimmers are aquatic true bugs (Heteroptera) in the family Notonectidae, so called because they swim upside down. Backswimmers are voracious predators and frequently feed on prey much larger than themselves, such as tadpoles, small fish, and other aquatic invertebrates including damselfly naiads (Borror *et al.* 1989, p. 296; Zalom 1978, p. 617). Backswimmers (several species) were introduced in recent times. *Buenoa pallipes* (NCN) has been recorded from Hawaii Island, Oahu, Maui, and Kauai (Zimmerman 1948, pp. 232–233; Larsen 1996, p. 40). This species is found in streams and can be abundant in lowland ponds and reservoirs. It feeds on any suitably sized insect, including damselfly naiads (Zalom 1978, p. 617). Two additional species of backswimmers have become established in Hawaii, *Anisops kuroiwae* (NCN) on Maui and Lanai, and *Notonecta indica* (NCN) on Hawaii Island, Oahu, and Maui (Larsen 1996, pp. 39–40). Predation by backswimmers is a threat to the orangeblack Hawaiian damselfly (Haines 2015, in litt.).

Ants

At least 47 species of ants are known to be established in the Hawaiian Islands (Hawaii Ants 2008, 11 pp.). No native ant species occur in Hawaii, and the native yellow-faced bee species in Hawaii evolved in the absence of predation pressure from ants. Ants are known to prey upon Hawaiian yellow-faced bee (*Hylaeus*) species, with observations of drastic reductions in yellow-faced bee populations in ant-infested areas (Medeiros *et al.* 1986, pp. 45–46; Reimer 1994, p. 17; Stone and Loope 1987, p. 251; Cole *et al.* 1992, pp. 1313, 1317, 1320). The presence of ants in nearly all of the low-elevation habitat sites currently and historically occupied by yellow-faced bee species may preclude these species' recovery in some of these areas (Reimer 1994, pp. 17–18; Daly and Magnacca 2003, pp. 9–10). Although the primary impact of ants on Hawaii's native invertebrate fauna is via predation, they also compete for nectar (Reimer 1994, p. 17; Howarth 1985, p. 155; Hopper *et al.* 1996, p. 9; Holway *et al.* 2002, pp. 188, 209; Daly and Magnacca 2003, p. 9; Lach 2008, p. 155) and nest sites (Krushelnycky *et al.* 2005, pp. 6–7). Some ant species may affect yellow-faced bee species indirectly as well, by consuming seeds of native host plants, thereby reducing the plants' recruitment and fecundity (Bond and Slingsby 1984, p. 1031). The threat of ant predation on the yellow-faced bees is amplified by the fact that most ant species have winged reproductive adults and can quickly expand their range by establishing new colonies in suitable habitat (Staples and Cowie 2001, p. 55). In addition, these attributes allow some ants to destroy otherwise geographically isolated populations of native arthropods (Nafus 1993, pp. 19, 22–23). Several studies suggest a serious ecosystem-level effect of invasive ants on plant pollination (Krushelnycky *et al.* 2005, p. 9; Lach 2008, p. 155). Where ranges overlap, ants compete with native pollinators such as yellow-faced bees and preclude them from pollinating native plants (Howarth 1985, p. 157), potentially leading to a decrease in availability of the bees' native plant food sources. Lach (2008, p. 155) found that yellow-faced bees that regularly consume pollen from flowers of *Metrosideros polymorpha* (ohia) were entirely absent from trees with flowers visited by the ant *Pheidole megacephala*.

The four most aggressive ant species in Hawaii are the big-headed ant (*Pheidole megacephala*), the yellow crazy ant (*Anoplolepis gracilipes*), the tropical fire ant (*Solenopsis geminata*), and *S. papuana* (NCN). The big-headed ant is native to central Africa and was first reported in Hawaii in 1879 (Krushelnycky *et al.* 2005, p. 24). This species occurs from coastal to mesic habitat up to 4,000 ft (1,220 m) in elevation. With few exceptions, native insects have been eliminated in habitats where the big-headed ant is present (Perkins 1913, p. xxxix; Gagne 1979, p. 81; Gillespie and Reimer 1993, p. 22). Native habitat of the yellow crazy ant is not known, but it is speculated the species originated in West Africa (MacGown 2015, in litt.). It occurs in low to mid elevations (less than 2,000 ft (600 m)) in rocky areas of moderate annual rainfall (less than 100 in (250 cm)) (Reimer *et al.* 1990, p. 42). Although surveys have not been conducted to ascertain this species' presence in each of the known habitats occupied by the seven yellow-faced bees, we know that the yellow crazy ant occurs adjacent to some of the identified populations sites based upon observations of their expanding range and their preference for coastal and dry forest habitat (as indicated where the species is most commonly collected) (Antweb 2015, in litt.; Magnacca and King 2013, pp. 13–14). Direct observations indicate that Hawaiian arthropods are susceptible to predation by this ant species. Gillespie and Reimer (1993, pp. 21, 26) and Hardy (1979, pp. 37–38) documented the complete elimination of native spiders from mesic and dry forests after they were invaded by the big-headed ant and the yellow crazy ant. Lester and Tavite (2004, p. 291) found that the yellow crazy ant in the atolls of Tokelau (Central Polynesia) form very high densities in a relatively short period of time with locally serious consequences for invertebrate diversity. Densities of 3,600 individuals collected in pitfall traps within a 24-hour period were observed, as well as predation on invertebrates ranging from crabs to other ant species. Results from these and other studies (Reimer *et al.* 1990, p. 47) indicate that yellow crazy ants have the potential as predators to profoundly affect endemic insect fauna in areas they occupy. We believe that the yellow crazy ant is a threat to populations of the Hawaiian yellow-faced bees in areas within their range.

Solenopsis papuana, native to the Pacific region but not to Hawaii, is the only abundant, aggressive ant that has invaded intact mesic and wet forest, as well as coastal and lowland dry ecosystems. First detected in 1967, this species occurs from sea level to over 3,600 ft (1,100 m) on all of the main Hawaiian Islands, and is still expanding its range (Reimer *et al.* 1990, p. 42; Reimer 1993, p. 14). Studies have been conducted that suggest a negative effect of this ant species on indigenous invertebrates (Gillespie and Reimer 1993, p. 21). Although surveys have not been conducted to ascertain the presence of *S. papuana* in each of the known ecosystems occupied by the seven yellow-faced bees, because of the expanding range of this introduced ant species, and its widespread occurrence in coastal to wet habitats, it is a possible threat to all known populations of the seven yellow-faced bees.

Solenopsis geminata is also considered a significant threat to native invertebrates in Hawaii (Wong and Wong 1988, p. 171). Found in drier areas of all the main Hawaiian Islands, it displaced *Pheidole megacephala* as the dominant ant in some localities more than 20 years ago (Wong and Wong 1988, p. 175). Known to be a voracious predator, this ant species was documented to significantly increase native fruit fly mortality in field studies in Hawaii (Wong and Wong 1988, p. 175). *Solenopsis geminata* is included among the eight species ranked as having the highest potential risk to New Zealand species in a detailed pest risk assessment for the country (GISD 2011, in litt.), and is included as one of the five ant species listed among the "100 of the World's Worst Invaders" (Manaaki Landcare Research 2015, in litt.). In addition to predation, *S. geminata* workers tend honeydew-producing members of the Homoptera suborder, especially mealybugs, which can affect plants directly and indirectly through the spread of disease (Manaaki Landcare Research 2015, in litt.). Although surveys have not been conducted to ascertain the presence of *S. geminata* in each of the known seven yellow-faced bees' habitat sites, because of its expanding range and widespread presence, *S. geminata* is a threat to all known populations of the seven yellow-faced bees.

Although we have no direct information that correlates the decrease in populations of the seven yellow-faced bees in this final rule due to the establishment of nonnative ants, predation of and competition with other yellow-faced bee species by ants has been documented, resulting in clear reductions in or absence of populations (Magnacca and King 2013, p. 24). We expect similar predation impacts to the seven yellow-faced bees to continue as a result of the widespread presence of ants throughout the Hawaiian Islands, their highly efficient and non-specific predatory behavior, and their ability to quickly disperse and establish new colonies. Therefore, we conclude that predation by nonnative ants represents a serious threat to the continued existence of the seven yellow-faced bees, now and into the future.

Wasps

Predation by the western yellow jacket wasp (*Vespula pensylvanica*) is a serious and ongoing threat to the seven yellow-faced bees (Gambino *et al.* 1987, p. 170; Wilson *et al.* 2009, pp. 1–5). The western yellow jacket is a social wasp species native to mainland North America. It was first reported on Oahu in the 1930s (Sherley 2000, p. 121), and an aggressive race became established in 1977 (Gambino *et al.* 1987, p. 170). In temperate climates, the western yellow jacket wasp has an annual life cycle, but in Hawaii's tropical climate, colonies of this species persist year round, allowing growth of large populations (Gambino *et al.* 1987, p. 170) and thus a greater impact on prey populations. Most colonies occur between 2,000 and 3,500 ft (600 and 1050 m) in elevation (Gambino *et al.* 1990, p. 1088), although they can also occur at sea level. The western yellow jacket wasp is known to be an aggressive, generalist predator and has been documented preying upon Hawaiian yellow-faced bee species (Gambino *et al.* 1987, p. 170; Wilson *et al.* 2009, p. 2). It has been suggested that the western yellow jacket wasp may compete for nectar with native Hawaiian invertebrates, but we have no information to suggest this represents a threat to the seven yellow-faced bees. Predation by the western yellow jacket wasp is a significant threat to the seven yellow-faced bee species because of the wasps' presence in habitat combined with the small number of occurrences and small population sizes of the Hawaiian yellow-faced bees.

Summary of Factor C

We are unaware of any information that indicates that disease is a threat to the 39 plant species. We are also unaware of any information that indicates that disease is a threat to the band-rumped storm-petrel, the orangeblack Hawaiian damselfly, or the anchialine pool shrimp, *Procaris hawaiana.* It has been suggested that transmission of disease from alien invertebrates by mutual flower visitation is a threat to the seven yellow-faced bees (*Hylaeus* spp.), but we currently have no evidence that this is occurring.

We consider predation and herbivory by one or more of the nonnative animal species (pigs, goats, axis deer, black-tailed deer, sheep, mouflon, cattle, rats, barn owls, cats, mongooses, fish, slugs, ants, black twig borers, and wasps) to pose an ongoing threat to 35 of the 39 plant species and to all 10 animal species throughout their ranges for the following reasons:

(1) Observations and reports have documented that pigs, goats, axis deer, black-tailed deer, sheep, mouflon, and cattle browse 27 of the 39 plant species, in addition to other studies demonstrating the negative impacts of ungulate browsing on native plant species of the islands. If the numbers and range of blackbuck antelope increase, their browsing will be a threat to native plants that occur on Molokai,

including host plants for the yellow-faced bees.

(2) Nonnative rats and slugs (either singly or combined) cause mechanical damage to plants and destruction of plant parts (branches, flowers, fruits, and seeds), and are considered a threat to 22 of the 39 plant species.

(3) Rats also prey upon adults, juveniles, and eggs of the band-rumped storm-petrel, and are linked with the dramatic decline of many closely related bird species. Because rats are found in all of the ecosystems in which the band-rumped storm-petrel occurs, we consider predation by rats to be a serious and ongoing threat.

(4) Barn owls and cats have established populations in the wild on all the main islands, and mongooses have established populations on all the main islands except for Kauai. All of these nonnative animals are known to prey on ground- and burrow-nesting seabirds. Predation by these animals is a serious and ongoing threat to the band-rumped storm-petrel.

(5) The absence of Hawaiian damselflies (including the orangeblack Hawaiian damselfly) from ponds, pools, and other aquatic habitat on the main Hawaiian Islands is strongly correlated with the presence of predatory nonnative fish; numerous observations and reports suggest nonnative predatory fishes eliminate native damselflies from these habitats. Accordingly, predation by nonnative fishes is a serious and ongoing threat to the orangeblack Hawaiian damselfly. Predation by bullfrogs, backswimmers, and Jackson's chameleons, and competition with caddisflies are threats to the orangeblack Hawaiian damselfly.

(6) Once introduced to anchialine pools, nonnative fish, through predation and competition for food sources, directly affect anchialine pool shrimp, including *Procaris hawaiana,* and also disrupt anchialine pool ecology.

(7) Damage and destruction by the black twig borer is a threat to two plant species, *Labordia lorenciana* and *Nothocestrum latifolium.*

(8) Predation by nonnative ants and wasps poses a threat to all seven yellow-faced bees.

These threats are serious and ongoing, act in concert with other threats to the species, and are expected to continue or increase in magnitude and intensity into the future without effective management actions to control or eradicate them. The effects of the combined threats suggest the need for immediate implementation of recovery and conservation methods.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

Overview

Currently, no existing Federal, State, or local laws, treaties, or regulations specifically conserve or protect 48 of the 49 species (except the band-rumped storm-petrel by the Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703–712)), or adequately address the threats to any of the 49 species (see Table 2). There are a few small programs and organizations that conduct vegetation monitoring and nonnative species and predator control, but these activities are nonregulatory, and neither continuation of these conservation efforts nor funding for them is guaranteed.

Federal laws pertaining to the 49 species addressed here include Executive Order (E.O.) 13112, the MBTA, the Lacey Act (16 U.S.C. 3371–3378; 18 U.S.C. 42–43), the Federal Noxious Weed List (7 CFR 360.200), and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The U.S. Department of Agriculture (USDA) inspects propagative and restricted plant materials and animals, and implements "Special Local Needs" rules for pesticide use, but only on a species-by-species basis. The Department of Homeland Security-Customs and Border Protection (CBP) is responsible for inspecting commercial, private, and military vessels and aircraft, and related cargo and passengers arriving from foreign locations. However, CBP focuses on quarantine issues involving non-propagative plant materials; wooden packing materials, timber, and products; internationally regulated commercial species under CITES; and federally listed noxious plants, seeds, soils, and pests of concern to the continental United States, such as pests to mainland U.S. forests and agriculture.

Hawaii State law regarding natural resource protections include those under Hawaii revised statutes (HRS): Plant and nondomestic animal quarantine and microorganism import (HRS 11–3–150A) and noxious weed control (HRS 11–3–152); flood control (HRS 12–2), water and land development (HRS 12–174), and State water code (HRS 12–2–174D); wildlife (general wildlife, hunting, game birds, game mammals, and wild birds and other wildlife) (HRS 12–4–183D); aquatic resources and wildlife-alien aquatic organisms (HRS 12–5–187A); general and miscellaneous, invasive species council (HRS 12–6–194); conservation of aquatic life, wildlife, and land plants (HRS 12–6–195D); and Natural Area Reserves (NARs) (HRS 12–6–195). These laws are interpreted and implemented under Hawaii administrative rules (HAR). Applicable HARs include: Noxious weed rules (HAR 4–6–68); plant and nondomestic animal quarantine, microorganism import rules (HAR 4–6-ch 71A, 71C), and plant intrastate rules (HAR4–6–72); rules regulating game mammal hunting (HAR 13–5–2-ch 123; indigenous wildlife, endangered and threatened wildlife, and introduced wild birds (HAR 13–5–2-ch 124); protection of instream uses of water (HAR 13–7-ch 169), and NARs system (HAR 13–9-ch 208–210).

Private and local programs that provide protections, and that help to implement Federal and State environmental regulations, laws, and rules for one or more of the 49 species, include the Hawaii Invasive Species Committee (HISC), the Coordinating Group on Alien Pest Species (CGAPS), and the Hawaii Association of Watershed Partnerships (HAWP). In addition, the Plant Extinction Protection Program (PEPP) was created to protect Hawaii's rare plant species in need of immediate conservation efforts, by monitoring, propagating, outplanting, and providing some protection from threats.

We discuss Federal and State regulatory mechanisms, along with agencies and groups authorized to implement them, and the coordination between them, below.

Federal Regulatory Mechanisms

On February 3, 1999, Executive Order (E.O.) 13112 was signed establishing the National Invasive Species Council (NISC). This E.O. requires that a Council of Departments dealing with invasive species be created to prevent the introduction of invasive species; provide for their control; and minimize the economic, ecological, and human health impacts that invasive species cause. Invasive species include aquatic plant and animal species, terrestrial plants and animal species, and plant and animal pathogens. This E.O. was reviewed in 2005 (NISC 2005). NISC uses a cooperative approach to enhance the Federal Government's response to the threat of invasive species, and emphasizes prevention, early detection and rapid response, and sharing of information. See our discussion below concerning the Hawaii Invasive Species Committee (HISC) regarding the effectiveness of this law.

The MBTA is the domestic law that implements the United States' commitment to four international conventions (with Canada, Japan, Mexico, and Russia) for the protection of shared migratory bird resources. The MBTA regulates most aspects of take, possession, transport, sale, purchase, barter, export, and import of migratory birds and prohibits the killing, capturing, and collecting of individuals, eggs, and nests, unless such action is authorized by permit. While the MBTA does prohibit actions that directly kill a covered species, unlike the Endangered Species Act (Act), it does not prohibit habitat modification that indirectly kills or injures a covered species, affords no habitat protection when the birds are not present, and provides only very limited mechanisms for addressing chronic threats to covered species, such as nonnative predators.

The Lacey Act authorizes the Secretary of the Interior to list as "injurious" any wildlife deemed to be harmful to human beings, to the interests of agriculture, horticulture, forestry, or to wildlife or the wildlife resources of the United States. The Service inspects arriving wildlife products, and enforces the injurious wildlife provisions of the Lacey Act. Among other provisions, the Lacey Act prohibits importation of injurious mammals, birds, fish, amphibians and reptiles listed in the Lacey Act or which are declared by the Secretary of the Interior through regulation to be injurious to human beings, agriculture, horticulture, forestry or wildlife; however, these prohibitions do not apply to plants and organisms other than those listed or designated by regulations as injurious wildlife (USFWS 2016, in litt.). The current list of animals considered as "injurious wildlife" is provided at 50 CFR part 16. The list includes fruit bats, mongoose, European rabbits and hares, wild dogs, rats or mice, raccoon dogs, brushtail possum (the species introduced to New Zealand), starlings, house sparrows, mynas, dioch, Java sparrows, red whiskered bulbuls, walking catfish, mitten crabs, zebra mussels, fish in the snakehead family, four species of carp, salmonids, brown tree snakes, and pythons (USFWS 2012, 50 CFR part 16). The Lacey Act requires declarations of importation only for formal entries (*i.e.*, commercial shipments), but not for informal entries (*i.e.*, personal shipments) (USDA–APHIS 2015, in litt.). Additionally, a species may still be imported or transported across State lines while it is being considered for addition to the list of "injurious wildlife" (Fowler *et al.* 2007, pp. 357–358). Mongoose, rabbits, rats, mice, house sparrows, mynas, Java sparrows, and red whiskered bulbuls are already established in Hawaii, are difficult and costly to control, or are not controlled at all. None of the aquatic species on the injurious species list is present in Hawaii.

The continued spread of injurious species indicates the limited effectiveness of the Lacey Act in preventing introductions of such species to the State (Fowler *et al.* 2007, p. 357). As an example of continued introduction of nonnative species in Hawaii, opossums (*Didelphis virginiana*) have been found in shipping containers on Oahu in 2005, 2011, and most recently in 2015 (Star Advertiser 2015b, in litt). This species is not included on the Lacey Act's list of injurious wildlife. Opossums are omnivorous scavengers, consuming a wide variety of food items including insects, small vertebrates, bird eggs, slugs and snails, and fruits and berries (Oregon Department of Fish and Wildlife 2015, in litt.; Clermont College 2015, in litt.). If opossums were to establish wild populations in Hawaii, their predation on ground-nesting seabirds, insects, and snails could negatively affect the band-rumped storm petrel, the orangeblack Hawaiian damselfly, one or more of the 39 plants, and endangered snail species.

The Department of Agriculture-Animal and Plant Health Inspection Service-Plant Protection and Quarantine (USDA–APHIS–PPQ) inspects propagative plant material, provides identification services for arriving plants and animals, conducts pest risk assessments, and other related matters, but focuses on pests of wide concern across the United States (HDOA 2009, in litt.). The USDA–APHIS–PPQ's Restricted Plants List restricts the import of a limited number of noxious weeds. If not specifically prohibited, current Federal regulations allow plants to be imported from international ports with some restrictions. The Federal Noxious Weed List (see 7 CFR 360.200; USDA 2012) includes more than 100 of the many globally known invasive plants, 21 of which are already established in Hawaii. Plants on the list do not require a weed risk assessment prior to importation from international ports.

A local organization (under the Institute of Pacific Islands Forestry-USFS), Pacific Island Ecosystems at Risk (PIER) has compiled a complete list of those plant species that are a threat to ecosystems in the Pacific Islands, and those that are potentially invasive and are present in the Pacific Region, along with a weed-risk assessment for most of them (*http://www.hear.org/pier/*, last updated May 15, 2013). There are over 1,000 plant species on the PIER list, and, in our proposed rule (80 FR 58820, September 30, 2015; see pp. 58869–58881), we discuss 114 of these invasive plants that currently have the greatest impacts on the 49 species. In addition, the USDA–APHIS–PPQ is in the process of finalizing rules to include a weed risk assessment for plants newly imported to Hawaii (and that may not yet appear on the PIER list).

Water extraction is a threat to the plant species (*Cyclosorus boydiae*), the orangeblack Hawaiian damselfly, and the anchialine pool shrimp *Procaris hawaiana*. The U.S. Army Corps of Engineers (COE) has regulatory jurisdiction under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) for activities that would result in a discharge of dredged or fill material into waters of the United States; however, in issuing permits for such activities, the COE does not typically establish minimal instream flow standards (IFS) as a matter of policy (U.S. Army 1985, RGL 85–6).

State Regulatory Mechanisms

The Hawaii Endangered Species law (HRS 195D) prohibits take, possession, sale, transport or commerce in designated species. This includes aquatic as well as terrestrial animal species, and terrestrial plants (not freshwater or marine plants). This State law also recognizes as endangered or threatened those species determined to be endangered or threatened pursuant to the Act. This Hawaii law states that a threatened species (under the Act) or an indigenous species may be determined to be an endangered species under State law. Protection of these species is under the authority of Hawaii's Department of Land and Natural Resources, and under administrative rule (HAR 13–5–2-Ch 124). Although this State law can address threats such as habitat modification, light attraction, and line collision through HCPs that address the effects of individual projects or programs, it does not address the pervasive threats to the 49 species posed by nonnative predators and feral ungulates.

The importation of nondomestic animals, including aquatic species and microorganisms, is regulated by a permit system (HAR 4–71) managed through the Hawaii Department of Agriculture (HDOA). In addition, transport of plants and plant parts between Hawaiian Islands is managed through the HDOA (HAR 4–6–72), but only for those species that have already been determined to be pest species. The objective of these administrative rules is to implement the requirements of HRS 11–3–150A. The list of nondomestic animals (HAR 4–71) is defined by providing a list of those animals considered domestic: dog, cat, horse, ass (burro or donkey), cattle and beefalo, sheep, goat, swine, pot-bellied pig, alpaca, llama, rabbit, chicken, turkeys, pigeons, ducks, geese, and their hybrids. Examples of regulated pests are listed at HAR 4–72, including nonnative insects, slugs, insects, plants, and plant viruses that can damage or harm commercial crops. The HDOA's Board of Agriculture maintains lists of nondomestic animals that are prohibited from entry, animals without entry restrictions, or those that require a permit for import and possession. The HDOA requires a permit to import animals, and conditionally approves entry for individual possession, businesses (*e.g.*, pets and resale trade, retail sales, and food consumption), or institutions. However, habitat destruction and modification, and predation, by feral domestic animals (such as goat and cats, respectively) are two primary threats to the 49 species not addressed by the HDOA prohibitions and permitting process.

The State of Hawaii allows importation of most plant taxa, with limited exceptions, if shipped from domestic ports (HLRB 2002; USDA–APHIS–PPQ 2010; CGAPS 2009). Hawaii's plant import rules (HAR 4–70) regulate the importation of 13 plant taxa of economic interest, including pineapple, sugarcane, palms, and pines. Certain horticultural crops (*e.g.*, orchids) may require import permits and have pre-entry requirements that include treatment or quarantine or both either prior to or following entry into the State.

Critical biosecurity gaps include inadequate staffing, facilities, and equipment for Federal and State inspectors devoted to invasive species interdiction (HLRB 2002; USDA–APHIS–PPQ 2010; CGAPS 2009). In recognition of these gaps, a State law has been passed that allows the HDOA to collect fees for quarantine inspection of freight entering Hawaii (Act 36 (2011) HRS 150A–5.3). Legislation enacted in 2011 (H.B. 1568) requires commercial harbors and airports to provide biosecurity and inspection facilities to facilitate the movement of cargo through ports. This bill is a significant step toward optimizing biosecurity capacity in the State, but only time will determine its effectiveness (Act 2011 (11)). We believe there is a need for all civilian and military port and airport operations and construction to make biosecurity concerns a core objective.

As an example, the threat of introduction of nonnative species is evidenced by the 2013 discovery of presence of the nonnative coconut rhinoceros beetle (CRB, *Oryctes rhinoceros*), which quickly spread from its known point of introduction across the island of Oahu in a few months (HISC 2014, in litt. + maps; HDOA 2014, in litt.). The CRB is considered one of the most damaging insects to coconut and African oil palm trees in southern and southeast Asia, as well as the western Pacific Islands, and could devastate populations of native and nonnative palm trees in Hawaii (Giblin-Davis 2001 *in* HISC 2014, in litt.). A rapid response team headed by HDOA (with USDA, University of Hawaii, U.S. Navy, and other partners) has set up pheromone traps island-wide, and capture and range delineation efforts are ongoing, along with funding for support services to control the CRB (HISC 2014, in litt.). However, existing regulatory mechanisms did not prevent the introduction of this pest species into Hawaii. These regulatory mechanisms, such as HAR 71A and HAR 71C (regarding release of nonnative species) and H.B. 1568 (pertaining to State law to enforce biosecurity measures), therefore, are inadequate to prevent introduction of nonnative species. Efforts to control the CRB continue, but whether those efforts will be effective is unknown at this time.

Hawaii's noxious weed law was enacted to prevent the introduction and transport of noxious weeds or their seeds or vegetative reproductive parts into any area that is reasonably free of those noxious weeds (HRS 11–3–152), and it states that the Hawaii Department of Agriculture shall take necessary measures to restrict the introduction and establishment of specific noxious weeds in such areas. Hawaii administrative rule (HAR 4–6–68) further defines the term "noxious weed" and the criteria for designation of plants as such and criteria for designation of a noxious weed "free area." The list of noxious weeds, compiled in 1992, consists of 79 plant species, 49 of which were not yet established in Hawaii. Since that time, 20 species on the list have become established in Hawaii: *Bocconia frutescens* (plume poppy), *Cereus uruguayanus* (spiny tree cactus), *Chromolaena odorata* (siamweed), *Cortaderia jubata* (Andean pampas grass), *Cytisus scoparius* (Scotch broom), *Hyptis suaveolens* (wild spikenard), *Malachra alceifolia* (malachra), *Melastoma* spp. (melastoma; two species now established, *M. candidum* and *M. sanguineum*), *Miconia* spp. (miconia; *M. calvescens* now on four islands), *Passiflora pulchella* (wingleaf passionfruit), *Piper aduncum* (spiked pepper), *Prosopis juliflora* (algarroba), *Pueraria phaseoloides* (tropical kudzu), *Rubus sieboldii* (Molucca raspberry), *Senecio madagascariensis* (fireweed), *Solanum elaeagnifolium* (silverleaf nightshade), *Solanum robustum* (shrubby nightshade), *Solanum torvum* (turkeyberry), and *Spartium junceum* (Spanish broom). Thus, despite State legislation and regulations addressing invasive and noxious species, their entry into the State continues.

The State manages the use of surface and ground water resources through the Commission on Water Resource Management (CWRM), as mandated by the State Water Code (HRS 174, HAR 13–168–196). The State considers all natural flowing surface water (streams, springs, seeps) as State property (HRS 174C), and the DLNR has management responsibility for the aquatic organisms in these waters (HRS Annotated 1988, Title 12 1992 Cumulative Supplement). In Hawaii, instream flow is regulated by establishing standards on a stream-by-stream basis. The standards currently in effect represent flow conditions in 1987 (status quo), the year the administrative rules (State Water Code) were adopted (HRS 174C–71, HAR title 13, ch 169–44–49). Because of the complexity of establishing instream flow standards (IFS) for 376 perennial streams, the Commission retains interim IFS at status quo levels as set in 1987 (CWRM 2009, in litt.; CRWM 2014, in litt). In the Waiahole Ditch Combined Contested Hearing on Oahu (1991–2006), the Hawaii Supreme Court determined that status quo interim IFS were not adequate, and required the Commission to reassess the IFS for Waiahole Ditch and other streams Statewide (Cast No. CCH–OA95–1; Maui Now.com, in litt.). The Commission has been gathering information to fulfill this requirement since 2006, but no IFS recommendations have been made to date (CWRM 2008, p. 3–153; CRWM 2014, in litt.).

In addition, in the Hawaii Stream Assessment Report (HDLNR 1990; prepared in coordination with the National Park Service (NPS)), the Commission identified high-quality rivers and streams (and portions thereof) that may be placed within a Wild and Scenic River System. This report ranked 70 out of 176 analyzed rivers and streams as outstanding high-quality habitat, and recommended that streams meeting certain criteria be protected from further development (HDLNR 1990, pp. xxi–xxiv). However, there is no mechanism within the State's Water Code to designate and set aside these streams, or to identify and protect stream habitat. Accordingly, damselfly populations (including the orangeblack Hawaiian damselfly) are at risk of continued loss of habitat.

Hawaii's DLNR Division of Aquatic Resources (DAR) is responsible for conserving, protecting, and enhancing the State's renewable resources of aquatic life and habitat (HDAR 2015, in litt.; DLNR–DAR 2003, p. 3–13). The release of live nonnative fish or other nonnative aquatic life into any waters of the State is prohibited (HRS 187A–6.5), and DAR has the authority to seize, confiscate, or destroy as a public nuisance any of these prohibited species (HRS 187A–2; HRS 187A–6.5). However, the DAR recognizes that nonnative species continue to enter the State and move between islands (DLNR–DAR 2003, p. 2–12).

There are no existing regulatory mechanisms that specifically protect Hawaii's anchialine pools (habitat for the anchialine pool shrimp *Procaris hawaiana* and the orangeblack Hawaiian damselfly); however 2 anchialine pools on Maui and 12 anchialine pool on Hawaii Island are located within State NARs. State NARs were created to preserve and protect samples of Hawaii's ecosystems and geological formations, and are monitored. Designation as a State NAR prohibits the removal of any native organism and the disturbance of pools (HAR 13–209–4). Though signs are posted at NARs to notify the public that anchialine pools are off-limits to bathers, off-road vehicle use around the pools, and other activities, the anchialine pools are in remote areas and the State does not have sufficient funding to effectively enforce those restrictions.

Nonnative ungulates pose threats of habitat destruction and modification and predation (herbivory) to 37 of the 39 plants species, and of habitat destruction and modification to 9 of the 10 animals in this rule (see Table 2). The State provides opportunities to the public to hunt game mammals (ungulates including feral pigs and goats, axis deer, black-tailed deer, and mouflon, sheep and mouflon-sheep hybrids) on 91 State-designated public hunting areas (within 45 units) on all the main Hawaiian Islands except Kahoolawe and Niihau (HAR–DLNR 2010, 13–123; HDLNR 2009b, pp. 25–30). On Niihau, public hunting opportunities are managed by a private business (Niihau Safaris Inc. 2015, in litt.). The State's management objectives for game mammals range from maximizing public hunting opportunities (*i.e.*, "sustained yield") in some areas to removal by State staff or their designees from other areas (HAR–DLNR 2010, p. 12–123; HDLNR 2009b, pp. 25–30). Thirty of the 39 plant species, the band-rumped storm-petrel, the orangeblack Hawaiian damselfly, and three yellow-faced bees have populations in areas where habitat is used for game enhancement and game populations are maintained at levels for public hunting (Holmes and Joyce 2009, 4 pp.; HAR–DLNR 2010, p. 12–123; HBMP 2010). Public hunting areas are defined, but not fenced, and game mammals have unrestricted access to most areas across the landscape, regardless of underlying land-use designation. While fences are sometimes built to protect areas from game mammals, the current number and locations of fences are not adequate to prevent habitat destruction and modification for 46 of the 49 species. One additional State regulation (HRS 12–183D) was enacted recently to prevent intra-island transport of axis deer only. There are no other State regulations than those described above that address protection of the species and their habitat from feral ungulates.

Under statutory authorities provided by HRS title 12, subtitle 4, 183D Wildlife, the DLNR maintains HAR ch 124 (2014), which defines "injurious wildlife" as "any species or subspecies of animal except game birds and game mammals which is known to be harmful to agriculture, aquaculture, indigenous wildlife or plants, or constitute a nuisance or health hazard and is listed in the exhibit entitled Exhibit 5, Chapter 13–124, List of Species of Injurious Wildlife in Hawaii." Under HAR 13–124–3(d), "no person shall, or attempt to: (1) Release injurious wildlife into the wild; (2) Transport them to island or locations within the State where they are not already established and living in a wild state; and (3) Export any such species or the dead body or parts thereof, from the State. Permits for these actions may be considered on a case-by-case basis." This law was enacted after an incident in 2012 of interisland transport of axis deer (for hunting purposes) to Hawaii Island, which was without axis deer previously.

Local Mechanisms

Local biologists and botanists recognize the urgent need to address the importation of nonnative, invasive species, and are working to implement actions required; however, their funding is not guaranteed. We discuss the four primary groups below.

In 1995, the Coordinating Group on Alien Pest Species (CGAPS), a partnership of managers from Federal, State, County, and private agencies and organizations involved in invasive species work in Hawaii, was formed in an effort to coordinate policy and funding decisions, improve communication, increase collaboration, and promote public awareness (CGAPS 2009). This group facilitated the formation of the Hawaii Invasive Species Council (HISC), which was created by gubernatorial executive order in 2002, to coordinate local initiatives for the prevention of introduction and for control of invasive species by providing policy-level direction and planning for the State departments responsible for invasive species issues (CGAPS 2009). In 2003, the Governor signed into law Act 85, which conveys statutory authority to the HISC to continue to coordinate approaches among the various State and Federal agencies, and international and local initiatives, for the prevention and control of invasive species (HDLNR 2003, p. 3–15; HISC 2009, in litt.; HRS 194–2). Some of the recent priorities for the HISC include interagency efforts to control nonnative species such as the plants *Miconia calvescens* (miconia) and *Cortaderia* spp. (pampas grass), coqui frogs (*Eleutherodactylus coqui*), the CRB, and ants (HISC 2009, 2013, and 2015, in litt.; OISC 2015, in litt.; *http://dlnr.hawaii.gov/hisc*). Budget cuts beginning in 2009 restricted State funding support of HISC, resulting in a serious setback of conservation efforts (HISC 2009; HISC 2015).

The Hawaii Association of Watershed Partnerships comprises 11 separate partnerships on six Hawaiian Islands. These partnerships are voluntary alliances of public and private landowners, "committed to the common value of protecting forested watersheds for water recharge, conservation, and other ecosystem services through collaborative management" (*http://hawp.org/partnerships*). Funding for the partnerships is provided through a variety of State and Federal sources, public and private grants, and in-kind services provided by the partners and volunteers. However, budget cuts of 40 to 60 percent have occurred since 2009, with serious impacts to the positive contributions of these groups to implementing the laws and rules that can protect and control threats to one or more of the 49 species.

Another group was established to coordinate State and Federal agency efforts in the protection of rare endemic plant species in the State and Guam and the Commonwealth of the Northern Mariana Islands (CNMI), Hawaii's Plant Extinction Prevention Program (PEPP). This program identifies and supports the "rarest of the rare" plant species in need of immediate conservation efforts. The goal of PEPP is to prevent the extinction of plant species that have fewer than 50 individuals remaining in the wild.

These four partnerships, CGAPS, HISC, HAWP, and PEPP, are stop-gap measures that attempt to address issues that are not resolved by individual State and Federal agencies. The capacity of State and Federal agencies and their nongovernmental partners in Hawaii to provide sufficient inspection services, enforce regulations, and mitigate or monitor the effects of nonnative species is limited due to the large number of taxa currently causing damage (CGAPS 2009). Many invasive, nonnative species established in Hawaii currently have limited but expanding ranges, and they cause considerable concern. Resources available to reduce the spread of these species and counter their negative effects are limited. Control efforts are focused on a few invasive species that cause significant economic or environmental damage to commercial crops and public and private lands. Comprehensive control of an array of nonnative species and management to reduce disturbance regimes that favor them remain limited in scope. If current levels of funding and regulatory support for control of nonnative species are maintained, the Service expects existing programs to continue to exclude, or, on a very limited basis, control these species only in the highest priority areas. Threats from established nonnative species are ongoing and are expected to continue into the future.

As an example of current and future challenges for biosecurity in Hawaii, a strain of the plant rust *Puccinia psidii* (ohia rust) was first noticed affecting stands of the nonnative rose apple (*Syzygium jambos*) and the native *Metrosideros* (ohia) seedlings (both in the plant family Myrtaceae) in nurseries in 2005. *Metrosideros* spp. are a dominant component of native forest in Hawaii, providing watershed protection and habitat for native wildlife. The Hawaii Board of Agriculture recommended a quarantine rule be passed against the introduction of all new strains of ohia rust (through transmission on Myrtaceae species used in the horticulture trade), to prevent destruction of ohia forests and the risk to agriculture and horticulture industries (Environment Hawaii 2015, pp. 1,8–9). However, the rule remains in draft form and under review (HDOA 2015, in litt.), accessed August 1, 2016). An example of the failure of biosecurity in Hawaii and the speed with which a new invader can cause widespread destruction is the introduction of the gall wasp *Quadrastichus erythrinae.* This highly destructive wasp was detected in Taiwan in 2003. Despite evidence of its rapid advance across the Pacific Basin with concomitant loss of populations of native and ornamental trees in the genus *Erythrina,* this wasp arrived and naturalized in Hawaii in 2005 (Gramling 2005, p. 1). The wasp dispersed throughout the main Hawaiian Islands within weeks, and as a result, the endemic wiliwili, *Erythrina sandwicensis,* was quickly devastated (Rubinoff *et al.* 2010, p. 24).

On the basis of the information provided above, existing State and Federal regulatory mechanisms are not preventing the introduction of nonnative species and pathogens into Hawaii via interstate and international pathways, or via intrastate movement of nonnative species between islands and watersheds. Nor do these mechanisms address the current threats posed to the 49 species by established nonnative species. Therefore, State and Federal regulatory mechanisms do not adequately protect the 49 species, or their habitats, from the threat of new introductions of nonnative species or the continued expansion of nonnative species populations on and between islands and watersheds. The impacts from these threats are ongoing and are expected to continue into the future.

Summary of Factor D

Existing State and Federal regulatory mechanisms are not preventing the introduction into Hawaii of nonnative species or controlling the spread of nonnative species between islands and watersheds, or establishing or maintaining instream flow standards. Water extraction is a threat to one plant, *Cyclosorus boydiae,* to the orangeblack Hawaiian damselfly, and the anchialine pool shrimp (Factor A). Habitat-altering ungulates and nonnative plants (Factor A) pose major ongoing threats to all 49 species addressed in this rule. Thirty-five of the 39 plants and all 10 animals experience the threat of predation or herbivory by nonnative animals (Factor C). The seven yellow-faced bees and the orangeblack Hawaiian damselfly experience competition with nonnative insect species (Factor E). The intentional or inadvertent introduction of nonnative species and their spread within Hawaii, and the damage caused by existing populations of nonnative species, continues despite existing regulatory mechanisms designed to address this threat (in all its manifestations described above) to all 49 species. No existing regulatory mechanisms effectively address maintenance of instream flow, springs, seeps, and anchialine pools or address the threats of water extraction and stream modification for the anchialine pool shrimp and orangeblack Hawaiian damselfly. All of these threats are ongoing and are expected to continue into the future; therefore, we conclude the existing regulatory mechanisms are inadequate to reduce or eliminate these threats to the 49 species.

Factor E. Other Natural or Manmade Factors Affecting Their Continued Existence

Other factors that pose a threat to some or all of the 49 species include artificial lighting and structures, ingestion of marine debris and plastics, dumping of trash and the introduction of nonnative fish into anchialine pools, recreational use of and sedimentation of anchialine pools, low numbers of individuals and populations, hybridization, lack of or declining regeneration, competition with nonnative invertebrates, and loss of host plants. Each threat is discussed in detail below, along with identification of which species are affected by these threats. The impacts of climate change to these species and their ecosystems have the potential to exacerbate all of the threats described below.

Artificial Lighting and Structures Effects on the Band-Rumped Storm-Petrel

Artificial lights are a well-documented threat to night-flying seabirds such as petrels, shearwaters, and storm-petrels (Croxall *et al.* 2012, p. 28). A significant impact to the band-rumped storm-petrel results from the effects of artificial (night) lighting on fledglings and, to a lesser degree, on adults. Lighting of roadways, resorts, ballparks, residences, and other development, as well as on cruise ships out at sea, both attracts and confuses night-flying storm-petrels and other seabirds (Harrison *et al.* 1990, p. 49; Reed *et al.* 1985, p. 377; Telfer *et al.* 1987, pp. 412–413; Banko *et al.* 1991, p. 651). Storm-petrels use the night sky to navigate and possibly to search for bioluminescent marine prey (Telfer *et al.* 1987, p. 412). Artificial lights can attract night-flying seabirds and result in "fallout" (birds becoming grounded) when birds become confused and exhaust themselves circling around lights or collide with buildings, powerlines, or other structures. Once grounded, these birds are at risk of predation or being run over by cars (Reed *et al.* 1985, p. 377; Telfer *et al.* 1987, p. 410). Vulnerability to artificial lighting varies among species and age classes and is influenced by season, lunar phase, and weather conditions.

Young birds are more likely than adults to become disoriented by manmade light sources (Montevecchi 2006, pp. 101–102). Over a 12-year period (1978 to 1990), Harrison *et al.* (1990, p. 49) reported that 15 band-rumped storm-petrels, 13 of which were fledglings, were recovered on Kauai as a result of fallout. Between 1991 and 2008, another 21 band-rumped storm-petrels were collected on Kauai (Holmes and Joyce 2009, p. 2). Currently, fallout due to light pollution is recorded almost annually on Kauai (Kauai Island Utility Cooperative 2015, in litt.). In addition, band-rumped storm-petrels may be attracted to lights at sea and collide with boats; this source of injury and mortality has been documented for other storm-petrel species (*e.g.,* Black 2005, p. 67). The actual extent of such loss and its overall impact on the band-rumped storm-petrel population in Hawaii is not known because scavengers often prevent the detection or recovery of the dead or injured birds, and the scattered and remote nesting areas of this species preclude demographic monitoring to quantify the impacts of this source of mortality. However, given the probable small total number of band-rumped storm-petrels nesting in Hawaii and the threats they face from nonnative predators such as rats and cats, any additional mortalities are likely to have negative impacts on the population.

A related threat to seabirds in Hawaii, including the band-rumped storm-petrel, is collision with structures such as communication towers and utility lines (Cooper and Day 1998, pp. 16–18; Podolsky *et al.* 1998, pp. 23–33). Several seabird species that nest in the Hawaiian Islands, including the Newell's Townsend's shearwater (federally listed as threatened), the Hawaiian petrel (federally listed as endangered), and the band-rumped storm-petrel, regularly commute between inland nest sites and the ocean. These birds commute at night, when manmade obstacles such as communication towers and utility lines are difficult to see. They strike these unseen obstacles, and often die or are injured as a result. An early study estimated that 340 Newell's Townsend's shearwater fledglings die annually on the eastern and southern shores of Kauai as a result of collisions (Podolsky *et al.* 1998, p. 30); however, current analyses for all seabirds on Kauai indicate the number of collisions with utility lines is much higher, over 2,000 strikes per year (using site-specific strike rates), but numbers of birds that hit utility lines is site-dependent (Travers *et al.* 2014, pp. 19, 29–37; Service 2015, in litt., Slide 21). Absent preventative measures, the impact to the band-rumped storm-petrel from artificial lighting and collisions with structures is expected to increase as the human population grows and development continues on the Hawaiian Islands.

Other Human Effects on the Band-Rumped Storm-Petrel

Other factors that may negatively affect the band-rumped storm-petrel include commercial fisheries interactions and alteration of prey base upon which the band-rumped storm-petrel depends. Commercial fisheries are known to adversely affect certain species of seabirds (Furness 2003, pp. 33–35). Seabirds are caught in fishing gear and suffer mortality by drowning. Seabirds also come into contact with and consume deep-water fish to which they would not normally have access, and can become contaminated by high levels of heavy metals in these fish (Furness 2003, p. 34). Commercial fisheries also cause depletion of small pelagic schooling fish, a significant food source for seabirds (Furness 2003, p. 34). The potential effects of these activities have not been assessed for the band-rumped storm-petrel; however, storm-petrels have been observed to attend fishing vessels (*e.g.,* Yorio and Caille 1999, p. 21; Yeh *et al.* 2013, p. 146), and the effects of fishery interactions on this species are likely to be similar to those documented for other seabird species in the same order (Procellariiformes or tubenoses; albatrosses and petrels). In addition, plastics and other debris in the open ocean can be ingested accidentally by band-rumped storm-petrels and pose a threat to this species (Ryan 1989, p. 629). Although a study by Moser and Lee (1992, p. 85) found no evidence of plastic ingestion by band-rumped storm-petrels, the sample size was very small (4 individuals) and inadequate to conclusively determine whether this species suffers from ingestion of plastics. Other species of storm-petrels have been documented to ingest plastics (Bond and Lavers 2013, p. 3; Ryan 2015, p. 20; Wilcox *et al.* 2015, p. 3), and band-rumped storm-petrels are likely to do so also. Many closely related seabirds do suffer ill effects from ingestion of plastics, including physical damage to the digestive tract, effects of toxins carried on the plastics, and resulting mortality (Ryan 1989, pp. 623–629; Tanaka *et al.* 2013, pp. 2–3).

Effects of Recreational Use, and Dumping of Trash and Nonnative Fish Into Anchialine Pools

On Hawaii Island, it is estimated that up to 90 percent of the anchialine pools have been destroyed or altered by human activities (Brock 2004, p. i). The more recent human modification of anchialine pools includes bulldozing and filling of pools (Bailey-Brock and Brock 1993, p. 354). Trampling damage from use of anchialine pools for swimming and bathing has been documented (Brock 2004, pp. 13–17). Historically, pools were sometimes modified with stone walls and steps by Hawaiians who used them for bathing. There are no documented negative impacts to pond biota as a result of this activity; however, introduction of soaps and shampoos is of concern (Brock 2004, p. 15).

The depressional features of anchialine pools make them susceptible to dumping. Refuse found in degraded pools and pools that have been filled with rubble have been dated to about 100 years old, and the practice of dumping trash into pools continues today (Brock 2004, p. 15). For example, Lua O Palahemo (Hawaii Island) is located approximately 560 ft (170 m) from a sandy beach frequented by visitors who fish and swim. There are multiple dirt roads that surround the pool making it highly accessible. Plastic bags, paper, fishing line, water bottles, soda cans, radios, barbed wire, and a bicycle have been documented within the pool (Kensley and Williams 1986, pp. 417–418; Bozanic 2004, p. 1; Wada 2010, in litt.). Introduction of trash involving chemical contamination into anchialine pools, as has been observed elsewhere on Hawaii Island (Brock 2004, pp. 15–16), drastically affects water quality and results in local extirpation of anchialine pool shrimp species.

Anchialine pool habitats can gradually disappear when wind-blown materials accumulate through a process known as senescence (Maciolek and Brock 1974, p. 3; Brock 2004, pp. 11, 35–36). Conditions promoting rapid senescence include an increased amount of sediment deposition, good exposure to light, shallowness, and a weak connection with the water table, resulting in sediment and detritus accumulating within the pool instead of being flushed away with tidal exchanges and ground water flow (Maciolek and Brock 1974, p. 3; Brock 2004, pp. 11, 35–36). Sedimentation degrades the health of Hawaiian anchialine pool systems in which the anchialine pool shrimp, *Procaris hawaiana,* and the orangeblack Hawaiian damselfly occur.

In general, the accidental or intentional introduction and spread of nonnative fishes (bait and aquarium fish) is considered the greatest threat to anchialine pools in Hawaii (Brock 2004, p. 16). Maciolek (1983, p. 612) found that the abundance of shrimp in a given population is indirectly related to predation by fish. Lua O Palahemo is vulnerable to the intentional dumping of nonnative bait and aquarium fishes because the area is accessible to vehicles and human traffic, although due to its remote location, it is not monitored regularly by State agency staff. The release of mosquito fish and tilapia into the Waikoloa Anchialine Pond Preserve (WAAPA) at Waikoloa, North Kona, Hawaii, resulted in the infestation of all ponds within an approximately 3-ha (8-ac) area, which represented about two-thirds of the WAAPA. Within 6 months, all native hypogeal (subterranean) shrimp species disappeared (Brock 2004, p. iii). Nonnative fish drive anchialine species out of the lighted, higher productivity portion of the pools, into the surrounding water table bed rock, subsequently leading to the decimation of the benthic community structure of the pool (Brock 2004, p. iii). In addition, nonnative fish prey on and exclude native hypogeal shrimp that are usually a dominant and essential faunal component of anchialine pool ecosystems (Brock 2004, p. 16; Bailey-Brock and Brock 1993, pp. 338–355). The loss of the shrimp changes ecological succession by reducing herbivory of macroalgae, allowing an overgrowth and change of pool flora. This overgrowth changes the system from clear, well-flushed basins to a system characterized by heavy sedimentation and poor water exchange, which increases the rate of pool senescence (Brock 2004, p. 16). Nonnative fishes, unlike native fishes, are able to complete their life cycles within anchialine pool habitats, and remain a permanent detrimental presence in all pools in which they are introduced (Brock 2004, p. 16). In Hawaii, the most frequently introduced fishes are those in the Poeciliidae family (freshwater fish which bear live young) and include mosquito fish, various mollies (*Poecilia* spp.), and tilapia, that prey on and exclude the herbivorous aquatic animals upon which *Procaris hawaiana* feeds. More than 90 percent of the 600 to 700 anchialine habitats in the State of Hawaii were degraded between 1974 and 2004, due to the introduction of nonnative fishes (Brock 2004, p. 24). According to Brock (2012, pers. comm.), sometime in the 1980s, nonnative fishes were introduced into Lua O Palahemo. It is our understanding that the fish were subsequently removed by illegal use of a fish poison (EPA 2007. pp. 22–23; Finlayson *et al.* 2010, p. 2), and to our knowledge the pool is currently free of nonnative fish; however, nonnative fish could be introduced into the pool at any time.

Low Numbers of Individuals and Populations

Species that undergo significant habitat loss and degradation, and other threats resulting in population decline, range reduction, and fragmentation, are inherently highly vulnerable to extinction because of localized catastrophes such as hurricanes, floods, rockfalls, landslides, treefalls, and drought; climate change impacts; demographic stochasticity; and the increased risk of genetic bottlenecks and inbreeding depression (Gilpin and Soulé 1986, pp. 24–34). These conditions are easily reached by island species and especially species endemic to single islands that face numerous threats such as those described above (Pimm *et al.* 1988, p. 757; Mangel and Tier 1994, p. 607). Populations that have been diminished and isolated by habitat loss, predation, and other threats exhibit reduced levels of genetic variability, which diminishes the species' capacity to adapt to environmental changes, thereby lessening the probability of long-term persistence (Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361). Very small, isolated plant populations are also more susceptible to reduced reproductive vigor due to ineffective pollination, inbreeding depression, and hybridization. This is particularly true for functionally unisexual plants like *Myrsine fosbergii* of which some individuals are functionally dioecious (male and female flowers occur on separate individuals). Isolated individuals have difficulty in achieving natural pollen exchange, which decreases the production of viable seed. Populations are also affected by demographic stochasticity, through which populations are skewed toward either male or female individuals by chance. The problems associated with small occurrence size and vulnerability to random demographic fluctuations or natural catastrophes are further magnified by interactions with other threats, such as those discussed above (see Factor A and Factor C, above).

Plants

The effects resulting from having a reduced number of individuals and occurrences poses a threat to all 39 plant species addressed in this proposal. We consider the following 19 species to be especially vulnerable to extinction due to threats associated with small occurrence size or small number of occurrences because:

- The only known occurrences of *Cyanea kauaulaensis, Labordia lorenciana, Lepidium orbiculare,* and *Phyllostegia helleri* are threatened either by landslides, rockfalls, treefalls, drought, or erosion, or a combination of these factors.
- *Cyanea kauaulaensis, Cyrtandra hematos, Gardenia remyi, Joinvillea ascendens* ssp. *ascendens, Labordia lorenciana, Nothocestrum latifolium,* and *Ochrosia haleakalae* numbers are declining, and they have not been observed regenerating in the wild.
- The only known wild individuals of *Cyperus neokunthianus, Kadua haupuensis,* and *Stenogyne kaalae* ssp. *sherffii* are extirpated; there is one remaining individual of *Deparia kaalaana,* and only three individuals of *Phyllostegia brevidens. Kadua haupuensis* and *Stenogyne kaalae* ssp. *sherffii* only exist in propagation.
- The following single-island endemic species are known from fewer than 250 individuals: *Asplenium diellaciniatum, Cyanea kauaulaensis, Cyperus neokunthianus, Cyrtandra hematos, Dryopteris glabra* var. *pusilla, Hypolepis hawaiiensis* var. *mauiensis, Kadua haupuensis, Labordia lorenciana, Lepidium orbiculare, Phyllostegia helleri, Pritchardia bakeri, Santalum involutum, Stenogyne kaalae* ssp. *sherffii,* and *Wikstroemia skottsbergiana.*

Animals

Like most native island biota, the Hawaiian population of band-rumped storm-petrel, the orangeblack Hawaiian damselfly, the anchialine pool shrimp (*Procaris hawaiana*), and the seven yellow-faced bees are particularly sensitive to disturbances due to their diminished numbers of individuals and populations, and small geographic ranges.

The band-rumped storm-petrel is represented in Hawaii by very small numbers of populations, and perhaps not more than a few hundred individuals (Harrison *et al.* 1990, p. 49). A single human-caused action such as establishment of mongoose on Kauai, or a hurricane during the breeding season, could cause reproductive failure and the mortality of a significant percentage of the remaining individuals. Threats to this species include habitat destruction and modification, landslides and erosion, hurricanes, predation, injury and mortality from lights and structures, and other human factors (such as commercial fisheries). The effects of these threats are compounded by the current low number of individuals and populations of band-rumped storm-petrel.

We consider the orangeblack Hawaiian damselfly vulnerable to extinction due to impacts associated with low numbers of individuals and low numbers of populations because this species is known from only five of eight Hawaiian Islands (Hawaii Island, Maui, Lanai, Molokai, and Oahu) where it occurred historically, and because of the current reduction in numbers on each of those five islands. Jordan *et al.* (2007, p. 247) conducted a genetic and comparative phylogeography analysis (a study of historical processes responsible for genetic divergence within a species) of four Hawaiian *Megalagrion* species, including the orangeblack Hawaiian damselfly. This analysis demonstrated *Megalagrion* populations with low genetic diversity are at greater risk of decline and extinction than those with high genetic diversity. The authors found that low genetic diversity was observed in populations known to be bottlenecked or relictual (groups of animals or plants that exist as a remnant of a formerly widely distributed group), including populations of the orangeblack Hawaiian damselfly. The following threats to this species have all been documented: habitat destruction and modification by agriculture and urban development, droughts, floods, and hurricanes; predation by nonnative fish, backswimmers, bullfrogs, and Jackson's chameleons; competition with caddisflies; and water extraction from streams and ponds. The effects of these threats are compounded by the current low number of individuals and populations of the orangeblack Hawaiian damselfly.

We consider the anchialine pool shrimp, *Procaris hawaiana,* vulnerable to extinction due to impacts associated with low numbers of individuals and populations because this species is known from only 25 of over 500 assessed anchialine pools on Hawaii Island, and from only 2 anchialine pools on Maui. Threats to *P. hawaiana* include: Habitat destruction and modification; agriculture and urban development; commercial trade; dumping of nonnative fish and trash into anchialine pools; recreation; and water extraction. The effects of these threats are compounded by the low number of individuals and populations of *P. hawaiana.*

We consider the seven Hawaiian yellow-faced bees vulnerable to extinction due to impacts associated with low numbers of individuals and populations. The seven yellow-faced bee species currently occur in only 22 locations (with some overlap) on six main Hawaiian Islands, and are vulnerable to habitat change and stochastic events due to low numbers and occurrences (Daly and Magnacca 2003, p. 3; Magnacca 2007, p. 173). *Hylaeus anthracinus* occurs in 15 total locations from Hawaii Island, Maui, Kahoolawe, Molokai, and Oahu, but has not been recently observed in its last known location on Lanai; *H. assimulans* is found in 5 total locations on Maui, Lanai, and Kahoolawe, but has not been observed recently on Oahu or Molokai; *H. facilis* is found in 2 total locations on Oahu and Molokai, but has not been observed recently from Lanai and Maui; *H. hilaris* is known from one population on Molokai and has not been observed recently from Lanai and Maui; *H. kuakea* is known from one small area on Oahu; *H. longiceps* is known from 6 total locations on Maui, Lanai, Molokai, and Oahu, but has not been collected from several historical locations on those islands; and *H. mana* is known from 3 locations on Oahu. Threats to these species include agriculture and urban development; habitat destruction and modification by nonnative ungulates, nonnative plants, tsunamis, fire, drought, and hurricanes; the effects of climate change on habitat; loss of host plants; and predation or competition by nonnative ants, wasps, and bees. The effects of these threats are compounded by the low numbers of individuals and populations of the seven yellow-faced bees.

Hybridization

Natural hybridization is a frequent phenomenon in plants and can lead to the creation of new species (Orians 2000, p. 1949), or sometimes to the decline of species through genetic assimilation or "introgression" (Ellstrand 1992, pp. 77, 81; Levin *et al.* 1996, pp. 10–16; Rhymer and Simberloff 1996, p. 85). Hybridization, however, is especially problematic for rare species that come into contact with species that are abundant or more common (Rhymer and Simberloff 1996, p. 83). We consider hybridization to be a threat to *Cyrtandra hematos, Microlepia strigosa* var. *mauiensis,* and *Myrsine fosbergii* because it will lead to extinction of the original genotypically distinct species and varieties, as noted by biologists' observations of occurrences (Kawelo 2009, in litt.; Ching Harbin 2015, in litt.; Oppenheimer 2015, in litt.;).

No Regeneration

Lack of, or low levels of, regeneration (reproduction and recruitment) in the wild has been observed, and is a threat to seven plants: *Cyanea kauaulaensis, Cyrtandra hematos, Gardenia remyi, Joinvillea ascendens* ssp. *ascendens, Labordia lorenciana, Nothocestrum latifolium,* and *Ochrosia haleakalae* (see *Plants* under "Low Numbers of Individuals and Populations," above). The reasons for this are not well understood; however, seed predation by rats and ungulates, inbreeding depression, and lack of pollinators are thought to play a role (Wagner *et al.* 1999, p. 1451; Wood *et al.* 2007, p. 198; HBMP 2010; Oppenheimer and Lorence 2012, pp. 20–21; PEPP 2010, p. 73; PEPP 2014, p. 34).

Competition With Nonnative Invertebrates

There are 15 known species of nonnative bees in Hawaii (Snelling 2003, p. 342), including two nonnative *Hylaeus* species (Magnacca 2007, p. 188). Most nonnative bees inhabit areas dominated by nonnative vegetation and do not compete with Hawaiian bees for foraging resources (Daly and Magnacca 2003, p. 13); however, the European honey bee (*Apis mellifera*) is an exception. This social species is often very abundant in areas with native vegetation and aggressively competes with *Hylaeus* for nectar and pollen (Hopper *et al.* 1996, p. 9; Daly and Magnacca 2003, p. 13; Snelling 2003, p. 345). The European honey bee was first introduced to the Hawaiian Islands in 1875, and currently inhabits areas from sea level to the upper tree line boundary (Howarth 1985, p. 156). Individuals of the European honey bee have been observed foraging on *Hylaeus* host plants such as *Scaevola* spp. and *Sesbania tomentosa* (ohai) (Hopper *et al.* 1996, p. 9; Daly and Magnacca 2003, p. 13; Snelling 2003, p. 345). Although we lack information indicating Hawaiian *Hylaeus* populations have declined because of competition with the European honey bee for nectar and pollen, it does forage in *Hylaeus* habitat and excludes *Hylaeus* species (Magnacca 2007b, p. 188; Lach 2008, p. 155). *Hylaeus* species do not occur in native habitat where there are large numbers of European honey bee individuals, but the impact of smaller, more moderate populations is not known (Magnacca 2007, p. 188). Nonnative, invasive bees are widely documented to decrease nectar volumes and usurp native pollinators (Lach 2008, p. 155). There are also indications that populations of the European honey bee are not as vulnerable as *Hylaeus* species to predation by nonnative ant species (see *Factor C. Disease or Predation,* above). As described above, *Hylaeus* bees that collect pollen from flowers of the native tree *Metrosideros polymorpha* were absent from trees with flowers visited by the big-headed ant, while visits by the European honey bee were not affected (Lach 2008, p. 155). As a result, Lach (2008, p. 155) concluded that the European honey bee may have a competitive advantage over *Hylaeus* species because it is not excluded by the big-headed ant. Other nonnative bees found in areas of native vegetation and overlapping with native *Hylaeus* population sites include *Ceratina* species (carpenter bees), *Hylaeus albonitens* (Australian colletid bees), *H. strenuus* (NCN), and *Lasioglossum impavidum* (NCN) (Magnacca 2007, p. 188; Magnacca and King 2013, pp. 19–22).

Loss of Host Plants Through Competition

The seven yellow-faced bees are dependent upon native flowering plants for their food resources, pollen and nectar, and for nesting sites. Introduced invertebrates outcompete native *Hylaeus* for use of host plants for pollen, nectar, and nesting sites. This effect is compounded by the impacts of nonnative ungulates on native host plants for *Hylaeus* (see discussion under Factors A and C, above). Nonnative plants are a threat to the seven yellow-faced bees and their host plants because they (1) Degrade habitat and outcompete native plants; (2) increase the intensity, extent, and frequency of fire, converting native shrubland and forest to land dominated by nonnative grasses; and (3) as a result of fire, cause the loss of the native host plants upon which the yellow-faced bees depend (Factor A). Drought, fire, and water extraction lead to loss of host plants within the known ranges of populations of yellow-faced bees, and are discussed under *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Their Habitat or Range,* above.

Competition With Caddisflies

Caddisflies (Order Trichoptera), a nonnative aquatic insect, were first observed and identified in Hawaii in the 1940s (Flint *et al.* 2003, p. 31); several species are established on all the main Hawaiian Islands. They may have been introduced inadvertently with aquarium plants released into streams (Flint *et al.* 2003, p. 37). Stream sampling showed that caddisflies accounted for 57 percent of the stream benthos (flora and fauna in stream sediment) in upper elevation Kauai streams (Englund *et al.* 2000, p. 23; Flint *et al.* 2003, p. 38), and caddisflies now inhabit every Oahu stream. Caddisflies compete with native aquatic invertebrate for resources and space (Haines 2015, in litt.), which may reduce prey abundance for naiads of the orangeblack Hawaiian damselfly. In addition, caddisflies provide a food source for introduced fish species, contributing to successful establishment of nonnative fish (Flint *et al.* 2003, p. 38), an additional threat to the orangeblack Hawaiian damselfly.

Climate Change

Our analyses under the Act include consideration of ongoing and projected changes in climate, and the impacts of global climate change and increasing temperatures on Hawaii ecosystems are the subjects of active research. Global temperature has increased over the past century, and particularly since the mid-20th century (IPCC 2014, p. 5), and this increase in temperature is correlated to emissions of carbon dioxide and other greenhouse gasses, which have increased more since 1970 than in prior periods (IPCC 2014, pp. 13–14). Analysis of the historical record indicates surface temperature in Hawaii has been increasing since the early 1900s, with relatively rapid warming over the past 30 years. The average increase since 1975 has been 0.48 °F (0.27 °C) per decade for annual mean temperature at elevations above 2,600 ft (800 m) and 0.16 °F (0.09 °C) per decade for elevations below 800 m (Giambelluca *et al.* 2008, pp. 3–4). Relative to average global temperature from 1986 to 2005, the average ambient air temperature is likely to increase globally by at least 0.5 to 4.7 °F (0.3 to 2.6 °C) by the year 2100 (IPCC 2013, p. 20). Based on models using climate data downscaled for Hawaii, the ambient temperature is projected to increase by 3.8 to 7.7 °F (2.1 to 4.3 °C), depending upon elevation and the emission scenario (Liao *et al.* 2015, p. 4344). On the main Hawaiian Islands, predicted changes associated with increases in temperature include a shift in vegetation zones upslope, a similar shift in animal species' ranges, changes in mean precipitation with unpredictable effects on local environments, increased occurrence of drought cycles, and increases in intensity and numbers of hurricanes (Loope and Giambelluca 1998, pp. 514–515; U.S. Global Change Research Program (US–GCRP) 2009, pp. 10, 12, 17–18, 32–33; Giambelluca 2013, p. 6). Additionally, sea level is rising as a result of thermal expansion of warming ocean water; the melting of ice sheets, glaciers, and ice caps; and the addition of water from terrestrial systems (Climate Institute 2011, in litt.), and sea-level rise negatively affects species occurring in low-lying coastal areas including *Solanum nelsonii* (Starr 2011, in litt.) and affects the stability of anchialine pools systems that are habitat for *Procaris hawaiana* (Sakihara 2015, in litt.).

The forecast of changes in precipitation is highly uncertain because it depends, in part, on how the El Niño–La Niña weather cycle (an episodic feature of the ocean-atmosphere system in the tropical Pacific having important global consequences for weather and climate) might change (State of Hawaii 1998, pp. 2–10). The historical record indicates that Hawaii tends to be dry (relative to a running average) during El Niño phases and wet during La Niña phases (Chen and Chu 2005, pp. 4809–4810). However, over the past century, the Hawaiian Islands have experienced a decrease in precipitation of just over 9 percent (US National Science and Technology Council 2008, p. 61) and a trend of decrease (from the long-term mean) is evident in recent decades (Chu and Chen 2005, pp. 4802–4803; Diaz *et al.* 2005, pp. 1–3). Stream-gauge data provide corroborating evidence of a long-term decrease in precipitation and stream flow on the Hawaiian Islands (Oki 2004, p. 4). This long-term drying trend, coupled with existing ditch diversions and periodic El Niño-caused drying events, has created a pattern of severe and persistent stream dewatering events (Polhemus 2008, in litt., p. 26). Models of future rainfall downscaled for Hawaii generally project increasingly wet windward slopes and mild to extreme drying of leeward areas in particular by the middle and end of the 21st century (Timm and Diaz 2009, p. 4262; Elison Timm *et al.* 2015, pp. 95, 103–105). Altered seasonal moisture regimes can have negative impacts on plant growth cycles and overall negative impacts on native ecosystems (US–GCRP 2009, pp. 32–33). Long periods of decline in annual precipitation result in a reduction of moisture availability, an increase in drought frequency and intensity, and a self-perpetuating cycle of nonnative plant invasion, fire, and erosion (US–GCRP 2009, pp. 32–33; Warren 2011, pp. 221–226) (see "Habitat Destruction and Modification by Fire," above). Overall, the documented and projected increase in variance of precipitation events will change patterns of water availability for the species (Parmesan and Matthews 2006, p. 340), changes that point to changes in plant communities as a consequence over the coming decades.

Tropical cyclone frequency and intensity are projected to change as a result of increasing temperature and changing circulation associated with climate change over the next 100 to 200 years (Vecchi and Soden 2007, pp. 1068–1069, Figures 2 and 3; Emanuel *et al.* 2008, p. 360, Figure 8; Yu *et al.* 2010, p. 1371, Figure 14). In the central Pacific, modeling projects an increase of up to two additional tropical cyclones per year in the main Hawaiian Islands by 2100 (Murakami *et al.* 2013, p. 2, Figure 1d). In general, tropical cyclones with the intensities of hurricanes have been an uncommon occurrence in the Hawaiian Islands. From the 1800s until 1949, hurricanes were only rarely reported from ships in the area. Between 1950 and 1997, 22 hurricanes passed near or over the Hawaiian Islands, and 5 of these caused serious damage (Businger 1998, in litt.). A recent study shows that, with a possible shift in the path of the subtropical jet stream northward, away from Hawaii, more storms will be able to approach and reach the Hawaiian Islands from an easterly direction, with Hurricane Iselle in 2014 being an example (Murakami *et al.* 2015, p. 751).

As described above (see *Climate Change Vulnerability Assessment for the Hawaiian Plants,* above, and Table 2), 27 of the 39 plant species in this proposal were included in the recent analysis of the vulnerability of Hawaiian plants to climate changes conducted by Fortini *et al.* (2013, 134 pp.). All 27 species scored as moderately to extremely vulnerable, as did most other species in the analysis that already are considered to be of conservation concern (because they face multiple non-climate threats) (Fortini *et al.* 2013, pp. 25, 37). The specific impacts of climate change effects on the habitat, biology, and ecology of individual species are largely unknown and remain a subject of study. However, in the assessment of more than 1,000 Hawaiian plants, including 319 already listed as endangered or threatened, a strong relationship emerged between climate vulnerability scores and current threats and conservation status (Fortini *et al.* 2013, p. 5). Therefore, we anticipate that the 13 plant species not analyzed are likely to be similarly vulnerable to climate change effects. The projected landscape- or island-scale changes in temperature and precipitation, as well as the potentially catastrophic impacts of projected increases in storm frequency and severity, also point to likely adverse impacts of climate change on all 10 of the animal species considered in this proposal because they rely on abiotic conditions, such as water temperature, or habitat elements, such as host plants and prey species, likely to be substantively altered by climate change.

Although we lack information about the specific effects of current and projected climate change on these species, we anticipate that increased ambient temperature and hurricane intensity, changing precipitation patterns, and sea-level rise and inundation will create additional stresses on these species because they are vulnerable to these disturbances. For example, projected warmer temperatures and increased storm severity resulting from climate change are likely to exacerbate other threats to the species, such as by enhancing the spread of nonnative invasive plants into these species' native ecosystems in Hawaii. The drying trend, especially on leeward sides of islands, creates suitable conditions for increased invasion by nonnative grasses and enhances the risk of wildfire. Sea-level rise threatens ecosystems and species nearest the coast, including the anchialine pool ecosystem.

The risk of extinction as a result of the effects of climate change increases when a species' range and habitat requirements are restricted, its habitat decreases, and its numbers and number of populations decline (IPCC 2014, pp. 14–15). The fragmented range, diminished number of populations, and low total number of individuals have compromised the rangewide redundancy and resilience of these 49 species. Therefore, we would expect them to be particularly vulnerable to the habitat impacts of the effects of climate change (Loope and Giambelluca 1998, pp. 504–505; Pounds *et al.* 1999, pp. 611–612; Still *et al.* 1999, p. 610; Benning *et al.* 2002, pp. 14,246–14,248; Giambelluca and Luke 2007, pp. 13–15). Although we cannot predict the timing, extent, or magnitude of specific impacts, we do expect the effects of climate change to exacerbate the current threats to these species, such as habitat loss and degradation.

In summary, based on the best available information, we conclude that climate change effects, including increased inter-annual variability of ambient temperature, precipitation, and hurricanes, are likely to impose additional stresses on all 11 ecosystems and all of the 49 species we are listing in this rule, thus exacerbating current threats to these species. These 49 species all persist with small population sizes and highly restricted or fragmented ranges. They thus face increased immediate risk from stochastic events such as hurricanes, which can extinguish an important proportion of the remaining individuals, and from long-term, landscape-scale environmental changes because reduced populations often lack ecological or genetic adaptive capacity (Fortini *et al.* 2013, pp. 3–5).

In addition to impacts resulting from changes in terrestrial habitat and disturbance regimes, climate change affects aquatic habitat. For example, physiological stress in the orangeblack Hawaiian damselfly is caused by increased water temperatures to which the species is not adapted (Pounds *et al.* 1999, pp. 611–612; Still *et al.* 1999, p. 610; Benning *et al.* 2002, pp. 14246, 14248). All of these aspects of climate change and their impacts on native species and ecosystems will be exacerbated by human demands on Hawaii's natural resources; for example, decreased availability of fresh water will magnify the impact of human water consumption on Hawaii's natural streams and reservoirs (Giambelluca *et al.* 1991, p. v). Climate change impacts contribute to the multiple threats affecting the status of all of these species, and the effects of climate change are projected to increase in the future.

Summary of Factor E

We consider the threat from artificial lighting and structures to be a serious and ongoing threat to the band-rumped storm-petrel in Hawaii because these threats cause injury and mortality, resulting in a loss of breeding individuals and juveniles, and are expected to continue into the future. Injury or mortality or loss of food sources caused by the activities of commercial fisheries, and injury or mortality resulting from ingestion of plastics and marine debris, are likely to contribute to further decline in the Hawaiian population of the band-rumped storm-petrel.

We consider the threats from recreational use of, and dumping of trash and introduction of nonnative fish into, the pools that support the anchialine pool shrimp *Procaris hawaiana* to be serious threats that have the potential to occur at any time, although their occurrence is not predictable. The use of anchialine pools for dumping of trash leads to accelerated sedimentation in the pool, exacerbating conditions leading to its senescence. Changing the anchialine pool system by dumping of trash, introduction of nonnative fish, and sedimentation also affects habitat for the orangeblack Hawaiian damselfly. In addition, recreational use of off-road vehicles contributes to increased sedimentation in anchialine pools, and has been noted to affect the habitat of the orangeblack Hawaiian damselfly on Lanai.

We consider the impacts from limited numbers of individuals and populations to be a serious and ongoing threat to all 39 plant species, and especially for the following 19 plants: *Asplenium diellaciniatum Cyanea kauaulaensis, Cyperus neokunthianus, Cyrtandra hematos, Deparia kaalaana, Dryopteris glabra* var. *pusilla, Gardenia remyi, Hypolepis hawaiiensis* var. *mauiensis, Joinvillea ascendens* ssp. *ascendens, Kadua haupuensis, Labordia lorenciana, Lepidium orbiculare, Myrsine fosbergii, Phyllostegia brevidens, P. helleri, Pritchardia bakeri, Santalum involutum, Stenogyne kaalae* ssp. *sherffii,* and *Wikstroemia skottsbergiana,* as low numbers and small occurrences of these plants result in greater vulnerability to stochastic events and can result in reduced levels of genetic variability leading to diminished capacity to adapt to environmental changes. Under these circumstances, the likelihood of long-term persistence is diminished, and the likelihood of extirpation or extinction is increased. This threat applies to the entire range of each of these species.

We also consider the impacts from limited numbers of individuals and populations to be a serious and ongoing threat to the band-rumped storm-petrel, the orangeblack Hawaiian damselfly, the anchialine pool shrimp *Procaris hawaiana,* and to the yellow-faced bees (*Hylaeus anthracinus, H. assimulans, H. facilis, H. hilaris, H. kuakea, H. longiceps,* and *H. mana*). The threat from limited numbers of individuals and populations is ongoing and is expected to continue into the future because (1) A single catastrophic event may result in extirpation of remaining populations and extinction of these species; (2) species with few known occurrences are less resilient to threats that might otherwise have a relatively minor impact (on widely distributed species); (3) these species experience reduced reproductive vigor due to inbreeding depression; and (4) they experience reduced levels of genetic variability leading to diminished capacity to adapt to environmental changes, thereby lessening the probability of its long-term persistence.

The threat from hybridization is an unpredictable but ongoing threat to *Cyrtandra hematos, Microlepia strigosa* var. *mauiensis,* and *Myrsine fosbergii,* as has been observed at current occurrences.

We consider the threat to *Cyanea kauaulaensis, Cyrtandra hematos, Gardenia remyi, Joinvillea ascendens* ssp. *ascendens, Labordia lorenciana, Nothocestrum latifolium,* and *Ochrosia haleakalae* from lack of regeneration to be ongoing and to continue into the future because the reasons for the lack of recruitment in the wild are unknown and uncontrolled, and any competition from nonnative plants or habitat modification by ungulates or fire, or other threats could lead to the extirpation of these species.

We consider the threat of competition with nonnative invertebrates a serious and ongoing threat to the yellow-faced bees, *Hylaeus anthracinus, H. assimulans, H. facilis, H. hilaris, H. kuakea, H. longiceps,* and *H. mana.* Nonnative wasps and bees are aggressive and can prevent use of the native host plants required for food and nesting by all seven yellow-faced bees. Competition with caddisflies is a threat to the orangeblack Hawaiian damselfly.

Based on current and projected changes in climate, increasing temperature, changing precipitation regimes, increases in storm severity, and sea-level rise will likely exacerbate the threats to these 49 species. The effects of climate change on these species include, but are not limited to, physiological stress caused by increased water or air temperature or lack of moisture, the long-term destruction and modification of habitat, increased competition by nonnative species, and changes in disturbance regimes that lead to changes in habitat and direct mortality of individuals (*e.g.,* fire, drought, flooding, and hurricanes).

Determination for 49 Species

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species based on (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to each of the 49 species. We find that all of these species face threats that are ongoing and are expected to continue into the future throughout their ranges. Habitat destruction and modification by agriculture and urban development, and conversion of wetland habitat or water extraction resulting from such activity, is a threat to one plant, *Cyclosorus boydiae,* and seven animals (the orangeblack Hawaiian damselfly, the anchialine pool shrimp (*Procaris hawaiana*), *Hylaeus anthracinus, H. assimulans, H. facilis, H. hilaris,* and *H. longiceps*) (Factor A). Habitat destruction and modification by nonnative feral ungulates poses a threat to 46 of the 49 species (except for *Cyanea kauaulaensis, Hypolepis hawaiiensis* var. *mauiensis,* and the anchialine pool shrimp) (Factor A). Habitat destruction and modification by nonnative plants poses a threat to all 39 plant species and 9 of the 10 animals (except for *Procaris hawaiana*) (Factor A). Fourteen of the plant species (*Exocarpos menziesii, Festuca hawaiiensis, Joinvillea ascendens* ssp. *ascendens, Labordia lorenciana, Nothocestrum latifolium, Ochrosia haleakalae, Portulaca villosa, Ranunculus mauiensis, Sanicula sandwicensis, Santalum involutum, Schiedea pubescens, Sicyos lanceoloideus, S. macrophyllus,* and *Solanum nelsonii*) and all seven yellow-faced bees, are at risk of habitat destruction and modification by fire. Habitat loss and mortality resulting from hurricanes is a threat to the plant *Pritchardia bakeri,* the band-rumped storm-petrel, the orangeblack Hawaiian damselfly, and all seven yellow-faced bees (Factor A). Twenty of the plant species (*Cyanea kauaulaensis, Cyclosorus boydiae, Deparia kaalaana, Dryopteris glabra* var. *pusilla, Gardenia remyi, Joinvillea ascendens* ssp. *ascendens, Kadua fluviatilis, K. haupuensis, Labordia lorenciana, Lepidium orbiculare, Phyllostegia brevidens, P. helleri, P. stachyoides, Portulaca villosa, Pseudognaphalium sandwicensium* var. *molokaiense, Ranunculus hawaiensis, R. mauiensis, Sanicula sandwicensis, Schiedea pubescens,* and *Solanum nelsonii*), the band-rumped storm-petrel, and the orangeblack Hawaiian damselfly are threatened by the destruction and modification of their habitats from, either singly or in combination, landslides, rockfalls, treefalls, flooding, or tsunamis (Factor A). Habitat loss or degradation and loss of host plants, mortality, and water extraction due to drought is a threat to the plants *Cyclosorus boydiae, Deparia kaalaana, Huperzia stemmermanniae, Phyllostegia* *stachyoides, Ranunculus hawaiensis, R. mauiensis, Sanicula sandwicensis, Schiedea pubescens, Sicyos lanceoloideus,* and *Solanum nelsonii;* the orangeblack Hawaiian damselfly; and all seven yellow-faced bees (Factor A and Factor E). Unpermitted collection for commercial purposes poses a serious threat to the anchialine pool shrimp *Procaris hawaiana* (Factor B). Predation or herbivory is a serious and ongoing threat to 35 of the 39 plant species (by feral pigs, goats, axis deer, black-tailed deer, cattle, sheep, mouflon, rats, slugs, and the black twig borer), to the band-rumped storm petrel (by barn owls, cats, rats, and mongoose), and to the seven yellow-faced bees (by ants and wasps) (Factor C). Predation by bullfrogs, backswimmers, nonnative fish, and Jackson's chameleons is a threat to the orangeblack Hawaiian damselfly (Factor C). Predation by nonnative fish is a threat to the anchialine pool shrimp (Factor C). The existing regulatory mechanisms do not adequately address these threats to the 49 species (Factor D). Injury and mortality caused by artificial lighting and structures are serious and ongoing threats to the band-rumped storm-petrel (Factor E). The threats of injury or mortality, or loss of food sources, caused by the activities of commercial fisheries, and injury or mortality resulting from ingestion of plastics and marine debris, can contribute to further decline of the Hawaiian population of the band-rumped storm-petrel (Factor E). Recreational use of, and dumping of trash and nonnative fish into, anchialine pools is a threat to the anchialine pool shrimp and also to the orangeblack Hawaiian damselfly that uses that habitat (Factor E). Competition by ants, wasps, and bees for the food and nesting resources, including loss of native host plants, is a threat to all seven yellow-faced bees. Competition with caddisflies is a threat to the orangeblack Hawaiian damselfly (Factor E). These threats are exacerbated by these species' inherent vulnerability to extinction from stochastic events at any time because of their endemism, low numbers of individuals and populations, and restricted habitats. There are serious and ongoing threats to all 49 species due to factors associated with low numbers of individuals and populations (Factor E). The threat of low numbers to seven plants (*Cyanea kauaulaensis, Cyrtandra hematos, Gardenia remyi, Joinvillea ascendens* ssp. *ascendens, Labordia lorenciana, Nothocestrum latifolium,* and *Ochrosia haleakalae*) is exacerbated by lack of regeneration in the wild (Factor E). Hybridization is a threat to three plant species, *Cyrtandra hematos, Microlepia strigosa* var. *mauiensis,* and *Myrsine fosbergii* (Factor E). The effects of rising temperature and other aspects of climate change are likely to exacerbate many of these threats and likely to pose threats to the 49 species (Factor E).

The Act defines an endangered species as any species that is "in danger of extinction throughout all or a significant portion of its range" and a threatened species as any species "that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future." We find that each of the endemic Hawaiian species and the Hawaii DPS of the band-rumped storm-petrel are presently in danger of extinction throughout their entire ranges. Based on the immediacy, severity, scope, and interaction of the threats described above, such as the pervasive threats of predation and habitat loss and degradation posed by nonnative plants and animals, a determination of threatened status for any of these species is not appropriate. Therefore, on the basis of the best available scientific and commercial information, we are listing the following 49 species as endangered in accordance with sections 3(6) and 4(a)(1) of the Act: the plants *Asplenium diellaciniatum, Calamagrostis expansa, Cyanea kauaulaensis, Cyclosorus boydiae, Cyperus neokunthianus, Cyrtandra hematos, Deparia kaalaana, Dryopteris glabra* var. *pusilla, Exocarpos menziesii, Festuca hawaiiensis, Gardenia remyi, Huperzia stemmermanniae, Hypolepis hawaiiensis* var. *mauiensis, Joinvillea ascendens* ssp. *ascendens, Kadua fluviatilis, Kadua haupuensis, Labordia lorenciana, Lepidium orbiculare, Microlepia strigosa* var. *mauiensis, Myrsine fosbergii, Nothocestrum latifolium, Ochrosia haleakalae, Phyllostegia brevidens, Phyllostegia helleri, Phyllostegia stachyoides, Portulaca villosa, Pritchardia bakeri, Pseudognaphalium sandwicensium* var. *molokaiense, Ranunculus hawaiensis, Ranunculus mauiensis, Sanicula sandwicensis, Santalum involutum, Schiedea diffusa* ssp. *diffusa, Schiedea pubescens, Sicyos lanceoloideus, Sicyos macrophyllus, Solanum nelsonii, Stenogyne kaalae* ssp. *sherffii,* and *Wikstroemia skottsbergiana;* and the following animals: the Hawaii DPS of the band-rumped storm-petrel (*Oceanodroma castro*), the orangeblack Hawaiian damselfly (*Megalagrion xanthomelas*), the anchialine pool shrimp (*Procaris hawaiana*), and the yellow-faced bees *Hylaeus anthracinus, Hylaeus assimulans, Hylaeus facilis, Hylaeus hilaris, Hylaeus kuakea, Hylaeus longiceps,* and *Hylaeus mana.*

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so throughout all or a significant portion of its range (SPR). Under our SPR policy (79 FR 37578, July 1, 2014), if a species is endangered or threatened throughout a significant portion of its range and the population in that significant portion is a valid DPS, we will list the DPS rather than the entire taxonomic species or subspecies. We have determined that the Hawaii population of the band-rumped storm-petrel is a valid DPS, and we are listing that DPS. Each of the other 48 species endemic to the Hawaiian Islands that we are listing in this rule is highly restricted in its range, and the threats occur throughout its range. Therefore, we assessed the status of each species throughout its entire range. In each case, the threats to the survival of these species occur throughout the species' range and are not restricted to any particular portion of that range. Accordingly, our assessment and determination applies to each species throughout its entire range. Likewise, we assessed the status of the Hawaii DPS of the band-rumped storm-petrel throughout the range of the DPS and have determined that the threats occur throughout the DPS and are not restricted to any particular portion of the DPS. Because we have determined that these 48 species and one DPS are endangered throughout all of their ranges, no portion of their ranges can be "significant" for purposes of the definitions of "endangered species" and "threatened species." See the Final Policy of Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species" (79 FR 37578, July 1, 2014).

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness and conservation by Federal, State, and local agencies; private organizations; and individuals. The Act encourages cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline shortly after a species is listed and preparation of a draft and final recovery plan. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan identifies site-specific management actions that set a trigger for review of the five factors that control whether a species remains endangered or may be downlisted or delisted, and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our Web site (*http://www.fws.gov/endangered*), or from our Pacific Islands Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.*, restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on all lands.

Following publication of this final listing rule, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State of Hawaii will be eligible for Federal funds to implement management actions that promote the protection or recovery of the 49 species. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants*.

Please let us know if you are interested in participating in recovery efforts for one or more of these 49 species. Additionally, we invite you to submit any new information on these species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Federal agency actions within the species' habitat that may require conference or consultation or both as described in the preceding paragraph include, but are not limited to, actions within the jurisdiction of the Natural Resources Conservation Service (NRCS), the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and branches of the Department of Defense (DOD). Examples of these types of actions include activities funded or authorized under the Farm Bill Program, Environmental Quality Incentives Program, Ground and Surface Water Conservation Program, Clean Water Act (33 U.S.C. 1251 *et seq.*), Partners for Fish and Wildlife Program, and DOD construction activities related to training or other military missions.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered wildlife. The prohibitions of section 9(a)(1) of the Act, codified at 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to take (which includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these) endangered wildlife within the United States or the high seas. In addition, it is unlawful to import; export; deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity; or sell or offer for sale in interstate or foreign commerce any listed species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to employees of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22. With regard to endangered wildlife, a permit may be issued for scientific purposes, to enhance the propagation or survival of the species, or for incidental take in connection with otherwise lawful activities. There are also certain statutory exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

With respect to endangered plants, prohibitions outlined at 50 CFR 17.61 make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale in interstate or foreign commerce, or to remove and reduce to possession any such plant species from areas under Federal jurisdiction. In addition, for endangered plants, the Act prohibits malicious damage or destruction of any such species on any area under Federal jurisdiction, and the removal, cutting, digging up, or damaging or destroying of any such species on any other area in knowing violation of any State law or regulation, or in the course of any violation of a State criminal trespass law. Exceptions to these prohibitions are outlined at 50 CFR 17.62.

We may issue permits to carry out otherwise prohibited activities involving endangered plants under certain circumstances. Regulations governing permits are codified at 50 CFR 17.62. With regard to endangered plants, the Service may issue a permit authorizing any activity otherwise prohibited by 50 CFR 17.61 for scientific purposes or for enhancing the propagation or survival of endangered plants.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a listing on proposed and ongoing activities within the range of a listed species. Based on the best available information, activities that may potentially result in a violation of section 9 of the Act include but are not limited to:

(1) Unauthorized collecting, handling, possessing, selling, delivering, carrying, or transporting of the species, including import or export across State lines and international boundaries, except for properly documented antique specimens of these taxa at least 100 years old, as defined by section 100(h)(1) of the Act;

(2) Activities that take or harm the band-rumped storm-petrel, the orangeblack Hawaiian damselfly, the anchialine pool shrimp (*Procaris hawaiana*), and the seven yellow-faced bees by causing significant habitat modification or degradation such that it causes actual injury by significantly impairing essential behavior patterns. This may include introduction of nonnative species that compete with or prey upon the 10 animal species or the unauthorized release of biological control agents that attack the life stage of any of these 10 species; and

(3) Damaging or destroying any of the 39 plant species in violation of the Hawaii State law prohibiting the take of listed species.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Pacific Islands Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). Requests for copies of the regulations concerning listed species and general inquiries regarding prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Pacific Region, Ecological Services, Endangered Species Permits, Eastside Federal Complex, 911 NE. 11th Avenue, Portland, OR 97232–4181 (telephone 503–231–6131; facsimile 503–231–6243).

Required Determinations

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with listing a species as an endangered or threatened species under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* under Docket No. FWS–R1–ES–2015–0125 and upon request from the Pacific Islands Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this final rule are the staff members of the Pacific Islands Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.11(h), the List of Endangered and Threatened Wildlife, as follows:

■ a. By adding an entry for "Storm-petrel, band-rumped (Hawaii DPS)" in alphabetical order under BIRDS;

■ b. By adding entries for "Bee, yellow-faced" (*Hylaeus anthracinus*), "Bee, yellow-faced" (*Hylaeus assimulans*), "Bee, yellow-faced" (*Hylaeus facilis*), "Bee, yellow-faced" (*Hylaeus hilaris*), "Bee, yellow-faced" (*Hylaeus kuakea*), "Bee, yellow-faced" (*Hylaeus longiceps*), "Bee, yellow-faced" (*Hylaeus mana*), and "Damselfly, orangeblack Hawaiian" (*Megalagrion xanthomelas*) in alphabetical order under INSECTS; and

■ c. By adding an entry for "Shrimp, anchialine pool" (*Procaris hawaiana*) before the entry for "Shrimp, anchialine pool" *(Vetericaris chaceorum)* under CRUSTACEANS.

The additions read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
BIRDS				
* *	*	*	*	* *
Storm-petrel, band-rumped (Hawaii DPS).	*Oceanodroma castro*	U.S.A. (HI)	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
* *	*	*	*	* *
INSECTS				
Bee, yellow-faced	*Hylaeus anthracinus*	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
Bee, yellow-faced	*Hylaeus assimulans*	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
Bee, yellow-faced	*Hylaeus facilis*	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
Bee, yellow-faced	*Hylaeus hilaris*	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
Bee, yellow-faced	*Hylaeus kuakea*	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
Bee, yellow-faced	*Hylaeus longiceps*	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
Bee, yellow-faced	*Hylaeus mana*	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
* * *	*	*	*	* *
Damselfly, orangeblack Hawaiian.	*Megalagrion xanthomelas*	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
* * *	*	*	*	* *
CRUSTACEANS				
* * *	*	*	*	* *
Shrimp, anchialine pool	*Procaris hawaiana*	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
* * *	*	*	*	* *

■ 3. Amend § 17.12(h), the List of Endangered and Threatened Plants, as follows:

■ a. By adding entries for *Calamagrostis expansa, Cyanea kauaulaensis, Cyperus neokunthianus, Cyrtandra hematos, Exocarpos menziesii, Festuca hawaiiensis, Gardenia remyi, Joinvillea ascendens* ssp. *ascendens, Kadua fluviatilis, Kadua haupuensis, Labordia lorenciana, Lepidium orbiculare, Myrsine fosbergii, Nothocestrum latifolium, Ochrosia haleakalae, Phyllostegia brevidens, Phyllostegia helleri, Phyllostegia stachyoides, Portulaca villosa, Pritchardia bakeri, Pseudognaphalium sandwicensium* var. *molokaiense, Ranunculus hawaiensis, Ranunculus mauiensis, Sanicula sandwicensis, Santalum involutum, Schiedea diffusa* ssp. *diffusa, Schiedea pubescens, Sicyos lanceoloideus, Sicyos macrophyllus, Solanum nelsonii, Stenogyne kaalae* ssp. *sherffii*, and *Wikstroemia skottsbergiana* in alphabetical order under FLOWERING PLANTS; and

■ b. By adding entries for *Asplenium diellaciniatum, Cyclosorus boydiae, Deparia kaalaana, Dryopteris glabra* var. *pusilla, Huperzia stemmermanniae, Hypolepis hawaiiensis* var. *mauiensis*, and *Microlepia strigosa* var. *mauiensis* in alphabetical order under FERNS AND ALLIES.

The additions read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Scientific name	Common name	Where listed	Status	Listing citations and applicable rules
FLOWERING PLANTS				
* * *	*	*	*	* *
Calamagrostis expansa	Maui reedgrass	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
* * *	*	*	*	* *
Cyanea kauaulaensis	No common name	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
* * *	*	*	*	* *
Cyperus neokunthianus	No common name	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
* * *	*	*	*	* *
Cyrtandra hematos	Haiwale	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.

Scientific name	Common name	Where listed	Status	Listing citations and applicable rules
* *	*	* *		* *
Exocarpos menziesii	Heau	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
Festuca hawaiiensis	No common name	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
* *	*	* *		* *
Gardenia remyi	Nanu	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
* *	*	* *		* *
Joinvillea ascendens ssp. *ascendens*.	Ohe	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
* *	*	* *		* *
Kadua fluviatilis	Kamapuaa	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
Kadua haupuensis	No common name	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
* *	*	* *		* *
Labordia lorenciana	No common name	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
* *	*	* *		* *
Lepidium orbiculare	Anaunau	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
* *	*	* *		* *
Myrsine fosbergii	Kolea	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
* *	*	* *		* *
Nothocestrum latifolium	Aiea	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
* *	*	* *		* *
Ochrosia haleakalae	Holei	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
* *	*	* *		* *
Phyllostegia brevidens	No common name	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
* *	*	* *		* *
Phyllostegia helleri	No common name	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
* *	*	* *		* *
Phyllostegia stachyoides	No common name	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.
* *	*	* *		* *
Portulaca villosa	Ihi	Wherever found	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; 09/30/2016.

Scientific name	Common name	Where listed	Status	Listing citations and applicable rules
* *	*	*	*	* *
Pritchardia bakeri	Baker's loulu	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
* *	*	*	*	* *
Pseudognaphalium sandwicensium var. *molokaiense*.	Enaena	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
* *	*	*	*	* *
Ranunculus hawaiensis	Makou	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
Ranunculus mauiensis	Makou	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
* *	*	*	*	* *
Sanicula sandwicensis	No common name	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
* *	*	*	*	* *
Santalum involutum	Iliahi	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
* *	*	*	*	* *
Schiedea diffusa ssp. *diffusa*	No common name	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
* *	*	*	*	* *
Schiedea pubescens	Maolioli	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
* *	*	*	*	* *
Sicyos lanceoloideus	Anunu	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
Sicyos macrophyllus	Anunu	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
* *	*	*	*	* *
Solanum nelsonii	Popolo	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
* *	*	*	*	* *
Stenogyne kaalae ssp. *sherffii*	No common name	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
* *	*	*	*	* *
Wikstroemia skottsbergiana	Akia	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
* *	*	*	*	* *
FERNS AND ALLIES				
* *	*	*	*	* *
Asplenium diellaciniatum	No common name	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
* *	*	*	*	* *
Cyclosorus boydiae	Kupukupu makalii	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.

Scientific name	Common name	Where listed	Status	Listing citations and applicable rules
Deparia kaalaana	No common name	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
*	*	*	*	* *
Dryopteris glabra var. *pusilla*	Hohiu	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
*	*	*	*	* *
Huperzia stemmermanniae	No common name	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
Hypolepis hawaiiensis var. *mauiensis.*	Olua	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
*	*	*	*	* *
Microlepia strigosa var. *mauiensis.*	No common name	Wherever found	E	81 FR [*Insert **Federal Register** page where the document begins*]; 09/30/2016.
*	*	*	*	* *

Dated: September 12, 2016.

Stephen Guertin,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2016–23112 Filed 9–29–16; 8:45 am]

BILLING CODE 4333–15–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
1985

FEDERAL REGISTER

Vol. 81 Friday,
No. 190 September 30, 2016

Part VI

Department of the Interior

Fish and Wildlife Service

50 CFR Part 16

Injurious Wildlife Species; Listing 10 Freshwater Fish and 1 Crayfish; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 16

[Docket No. FWS–HQ–FAC–2013–0095; FXFR13360900000–167–FF09F14000]

RIN 1018–AY69

Injurious Wildlife Species; Listing 10 Freshwater Fish and 1 Crayfish

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service) is amending its regulations to add to the list of injurious fish the following freshwater fish species: Crucian carp (*Carassius carassius*), Eurasian minnow (*Phoxinus phoxinus*), Prussian carp (*Carassius gibelio*), roach (*Rutilus rutilus*), stone moroko (*Pseudorasbora parva*), Nile perch (*Lates niloticus*), Amur sleeper (*Perccottus glenii*), European perch (*Perca fluviatilis*), zander (*Sander lucioperca*), and wels catfish (*Silurus glanis*). In addition, the Service also amends its regulations to add the freshwater crayfish species common yabby (*Cherax destructor*) to the list of injurious crustaceans. These listings will prohibit the importation of any live animal, gamete, viable egg, or hybrid of these 10 fish and 1 crayfish into the United States, except as specifically authorized. These listings will also prohibit the interstate transportation of any live animal, gamete, viable egg, or hybrid of these 10 fish and 1 crayfish between States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States, except as specifically authorized. These species are injurious to the interests of agriculture or to wildlife or the wildlife resources of the United States, and the listing will prevent the purposeful or accidental introduction, establishment, and spread of these 10 fish and 1 crayfish into ecosystems of the United States.

DATES: This rule is effective on October 31, 2016.

ADDRESSES: This final rule is available on the Internet at *http://www.regulations.gov* under Docket No. FWS–HQ–FAC–2013–0095. Comments and materials received, as well as supporting documentation used in the preparation of this rule, will also be available for public inspection by appointment during normal business hours at: U.S. Fish and Wildlife Service; 5275 Leesburg Pike; Falls Church, VA 22041.

FOR FURTHER INFORMATION CONTACT: Susan Jewell, U.S. Fish and Wildlife Service, MS–FAC, 5275 Leesburg Pike, Falls Church, VA 22041–3803; 703–358–2416. If a telecommunications device for the deaf (TDD) is required, please call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

The U.S. Fish and Wildlife Service (Service) is amending its regulations to add to the list of injurious fish the following nonnative freshwater fish species: Crucian carp, Eurasian minnow, Prussian carp, roach, stone moroko, Nile perch, Amur sleeper, European perch, zander, and wels catfish. In addition, the Service is amending its regulations to add the common yabby, a nonnative freshwater crayfish species, to the list of injurious crustaceans. These listings prohibit the importation of any live animal, gamete, viable egg, or hybrid of these 10 fish and 1 crayfish (11 species) into the United States, except as specifically authorized. These listings also prohibit the interstate transportation of any live animal, gamete, viable egg, or hybrid of these 10 fish and 1 crayfish, except as specifically authorized. With this final rule, the importation and interstate transportation of any live animal, gamete, viable egg, or hybrid of these 10 fish and 1 crayfish may be authorized only by permit for scientific, medical, educational, or zoological purposes, or without a permit by Federal agencies solely for their own use. This action is necessary to protect the interests of agriculture, wildlife, or wildlife resources from the purposeful or accidental introduction, establishment, and spread of these 11 species into ecosystems of the United States.

On October 30, 2015, we published a proposed rule in the **Federal Register** (80 FR 67026) to add the 11 species to the list of injurious fish and crustaceans as injurious wildlife under the Lacey Act (the Act; 18 U.S.C. 42, as amended) and announced the availability of the draft economic analysis and the draft environmental assessment of the proposed rule. The 60-day comment period ended on December 29, 2015. We also solicited peer review at the same time. In this final rule, we used public comments and peer review to inform our final determinations.

The need for the action to add 11 nonnative species to the list of injurious wildlife under the Lacey Act developed from the Service's concern that, through our rapid screen process, these 11 species were categorized as "high risk" for invasiveness. A species does not have to be currently imported or present in the United States for the Service to list it as injurious. All 11 species have a high climate match in parts of the United States, a history of invasiveness outside their native ranges, and, except for one fish species in one lake, are not currently found in U.S. ecosystems. Nine of the freshwater fish species (Amur sleeper, crucian carp, Eurasian minnow, European perch, Prussian carp, roach, stone moroko, wels catfish, and zander) have been introduced to and established populations within Europe and Asia, where they have spread and are causing harm. The Nile perch has been introduced to and become invasive in new areas of central Africa. The common yabby has been introduced to western Australia and to Europe where it has established invasive populations. Most of these species were originally introduced for aquaculture, recreational fishing, or ornamental purposes. Two of these fish species (the Eurasian minnow and stone moroko) were accidentally introduced when they were unintentionally transported in shipments with desirable fish species stocked for aquaculture or fisheries management.

Based on our evaluation under the Act of all 11 species, the Service seeks to prevent the introduction, establishment, and spread within the United States of each species by adding them all to the Service's lists of injurious wildlife, thus prohibiting both their importation and interstate transportation. We take this action to prevent injurious effects, which is consistent with the Lacey Act.

We evaluated the 10 fish and 1 crayfish species using the Service's Injurious Wildlife Evaluation Criteria. The criteria include the likelihood and magnitude of release or escape, of survival and establishment upon release or escape, and of spread from origin of release or escape. The criteria also examine the effect on wildlife resources and ecosystems (such as through hybridizing, competition for food or habitat, predation on native species, and pathogen transfer), on endangered and threatened species and their respective habitats, and on human beings, forestry, horticulture, and agriculture. Additionally, criteria evaluate the likelihood and magnitude of wildlife or habitat damages resulting from control measures. The analysis using these criteria serves as a basis for the Service's regulatory decision regarding injurious wildlife species listings.

Each of these 11 species has a well-documented history of invasiveness outside of its native range, but not in the United States. When released into the environment, these species have survived and established, expanded their nonnative range, preyed on native wildlife species, and competed with native species for food and habitat. Since it would be difficult to eradicate, manage, or control the spread of these 11 species; it would be difficult to rehabilitate or recover habitats disturbed by these species; and because introduction, establishment, and spread of these 11 species would negatively affect agriculture, and native wildlife or wildlife resources, the Service is amending its regulations to add these 11 species as injurious under the Lacey Act. This listing prohibits the importation and interstate transportation of any live animal, gamete, viable egg, or hybrid in the United States, except as specifically authorized.

The Service solicited three independent scientific peer reviewers who all submitted individual comments in written form. We also received comments from 20 State agencies, regional and U.S.-Canada governmental alliances, commercial businesses, conservation organizations, nongovernmental organizations, and private citizens during the 60-day public comment period. We reviewed all comments for substantive issues and new information regarding the proposed designation of the 11 species as injurious wildlife. None of the peer or public comments necessitated any substantive changes to the rule, the environmental assessment, or the economic analysis. Comments received provided a range of opinions on the proposed listing: (1) Unequivocal support for the listing with no additional information included; (2) unequivocal support for the listing with additional information provided; (3) equivocal support for the listing with or without additional information included; and (4) unequivocal opposition to the listing with additional information included. We consolidated comments and our responses into key issues in the "Summary of Comments Received on the Proposed Rule" section.

This final rule is not significant under Executive Order (E.O.) 12866. E.O. 12866 Regulatory Planning and Review (Panetta 1993) and the subsequent document, Economic Analysis of Federal Regulations under E.O. 12866 (U.S. Office of Management and Budget 1996) require the Service to ensure that proper consideration is given to the effect of this final action on the business community and economy. With respect to the regulations under consideration, analysis that comports with the Circular A–4 would include a full description and estimation of the economic benefits and cost associated with the implementation of the regulations. The economic effects to three groups would be addressed: (1) Producers; (2) consumers; and (3) society. Of the 11 species, only one population of one species (zander) is found in the wild in the United States. Of the 11 species, 4 species (crucian carp, Nile perch, wels catfish, yabby) have been imported in small numbers since 2011, and 7 species are not in U.S. trade. To our knowledge, the total number of importation events of those 4 species from 2011 to 2015 is 25, with a declared total value of $5,789. Therefore, the economic effect in the United States is negligible for those four species and nil for the seven not in trade. The final economic analysis that the Service prepared supports this conclusion (USFWS Final Economic Analysis 2016).

Previous Federal Actions

On October 30, 2015, we published a proposed rule in the **Federal Register** (80 FR 67026) to list the crucian carp, Eurasian minnow, Prussian carp, roach, stone moroko, Nile perch, Amur sleeper, European perch, zander, wels catfish, and common yabby to the list of injurious fish and crustaceans as injurious wildlife under the Act. The proposed rule established a 60-day comment period ending on December 29, 2015, and announced the availability of the draft economic analysis and the draft environmental assessment of the proposed rule. We also solicited peer review at the same time.

For the injurious wildlife evaluation in this final rule, in addition to information used for the proposed rule, we considered: (1) Comments from the public comment period for the proposed rule, (2) comments from three peer reviewers, and (3) new information acquired by the Service by the end of the public comment period. We present a summary of the peer review comments and the public comments and our responses to them following the Lacey Act Evaluation Criteria section in this final rule.

Summary of Changes From the Proposed Rule

We fully considered comments from the public and the peer reviewers on the proposed rule. This final rule incorporates changes to our proposed rule based on the comments we received that are discussed under Summary of Comments Received on the Proposed Rule and newly available information that became available after the close of the comment period. Specifically, we made one change to the common yabby that did not result in a change to the final determination to that species but may be worth singling out. We removed "*Potential Impacts to Humans*" as one of the factors for considering the yabby as injurious. We found that while the common yabby may directly impact human health by transferring metal contaminants through consumption and may require consumption advisories, these advisories are not expected to be more stringent than those for crayfish species that are not considered injurious. Therefore, none of the 11 species in this final rule is being listed as injurious wildlife because of potential impacts to humans.

Background

The regulations contained in 50 CFR part 16 implement the Act. Under the terms of the Act, the Secretary of the Interior is authorized to prescribe by regulation those wild mammals, wild birds, fish, mollusks, crustaceans, amphibians, reptiles, and the offspring or eggs of any of the foregoing that are injurious to human beings, to the interests of agriculture, horticulture, forestry, or to wildlife or the wildlife resources of the United States. The lists of injurious wildlife species are found in title 50 of the Code of Federal Regulations (CFR) at §§ 16.11 through 16.15.

The purpose of listing the crucian carp, Eurasian minnow, Prussian carp, roach, stone moroko, Nile perch, Amur sleeper, European perch, zander, and wels catfish and the common yabby (hereafter "11 species") as injurious wildlife is to prevent the harm that these species could cause to the interests of agriculture, wildlife, and wildlife resources through their accidental or intentional introduction, establishment, and spread into the wild in the United States. The Service evaluated each of the 11 species individually, and we determined each species to be injurious based on its own traits.

Consistent with the statutory language and congressional intent, it is the Service's longstanding and continued position that the Lacey Act prohibits both the importation into the United States and all interstate transportation between States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States, including interstate transportation between States within the Continental United States, of injurious wildlife, regardless of the preliminary injunction decision in *U.S. Association of Reptile Keepers* v. *Jewell*, No. 13–2007 (D.D.C. May 12, 2015). The

Service's interpretation of 18 U.S.C. 42(a)(1) finds support in the plain language of the statute, the Lacey Act's purpose, legislative history, and congressional ratification. First, the statute's use of the disjunctive "or" to separate the listed geographic entities indicates that each location has independent significance. Second, Congress enacted the Lacey Act in 1900 for the purpose of, among other things, regulating the introduction of species in localities, not merely large territories, where they have not previously existed. See 16 U.S.C. 701. Third, the legislative history of Congress' many amendments to the Lacey Act since its enactment in 1900 shows that Congress intended, from the very beginning, for the Service to regulate the interstate shipment of certain injurious wildlife. Finally, recent Congresses have made clear that Congress interprets 18 U.S.C. 42(a)(1) as prohibiting interstate transport of injurious wildlife between the States within the continental United States. In amending § 42(a)(1) to add zebra mussels and bighead carp as injurious wildlife without making other changes to the provision, Congress repeated and ratified the Service's interpretation of the statute as prohibiting all interstate transport of injurious species.

The prohibitions on importation and all interstate transportation are both necessary to prevent the introduction, establishment, and spread of injurious species that threaten human health or the interests of agriculture, horticulture, forestry, or the wildlife or wildlife resources of the United States. By listing these 11 species as injurious wildlife, both the importation into the United States and interstate transportation between States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States of live animals, gametes, viable eggs, or hybrids is prohibited, except by permit for zoological, educational, medical, or scientific purposes (in accordance with permit regulations at 50 CFR 16.22), or by Federal agencies without a permit solely for their own use, upon filing a written declaration with the District Director of Customs and the U.S. Fish and Wildlife Service Inspector at the port of entry. In addition, no live specimens of these 11 species, gametes, viable eggs, or hybrids imported or transported under a permit could be sold, donated, traded, loaned, or transferred to any other person or institution unless such person or institution has a permit issued by the Service. The rule would not prohibit intrastate transport of the listed fish or crayfish species. Any regulations pertaining to the transport or use of these species within a particular State would continue to be the responsibility of that State.

How the 11 Species Were Selected for Consideration as Injurious Species

While the Service recognizes that not all nonnative species become invasive, it is important to have some understanding of the risk that nonnative species pose to the United States. The Ecological Risk Screening Summary (ERSS) approach was developed to address the need described in the National Invasive Species Management Plan (NISC 2008). The Plan states that prevention is the first-line of defense. One of the objectives in the Plan is to "[d]evelop fair and practical screening processes that evaluate different types of species moving intentionally in trade." The ERSS process, and the associated Risk Assessment Mapping Program, were peer-reviewed by risk assessment experts from the United States, Canada, and Mexico. Those experts support the use of those tools for U.S. national risk assessment, and associated risk management. The Service utilizes a rapid screening process to provide a prediction of the invasive potential of nonnative species and to prioritize which species to consider for listing. Rapid screens categorize risk as either high, low, or uncertain and have been produced for two thousand foreign aquatic fish and invertebrates for use by the Service and other entities. Each rapid screen is summarized in an Ecological Risk Screening Summary (ERSS; see "Rapid Screening" below for explanation regarding how these summaries were done). The Service selected 11 species with a rapid screen result of "high risk" to consider for listing as injurious. We put these 11 species through a subsequent risk analysis to evaluate each species for injuriousness (see "Injurious Wildlife Evaluation Criteria" section below).

These 11 species have a high climate match (see Rapid Screening) in parts of the United States, a history of invasiveness outside of their native range (see *Need for the Final Rule*), are not yet found in U.S. ecosystems (except for one species in one lake), and have a high degree of certainty regarding these results. The ERSS reports for each of the 11 species are available on the Service's Web site (*http://www.fws.gov/injuriouswildlife/Injurious_prevention.html*).

The practice of using history of invasiveness and climate match to determine risk has been validated in peer-reviewed studies over the years. Here are some examples: Kolar and Lodge (2002) found that discriminant analysis revealed that successful fishes in the establishment stage grew relatively faster, tolerated wider ranges of temperature and salinity, and were more likely to have a history of invasiveness than were failed fishes. They also correlated traits of invasiveness with stages of invasion to predict rate of spread for specific species and predicted that the roach, Eurasian minnow, and European perch would spread quickly, while the zander would spread slowly (the other seven species in this final rule were not studied). Hayes and Barry (2008) found that climate and habitat match, history of successful invasion, and number of arriving and released individuals are consistently associated with successful establishment. Bomford *et al.* (2010) found that "Relative to failed species, established species had better climate matches between the country where they were introduced and their geographic range elsewhere in the world. Established species were also more likely to have high establishment success rates elsewhere in the world." Recently, Howeth *et al.* (2016) showed that climate match between a species' native range and the Great Lakes region predicted establishment success with 75 to 81 percent accuracy.

All 11 species are documented to be highly invasive internationally (see Species Information for each species). Nine of the freshwater fish species (Amur sleeper, crucian carp, Eurasian minnow, European perch, Prussian carp, roach, stone moroko, wels catfish, and zander) have been introduced and established populations within Europe and Asia. The Prussian carp was recently found to be established in waterways in southern Alberta, Canada (Elgin *et al.* 2014), near the U.S. border. Another freshwater fish species, the Nile perch, has been introduced to and become invasive in new areas of central Africa. The freshwater crayfish, the common yabby, has been introduced to and established populations in new areas of Australia and in Europe. Most of the 11 species were originally intentionally introduced for aquaculture, recreational fishing, or ornamental purposes. The Eurasian minnow and the stone moroko were accidentally mixed with and introduced with shipments of fish stocked for other intended purposes.

Need for the Final Rule

Consistent with 18 U.S.C. 42, the Service aims to prevent the introduction, establishment, and spread of all 11 species within the United States due to concerns regarding the potential injurious effects of the 11 species on the interests of agriculture or to wildlife or wildlife resources of the United States. The threat posed by these 11 species is evident in their history of invasiveness (establishment and spread) in other countries and their high risk of establishment as demonstrated by a high climate match within the United States.

All of these species have wide distribution ranges where they are native and where they are invasive, suggesting they are highly adaptable and tolerant of new environments and opportunistic when expanding from their native range. Based on the results of rapid screening assessments and our injurious wildlife evaluation, we anticipate that these 11 species will become invasive if they are introduced into waters of the United States. Furthermore, if introduced and established in one area of the United States, these species could then spread to other areas of the country through unintentional or intentional interstate transport, such as for aquaculture, recreational and commercial fishing, bait, ornamental display, and other possible uses.

Listing Process

The Service promulgates regulations under the Act in accordance with the Administrative Procedure Act (APA; 5 U.S.C. 551 *et seq.*). We published a proposed rule for public notice and comment. We solicited peer review under Office of Management and Budget (OMB) guidelines "Final Information Quality Bulletin for Peer Review" (OMB 2004). We also prepared a draft economic analysis (including analysis of potential effects on small businesses) and a draft environmental assessment, both of which we made available to the public. For this final rule, we prepared a final economic analysis and a final environmental assessment.

This final rule is based on an evaluation using the Service's Injurious Wildlife Evaluation Criteria (see Injurious Wildlife Evaluation Criteria, below, for more information). We use these criteria to evaluate whether a species does or does not qualify as injurious under the Act. These criteria include the likelihood and magnitude of release or escape, of survival and establishment upon release or escape, and of spread from origin of release or escape. These criteria also examine the impact on wildlife resources and ecosystems (such as through hybridizing, competition for food or habitat, predation on native species, and pathogen transfer), on endangered and threatened species and their respective habitats, and on human beings, forestry, horticulture, and agriculture. Additionally, criteria evaluate the likelihood and magnitude of wildlife or habitat damages resulting from measures to control the proposed species. The analysis using these criteria serves as a basis for the Service's regulatory decision regarding injurious wildlife species listings. The objective of such a listing is to prohibit importation and interstate transportation and thus prevent the species' likely introduction, establishment, and spread in the wild, thereby preventing injurious effects consistent with 18 U.S.C. 42.

We evaluated each of the 11 species individually and are listing all 11 species because we determined each of these species to be injurious. The final rule contains responses to comments we received on the proposed rule, states the final decision, and provides the justification for that decision. Each of the species determined to be injurious will be added to the list of injurious wildlife found in 50 CFR 16.13.

To assist us with making our determination under the injurious wildlife evaluation criteria, we used information from available sources, including the Centre for Agricultural Bioscience International (CABI) reports (called full datasheets) from their Invasive Species Compendium (CABI ISC) that were specific to each species for biological and invasiveness information as well as primary literature and import data from our Office of Law Enforcement.

Introduction Pathways for the 11 Species

The primary potential pathways for the 11 species into the United States are through commercial trade in the live animal industry, including aquaculture, recreational fishing, bait, and ornamental display. Some could arrive unintentionally in water used to carry other aquatic species. Aquatic species may be imported into many designated ports of entry, including Miami, Los Angeles, Baltimore, Dallas-Fort Worth, Detroit, Chicago, and San Francisco. Once imported, aquatic species could be transported throughout the country for aquaculture, recreational and commercial fishing, bait, display, and other possible uses.

Aquaculture is the farming of aquatic organisms, such as fish, crustaceans, mollusks, and plants, for food, pets, stocking for fishing, and other purposes. Aquaculture usually occurs in a controlled setting where the water is contained, as a pond or in a tank, and is separate from lakes, ponds, rivers, and other natural waters. The controlled setting allows the aquaculturist to maintain proper conditions for each species being raised, which promotes optimal feeding and provides protection from predation and disease. However, Bartley (2011) states that aquaculture is the primary reason for the deliberate movement of aquatic species outside of their range, and Casal (2006) states that many countries are turning to aquaculture for human consumption, and that has led to the introduction and establishment of these species in local ecosystems. Although the farmed species are normally safely contained, outdoor aquaculture ponds have often flooded from major rainfall events and merged with neighboring natural waters, allowing the farmed species to escape by swimming or floating to nearby watersheds. Once a species enters a watershed, it has the potential to establish and spread throughout the watershed, which then increases the risk of spread to neighboring watersheds through further flooding. Other pathways for aquaculture species to enter natural waters include intentional stocking programs, and through unintentional stocking when the species is inadvertently included in a shipment with an intended species for stocking (Bartley 2011), release of unwanted ornamental fish, and release of live bait by fishermen.

Stocking for recreational fishing is a common pathway for invasive species when an aquatic species is released into a water body where it is not native. Often it takes repeated releases before the fish (or other animal) becomes established. The type of species that are typically selected and released for recreational fishing are predatory, grow quickly and to large sizes, reproduce abundantly, and are adaptable to many habitat conditions (Fuller *et al.* 1999). These are often the traits that also contribute to the species becoming invasive (Copp *et al.* 2005c; Kolar and Lodge 2001, 2002).

Live aquatic species, such as fish and crayfish, are frequently used as bait for recreational and commercial fishing. Generally, bait animals are kept alive until they are needed, and leftover individuals may be released into convenient waterbodies (Litvak and Mandrak, 1993; Ludwig and Leitch, 1996). For example, Kilian *et al.* (2012) reported that 65 and 69 percent of Maryland anglers using fishes and crayfishes, respectively, released their unused bait, and that a nonnative, potentially invasive species imported into the State as bait is likely to be released into the wild. Often, these individuals survive, establish, and cause harm to that waterbody (Fuller *et al.* 1999; Kilian *et al.* 2012).

Litvak and Mandrak (1993) found that 41 percent of anglers released live bait after use. Their survey found nearly all the anglers who released their bait thought they were doing a good thing for the environment. When the authors examined the purchase location and the angling destination, they concluded that 18 of the 28 species found in the dealers' bait tanks may have been used outside their native range. Therefore, it is not surprising that so many species are introduced in this manner; Ontario, Canada, alone has more than 65 legal baitfish species, many of which are not native to some or all of Ontario (Cudmore and Mandrak 2005). Ludwig and Leitch (1996) concluded that the probability of at least 1,000 bait release events from the Mississippi Basin to the Hudson Bay Basin in 1 year is close to 1 (a certainty).

Ornamental aquatic species are species kept in aquaria and aquatic gardens for display for entertainment or public education. The first tropical freshwater fishes became available in trade in the United States in the early 1900s (Duggan 2011), and there is currently a large variety of freshwater and saltwater fishes in the ornamental trade. The trade in ornamental crayfish species is more recent but is growing rapidly (Gherardi 2011). The most sought-after species frequently are not native to the display area. Ornamental species may accidentally escape from outdoor ponds into neighboring waterbodies (Andrews 1990; Fuller *et al.* 1999; Gherardi 2011). They may also be released outdoors intentionally when owners no longer wish to maintain them, despite laws in most States prohibiting release into the wild.

The invasive range of many of the species in this final rule has expanded through intentional release for commercial and recreational fishing (European perch, Nile perch, Prussian carp, roach, wels catfish, zander, and common yabby), as bait (Eurasian minnow, roach, common yabby), and as ornamental fish (Amur sleeper, stone moroko), and unintentionally (Amur sleeper, crucian carp, Eurasian minnow, and stone moroko) with shipments of other aquatic species. All 11 species have proven that they are capable of naturally dispersing through waterways.

The main factor influencing the chances of these 11 species establishing in the wild would be the propagule pressure, defined as the frequency of release events (propagule number) and numbers of individuals released (propagule size) (Williamson 1996; Colautti and MacIsaac 2004; Duncan 2011). This factor increases the odds of both genders being released and finding mates and of those individuals being healthy and vigorous. After a sufficient number of unintentional or intentional releases, a species may establish in those regions suitable for its survival and reproduction. Thus, continuing to allow the importation and interstate transport of these 11 species subsequently increases the risk of any of these species becoming established and spreading in the United States.

An additional factor indicating an invasive species' likelihood of successful establishment and spread is a documented history of these same species successfully establishing and spreading elsewhere outside of their native ranges. All 11 species have been introduced, become established, and been documented as causing harm in countries outside of their native ranges. For example, the stone moroko's native range includes southern and central Japan, Taiwan, Korea, China, and the Amur River basin (Copp *et al.* 2010). Since the stone moroko's original introduction to Romania in the early 1960s, this species has invaded nearly every European country and additional regions of Asia (Welcomme 1988; Copp *et al.* 2010; Froese and Pauly 2014g).

The demonstrated ability of each of these species to become established, spread, and cause harm outside of their native range, in conjunction with the risk they would pose to U.S. ecosystems, warrants listing all 11 species as injurious under the Lacey Act. The objective of this listing is to prohibit importation and interstate transportation of these species and thus prevent their likely introduction, establishment, and spread in the wild and associated harms to the interests of agriculture, or wildlife or wildlife resources of the United States.

Species Information

We obtained our information on a species' biology, history of invasiveness, and climate matching from a variety of sources, including the U.S. Geological Survey Nonindigenous Aquatic Species (NAS) database, CABI datasheets, ERSS reports, primary literature, and peer and public comments. We queried the NAS database (*http://nas.er.usgs.gov/*) to confirm that 10 of the 11 species are not currently established in U.S. ecosystems. The zander is established in a lake in North Dakota (Fuller 2009). The CABI ISC (*http://www.cabi.org/isc/*) is an encyclopedic resource containing datasheets on more than 1,500 invasive species and animal diseases. The Service contracted with CABI for many of the species-specific datasheets that we used in preparation of this final rule. The datasheets were prepared by experts on the species, and each datasheet was reviewed by expert peer reviewers.

Crucian Carp (Carassius carassius)

The crucian carp was first described and cataloged by Linnaeus in 1758, and is part of the order Cypriniformes and family Cyprinidae (ITIS 2014). The family Cyprinidae, or the carp and minnow family, is a large and diverse group that includes 2,963 freshwater species (Froese and Pauly 2014d). The taxonomic status of the crucian carp has been reported to be confused and it is commonly misidentified with other *Carassius spp.* (Godard and Copp 2012).

Native Range and Habitat

The crucian carp inhabits a temperate climate (Riehl and Baensch 1991). The native range includes much of north and central Europe, extending from the North Sea and Baltic Sea basins across northern France and Germany to the Alps and through the Danube River basin and eastward to Siberia (Godard and Copp 2012). The species inhabits freshwater lakes, ponds, rivers, and ditches (Godard and Copp 2012). This species can survive in water with low dissolved oxygen levels, including aquatic environments with greatly reduced oxygen (hypoxic) or largely devoid of dissolved oxygen (anoxic) (Godard and Copp 2012).

Nonnative Range and Habitat

Crucian carp have been widely introduced to and established in Croatia, Greece, southern France (Holčík 1991; Godard and Copp 2012), Italy, and England (Kottelat and Freyhof 2007), Spain, Belgium, Israel, Switzerland, Chile, India, Sri Lanka, Philippines (Holčík 1991; Froese and Pauly 2014a), and Turkey (Innal and Erk'akan 2006). In the United States, crucian carp may have been established within Chicago (Illinois) lakes and lagoons in the early 1900s (Meek and Hildebrand 1910; Schofield *et al.* 2005), but they apparently died out because currently no such population exists (Welcomme 1988; Schofield *et al.* 2005; Schofield *et al.* 2013).

Several other fish species, including the Prussian carp, the common carp (*Cyprinus carpio*), and a brown variety of goldfish (*Carassius auratus*) have been misidentified as crucian carp (Godard and Copp 2012). Crucian carp may have been accidentally introduced to some regions in misidentified shipments of ornamental fishes (Wheeler 2000; Hickley and Chare 2004). However, no known populations of crucian carp currently exist in the United States.

Biology

Crucian carp generally range from 20 to 45 centimeters (cm) (8 to 18 inches (in)) long with a maximum of 50 cm (19.5 in) (Godard and Copp 2012). Specimens have been reported to weigh up to 3 kilograms (kg) (6.6 pounds (lb)) (Froese and Pauly 2014a). These fish have an olive-gray back that transitions into brassy green along the sides and brown on the body (Godard and Copp 2012).

Crucian carp can live up to 10 years (Kottelat and Freyhof 2007) and reach sexual maturity at one and a half years but may not begin spawning until their third year (Godard and Copp 2012). Crucian carp are batch spawners (release multiple batches of eggs per season) and may spawn one to three times per year (Aho and Holopainen 2000, Godard and Copp 2012).

Crucian carp feed during the day and night on plankton, benthic (bottom-dwelling) invertebrates, plant materials, and detritus (organic material) (Kottelat and Freyhof 2007).

Crucian carp can harbor the virus causing the fish disease Spring Viraemia of Carp (SVC) (Ahne *et al.* 2002) and several parasitic infections (*Dactylogyrus* gill flukes disease, Trichodinosis, skin flukes, false fungal infection (*Epistylis* sp.), and turbidity of the skin) (Froese and Pauly 2014b). SVC is a disease that, when found, is required to be reported to the Office International des Epizooties (OIE) (World Organisation of Animal Health) (Ahne *et al.* 2002). The SVC virus infects carp species but may be transmitted to other fish species. The virus is shed with fecal matter and urine, and often infects through waterborne transmission (Ahne *et al.* 2002). Additionally, SVC may result in significant morbidity and mortality with an approximate 70 percent fatality among juvenile fish and 30 percent fatality in adult fish (Ahne *et al.* 2002). Thus, the spread of SVC may have serious effects on native fish stocks.

OIE-notifiable diseases affect animal health internationally. OIE-notifiable diseases meet certain criteria for consequences, spread, and diagnosis. For the consequences criteria, the disease must have either been documented as causing significant production losses on a national or multinational (zonal or regional) level, or have scientific evidence that indicates that the diseases will cause significant morbidity or mortality in wild aquatic animal populations, or be an agent of public health concern. For the spread criteria, the disease's infectious etiology (cause) must be known or an infectious agent is strongly associated with the disease (with etiology unknown). In addition for the spread criteria, there must be a likelihood of international spread (via live animals and animal products) and the disease must not be widespread (several countries or regions of countries without specific disease). For the diagnosis criteria, there must be a standardized, proven diagnostic test for disease detection (OIE 2012). These internationally accepted standards, including those that document the consequences (harm) of certain diseases, offer supporting evidence of injuriousness.

Invasiveness

This species demonstrates many of the strongest traits for invasiveness. The crucian carp is capable of securing and ingesting a wide range of food, has a broad native range, and is highly adaptable to different environments (Godard and Copp 2012). While foraging along the substrate, Crucian carp can increase turbidity (cloudiness of water) in lakes, rivers, and streams with soft bottom sediments. Increased turbidity reduces light availability to submerged plants and can result in harmful ecosystem changes, such as to phytoplankton survival and nutrient cycling. Crucian carp can breed with other carp species, including the common carp (Wheeler 2000). Hybrids of crucian carp and common carp can affect fisheries, because such hybrids, along with the introduced crucian carp, may compete with native species for food and habitat resources (Godard and Copp 2012).

Eurasian Minnow (Phoxinus phoxinus)

The Eurasian minnow was first described and cataloged by Linnaeus in 1758, and belongs to the order Cypriniformes and family Cyprinidae (ITIS 2014). Although Eurasian minnow is the preferred common name, this fish species is also referred to as the European minnow.

Native Range and Habitat

The Eurasian minnow inhabits a temperate climate, and the native range includes much of Eurasia within the basins of the Atlantic, North and Baltic Seas, and the Arctic and the northern Pacific Oceans (Froese and Pauly 2014e).

Eurasian minnows can be found in a variety of habitats ranging from brackish (estuarine; slightly salty) to freshwater streams, rivers, ponds, and lakes located within the coastal zone to the mountains (Sandlund 2008). In Norway, they are found at elevations up to 2,000 m (6,562 ft). These minnows prefer shallow lakes or slow-flowing streams and rivers with stony substrate (Sandlund 2008).

Nonnative Range and Habitat

The Eurasian minnow's nonnative range includes parts of Sweden and Norway, United Kingdom, and Egypt (Sandlund 2008), as well as other drainages juxtaposed to native waterways. The Eurasian minnow was initially introduced as live bait, which was the main pathway of introduction throughout the 1900s (Sandlund 2008). The inadvertent inclusion of this minnow species in the transport water of brown trout (*Salmo trutta*) that were intentionally stocked into lakes for recreational angling has contributed to their spread (Sandlund 2008). From these initial stockings, minnows have dispersed naturally downstream and established in new waterways, and have spread to new waterways through tunnels constructed for hydropower development. These minnows have also been purposely introduced as food for brown trout and to control the Tune fly (in Simuliidae) (Sandlund 2008).

The Eurasian minnow is expanding its nonnative range by establishing populations in additional waterways bordering the native range. Waterways near where the minnow is already established are most at risk (Sandlund 2008).

Biology

The Eurasian minnow has a torpedo-shaped body measuring 6 to 10 cm (2.3 to 4 in) with a maximum of 15 cm (6 in). Size and growth rate are both highly dependent on population density and environmental factors (Lien 1981; Mills 1987, 1988; Sandlund 2008). These minnows have variable coloration but are often brownish-green on the back with a whitish stomach and brown and black blotches along the side (Sandlund 2008).

The Eurasian minnow's life-history traits (age, size at sexual maturity, growth rate, and lifespan) may be highly variable (Mills 1988). Populations residing in lower latitudes often have smaller body size and younger age of maturity than those populations in higher altitudes and latitudes (Mills 1988). Maturity ranges from less than 1 year to 6 years of age, with a lifespan as long as 13 to 15 years (Sandlund 2008). The Eurasian minnow spawns annually with an average fecundity between 200 to 1,000 eggs (Sandlund 2008).

This minnow usually cohabitates with salmonid fishes (Kottelat and Freyhof

2007). The Eurasian minnow feeds mostly on invertebrates (crustaceans and insect larvae) as well as some algal and plant material (Lien 1981).

Invasiveness

The Eurasian minnow demonstrates many of the strongest traits for invasiveness. The species is highly adaptable to new environments and is difficult to control (Sandlund 2008). The species can become established within varying freshwater systems, including lowland and high alpine areas, as well as in brackish water (Sandlund 2008). Introductions of the Eurasian minnow can cause major changes to nonnative ecosystems by affecting the benthic community (decreased invertebrate diversity) and disrupting trophic-level structure (Sandlund 2008). This occurrence affects the ability of native fish to find food as well as disrupts native spawning. The Eurasian minnow has been shown to reduce recruitment of brown trout by predation (Sandlund 2008). Although brown trout are not native to the United States, they are closely related to our native trout and salmon, and thus Eurasian minnows could be expected to reduce the recruitment of native trout.

In addition, Eurasian minnows are carriers of parasites and have increased the introduction of parasites to new areas. Such parasites affected native snails, mussels, and different insects within subalpine lakes in southern Norway following introduction of the Eurasian minnows (Sandlund 2008). Additionally, Zietara *et al.* (2008) used molecular methods to link the parasite *Gyrodactylus aphyae* from Eurasian minnows to the new hosts of Atlantic salmon (*Salmo salar*) and brown trout.

Prussian Carp (Carassius gibelio)

The Prussian carp was first described and catalogued by Bloch in 1782, and belongs to the order Cypriniformes and family Cyprinidae (ITIS 2014). While some have questioned the taxonomy of Prussian carp, genetic studies have suggested that it is distinct Carassius species (Elgin et al. 2014). However, the species is not monophyletic (characterized by descent from a single ancestral group) and therefore possibly two distinct species (Kalous et al. 2012, Elgin et al. 2014). In fact, one clade (represents a single lineage) of Prussian carp is more closely related to goldfish (*C. auratus*) than to the second clade of Prussian carp (Kalous et al. 2012). The Prussian carp is very similar in appearance to other *Carassius spp.* and common carp (*Cyprinus carpio*), and are often difficult to differentiate (Britton 2011).

Native Range and Habitat

The Prussian carp inhabits a temperate climate (Baensch and Riehl 2004). The species is native to regions of central Europe and eastward to Siberia. It is also native to several Asian countries, including China, Georgia, Kyrgyzstan, Mongolia, Turkey, and Turkmenistan (Britton 2011). The Prussian carp resides in a variety of fresh stillwater bodies and rivers. This species also inhabits warm, shallow, eutrophic (high in nutrients) waters with submerged vegetation or regular flooding events (Kottelat and Freyhof 2007). This species can live in polluted waters with pollution and low oxygen concentrations (Britton 2011).

Nonnative Range and Habitat

The Prussian carp has been introduced to many countries within central and Western Europe. This species was first introduced to Belgium during the 1600s and is now prevalent in its freshwater systems. The Prussian carp was also introduced to Belarus and Poland during the 1940s for recreational fishing and aquaculture. This carp species has dispersed and expanded its range using the Vistula and Bug River basins (Britton 2011). During the mid to late 1970s, this carp species invaded the Czech Republic river system from the Danube River via the Morava River. Once in the river system, the fish expanded into tributary streams and connected watersheds. Throughout its nonnative range, this species has been stocked with common carp and misidentified as crucian carp (Britton 2011). From the original stocked site, the Prussian carp has dispersed both naturally and with human involvement.

The Prussian carp's current nonnative range includes the Asian countries of Armenia, Turkey, and Uzbekistan and the European countries of Belarus, Belgium, Czech Republic, Denmark, Estonia, France, Germany, Poland, and Switzerland (Britton 2011). The species has recently invaded the Iberian Peninsula (Ribeiro *et al.* 2015). The species was recently found to be established in waterways in southern Alberta, Canada (Elgin *et al.* 2014).

Biology

The Prussian carp has a silvery-brown body with an average length of 20 cm (7.9 in) and reported maximum length of 35 cm (13.8 in) (Kottelat and Freyhof 2007, Froese and Pauly 2014c). This species has a reported maximum weight of 3 kilograms (kg; 6.6 pounds (lb) (Froese and Pauly 2014c)).

The Prussian carp lives up to 10 years (Kottelat and Freyhof 2007). This species can reproduce in a way very rare among fish. Introduced populations often include, or are solely composed of, triploid females that can undergo natural gynogenesis, allowing them to use the sperm of other species to activate (but not fertilize) their own eggs (Vetemaa *et al.* 2005, Britton 2011). Thus, the eggs are viable without being fertilized by male Prussian carp.

The Prussian carp is a generalist omnivore and consumes a varied diet that includes plankton, benthic invertebrates, plant material, and detritus (Britton 2011).

The parasite *Thelohanellus wuhanensis* (Wang *et al.* 2001) and black spot disease (Posthodiplostomatosis) have been found to affect the Prussian carp (Markovíc *et al.* 2012).

Invasiveness

The Prussian carp is a highly invasive species in freshwater ecosystems throughout Europe and Asia. This fish species grows rapidly and can reproduce from unfertilized eggs (Vetemaa *et al.* 2005). Prussian carp have been implicated in the decline in both the biodiversity and population of native fish (Vetemaa *et al.* 2005, Lusk *et al.* 2010). The presence of this fish species has been linked with increased water turbidity (Crivelli 1995), which in turn alters both the ecosystem's trophic-level structure and nutrient availability.

Roach (Rutilus rutilus)

The roach was first described and cataloged by Linnaeus in 1758, and belongs to the order Cypriniformes and family Cyprinidae (ITIS 2014).

Native Range and Habitat

The roach inhabits temperate climates (Riehl and Baensch 1991). The species' native range includes regions of Europe and Asia. Within Europe, it is found north of the Pyrenees and Alps and eastward to the Ural River and Eya drainages (Caspian Sea basin) and within the Aegean Sea basin and watershed (Kottelat and Freyhof 2007). In Asia, the roach's native range extends from the Sea of Marmara basin and lower Sakarya Province (Turkey) to the Aral Sea basin and Siberia (Kottelat and Freyhof 2007).

This species often resides in nutrient-rich lakes, medium to large rivers, and backwaters. Within rivers, the roach is limited to areas with slow currents.

Nonnative Range and Habitat

This species has been introduced to several countries for recreational fishing or as bait. Once introduced, the roach has moved into new water bodies within the same country (Rocabayera and Veiga 2012). In 1889, the roach was brought from England to Ireland for use as bait fish. Some of these fish accidentally escaped into the Cork Blackwater system. After this initial introduction, this fish species was deliberately stocked in nearby lakes. The roach has continued its expansion throughout Ireland watersheds, and by 2000, had invaded every major river system within Ireland (Rocabayera and Veiga 2012).

This species has been reported as invasive in north and central Italy, where it was introduced for recreational fishing (Rocabayera and Veiga 2012). The roach was also introduced to Madagascar, Morocco, Cyprus, Portugal, the Azores, Spain, and Australia (Rocabayera and Veiga 2012).

Biology

The roach has an average body length of 25 cm (9.8 in) and reported maximum length of 50 cm (19.7 in) (Rocabayera and Veiga 2012). The maximum published weight is 1.84 kg (4 lb) (Froese and Pauly 2014f).

The roach can live up to 14 years (Froese and Pauly 2014f). Male fish are sexually mature at 2 to 3 years and female fish at 3 to 4 years. A whole roach population typically spawns within 5 to 10 days, with each female producing 700 to 77,000 eggs (Rocabayera and Veiga 2012). Eggs hatch approximately 12 days later (Kottelat and Freyhoff 2007).

The roach has a general, omnivorous diet, including benthic invertebrates, zooplankton, plants, and detritus (Rocabayera and Veiga 2012). Of the European cyprinids (carps, minnows, and their relatives), the roach is one of the most efficient molluscivores (Winfield and Winfield 1994).

Parasitic infections, including worm cataracts (*Diplostomum spathaceum*), black spot disease (diplostomiasis), and tapeworm (*Ligula intestinalis*), have all been found associated with the roach (Rocabayera and Veiga 2012), as has the pathogen bacterium *Aeromonas salmonicida,* which causes furunculosis (skin ulcers) in several fish species (Wiklund and Dalsgaard 1998).

Invasiveness

The main issues associated with invasive roach populations include competition with native fish species, hybridization with native fish species, and altered ecosystem nutrient cycling (Rocabayera and Veiga 2012). The roach is a highly adaptive species and adapts to a different habitat or diet to avoid predation or competition (Winfield and Winfield 1994).

The roach also has a high reproductive potential and spawns earlier than some other native fish (Volta and Jepsen 2008, Rocabayera and Veiga 2012). This trait allows larvae to have a competitive edge over native fish larvae (Volta and Jepsen 2008).

The roach can hybridize with other cyprinids, including rudd (*Scardinius erythrophthalmus*) and bream (*Abramis brama*), in places where it has invaded. The new species (roach-rudd cross and roach-bream cross) then compete for food and habitat resources with both the native fish (rudd, bream) and invasive fish (roach) (Rocabayera and Veiga 2012).

Within nutrient-rich lakes or ponds, large populations of roach create adverse nutrient cycling. High numbers of roach consume large amounts of zooplankton, which results in algal blooms, increased turbidity, and changes in nutrient availability and cycling (Rocabayera and Veiga 2012).

Stone Moroko (Pseudorasbora parva)

The stone moroko was first described and cataloged by Temminick and Schlegel in 1846 and belongs to the order Cypriniformes and family Cyprinidae (ITIS 2014). Although the preferred common name is the stone moroko, this fish species is also called the topmouth gudgeon (Froese and Pauly 2014g).

Native Range and Habitat

The stone moroko inhabits a temperate climate (Baensch and Riehl 1993). Its native range is Asia, including southern and central Japan, Taiwan, Korea, China, and the Amur River basin. The stone moroko resides in freshwater lakes, ponds, rivers, streams, and irrigation canals (Copp 2007).

Nonnative Range and Habitat

The stone moroko was introduced to Romania in the early 1960s with a Chinese carp shipment (Copp *et al.* 2010). By 2000, this fish species had invaded nearly every other European country and additional countries in Asia (Copp 2007). This species was primarily introduced unintentionally with fish shipped purposefully. Natural dispersal also occurred in most countries (Copp 2007).

Within Asia, the stone moroko has been introduced to Afghanistan, Armenia, Iran, Kazakhstan, Laos, Taiwan, Turkey, and Uzbekistan (Copp 2007). In Europe, this fish species' nonnative range includes Albania, Austria, Belgium, Bulgaria, Czech Republic, Denmark, France, Germany, Greece, Hungary, Italy, Lithuania, Moldova, Montenegro, Netherlands, Poland, Romania, Russia, Serbia, Slovakia, Spain, Sweden, Switzerland, Ukraine, and the United Kingdom (Copp 2007). The stone moroko has also been introduced to Algeria and Fiji (Copp 2007).

Biology

The stone moroko is a small fish with an average body length of 8 cm (3.1 in), maximum reported length of 11 cm (4.3 in) (Froese and Pauly 2014g), and average body mass of 17 to 19 grams (g; 0.04 lb) (Witkowski 2011). This fish species is grayish black with a lighter belly and sides. Juveniles have a dark stripe along the side that disappears with maturity (Witkowski 2011).

This fish species can live up to 5 years (Froese and Pauly 2014g). The stone moroko becomes sexually mature and begins spawning at 1 year (Witkowski 2011). Females release several dozen eggs per spawning event and spawn several times per year. The total number of eggs spawned per female ranges from a few hundred to a few thousand eggs (Witkowski 2011). Male fish aggressively guard eggs until hatching (Witkowski 2011).

The stone moroko maintains an omnivorous diet of small insects, fish, mollusks, planktonic crustaceans, fish eggs, algae (Froese and Pauly 2014g), and plants (Kottelat and Freyhof 2007).

The stone moroko is an unaffected carrier of the pathogenic parasite *Sphaerothecum destruens* (Gozlan *et al.* 2005, Pinder *et al.* 2005). This parasite is transferred to water from healthy stone morokos. Once in the water, this parasite has infected Chinook salmon (*Oncorhynchus tshawytscha*), Atlantic salmon, sunbleak (*Leucaspius delineatus*), and fathead minnows (*Pimephales promelas*) (Gozlan *et al.* 2005). *Sphaerothecum destruens* infects the internal organs, resulting in spawning failure, organ failure, and death (Gozlan *et al.* 2005).

Invasiveness

The stone moroko has proven to be a highly invasive fish, establishing invasive populations in nearly every European country over a 40-year span (Copp 2007, Copp *et al.* 2010). This fish species has proven to be adaptive and tolerant of a variety of habitats, including those of poorer quality (Beyer *et al.* 2007). This species' invasiveness is further aided by multiple spawning events and the guarding of eggs by the male until hatching (Kottelat and Freyhof 2007).

In many areas of introduction and establishment (for example, United

Kingdom, Italy, China, and Russia), the stone moroko has been linked to the decline of native freshwater fish populations (Copp 2007). The stone moroko has been found to dominate the fish community when it becomes established. Native fishes have exhibited decreased growth rate and reproduction, and they shifted their diet as a result of food competition (Britton *et al.* 2010b).

Additionally, this species is a vector of *Sphaerothecum destruens,* which is a documented pathogen of salmonids native to the United States (Gozlan *et al.* 2005, Gozlan *et al.* 2009, Andreou *et al.* 2011). *Sphaerothecum destruens* has caused mortalities in cultured North American salmon (Andreou *et al.* 2011).

Nile Perch (Lates niloticus)

The Nile perch was first described and cataloged by Linnaeus in 1758 and is in the order Perciformes and family Centropomidae (ITIS 2014). Although its preferred common name is the Nile perch, it is also referred to as the African snook and Victoria perch (Witte 2013).

Native Range and Habitat

The Nile perch inhabits a tropical climate with an optimal water temperature of 28 °C (82 °F) and an upper lethal temperature of 38 °C (100 °F) (Kitchell *et al.* 1997). The species' native distribution includes much of central, western, and eastern Africa. The species is common in the Nile, Chad, Senegal, Volta, and Zaire River basins and brackish Lake Mariout near Alexandria, Egypt, on the Mediterranean coast (Azeroual *et al.* 2010, Witte 2013). Nile perch reside in brackish lakes and freshwater lakes, rivers, stream, reservoirs, and irrigation channels (Witte 2013).

Nonnative Range and Habitat

The Nile perch, which is not native to Lake Victoria in Africa, was first introduced to the lake in 1954 from nearby Lake Albert. This species was introduced on the Ugandan side and spread to the Kenyan side. A breeding population existed in the lake by 1962 (Witte 2013).

The Nile perch was also introduced to Lake Kyoga (1954 and 1955) to gauge the effects of Nile perch on fish populations similar to that of Lake Victoria. At the time of introduction, people were unaware that this species had already been introduced unofficially into Lake Victoria (Witte 2013). Additional introductions of Nile perch occurred in 1962 and 1963 in Kenyan and Ugandan waters to promote a commercial fishery. Since its initial introduction to Lakes Victoria and Kyoga, this fish species has been accidentally and deliberately introduced to many of the neighboring lakes and waterways (Witte 2013). The increase in Nile perch population was first noted in Kenyan waters in 1979, in Ugandan waters 2 to 3 years later, and in Tanzanian waters 4 to 5 years later (Witte 2013). There are currently only a few lakes in the area without a Nile perch population (Witte 2013).

The Nile perch was also introduced into Cuba for aquaculture and sport in 1982 and 1983 (Welcomme 1988), but we have no information on the subsequent status.

Nile perch were stocked in Texas waters in 1978, 1979, and 1984 (88, 14, and 26 fish respectively in Victor Braunig Lake); in 1981 (68,119 in Coleto Creek Reservoir); and in 1983 (1,310 in Fairfield Lake) (Fuller *et al.* 1999, TPWD 2013a). These introductions were unsuccessful at establishing a self-sustaining population (Howells 1992, Howells and Garret 1992, Howells 2001). Although the fish did not establish, biologists in Texas and Florida recommended against stocking Nile perch because of its ability to tolerate cold winter temperatures in some local waters, tolerance of salt water, and ability to range widely in riverine habitats, as well as large size and predatory nature (Howells and Garret 1992). Today, Nile perch are a prohibited exotic species in Texas (TPWD 2013b, 2016).

Biology

The Nile perch has a perch-like body with an average body length of 1 meter (m) (3.3 feet (ft)), maximum length of 2 m (6.6 ft) (Ribbink 1987, Froese and Pauly 2014h), and maximum weight of 200 kg (441 lb) (Ribbink 1987). The Nile perch is gray-blue on the dorsal side with gray-silver along the flank and ventral side (Witte 2013).

The age of sexual maturity varies with habitat location. Most male fish become sexually mature before females (1 to 2 years versus 1 to 4 years of age) (Witte 2013). This species spawns throughout the year with increased spawning during the rainy season (Witte 2013). The Nile perch produce 3 million to 15 million eggs per breeding cycle (Asila and Ogari 1988). This high fecundity allows the Nile perch to quickly establish in new regions with favorable habitats (Ogutu-Ohwayo 1988). Additionally, the Nile perch's reproductive potential in introduced habitats is much greater than that of its prey, haplochromine cichlids (fish from the family Cichlidae), which have a reproductive rate of 13 to 33 eggs per breeding cycle (Goldschmidt and Witte 1990).

Nile perch less than 5 cm eat zooplankton (cladocerans and copepods) (Witte 2013). Juvenile Nile perch (35 to 75 cm long) feed on invertebrates, primarily aquatic insects, crustaceans, and mollusks (Ribbink 1987). Adult Nile perch are primarily piscivorous (fish eaters), but they also consume large crustaceans (*Caridina* and *Macrobrachium* shrimp) and insects (Witte 2013).

The Nile perch is host to a number of parasites capable of causing infections and diseases in other species, including sporozoa infections (*Hennegya* sp.), *Dolops* infestation, *Ergasilus* disease, gonad nematodosis disease (*Philometra* sp.), and *Macrogyrodactylus* and *Diplectanum* infestation (Paperna 1996, Froese and Pauly 2014i).

Invasiveness

The Nile perch has been listed as one of the 100 "World's Worst" Invaders by the Global Invasive Species Database (*http://www.issg.org*) (Snoeks 2010, ISSG 2015). During the 1950s and 1960s, this fish was introduced to several East African lakes for commercial fishing. This fish is now prevalent in Lake Victoria and constitutes more than 90 percent of demersal (bottom-dwelling) fish mass within this lake (Witte 2013). Since its introduction, native fish populations have declined or disappeared (Witte 2013). Approximately 200 native haplochromine cichlid species have become locally extinct due to predation and competition (Snoeks 2010, Witte 2013).

According to Gophen (2015), the Lake Victoria ecosystem was unique and comprised at least 400 endemic species of haplochromine fishes. Historically, the food web structure was naturally balanced, with short periods of anoxia in deep waters and dominance of diatomides algal species. During the 1980s, Nile perch became the dominant fish. The haplochromine species were depleted, and the whole ecosystem was modified. Algal assemblages were changed to Cyanobacteria; anoxia became more frequent and occurred in shallower waters. The effect of the Nile perch predation and its ecological implications in Lake Victoria is also confirmed by the elimination of planktivory by the haplochromine fishery. Consequently, this loss has resulted in significant shifts to the trophic-level structure and loss of biodiversity of this lake's ecosystem.

Amur Sleeper (Perccottus glenii)

The Amur sleeper was first described and cataloged by B.I. Dybowski in 1877, as part of the order Perciformes and family Odontobutidae (Bogutskaya and Naseka 2002, ITIS 2014). The Amur sleeper is the preferred common name of this freshwater fish, but this fish is also called the Chinese sleeper or rotan (Bogutskaya and Naseka 2002, Froese and Pauly 2014j). In this final rule, we will refer to the species as the Amur sleeper.

Native Range and Habitat

The Amur sleeper inhabits a temperate climate (Baensch and Riehl 2004). The species' native distribution includes much of the freshwater regions of northeastern China, northern North Korea, and eastern Russia (Reshetnikov and Schliewen 2013). Within China, this species is predominantly native to the lower to middle region of the Amur River watershed, including the Zeya, Sunguri, and Ussuri tributaries (Bogutskaya and Naseka 2002, Grabowska 2011) and Lake Khanka (Courtenay 2006). The Amur sleeper's range extends northward to the Tugur River (Siberia) (Grabowska 2011) and southward to the Sea of Japan (Bogutskaya and Naseka 2002, Grabowska 2011). To the west, the species does not occur in the Amur River upstream of Dzhalinda (Bogutskaya and Nasaka 2002).

The Amur sleeper inhabits freshwater lakes, ponds, canals, backwaters, flood plains, oxbow lakes, and marshes (Grabowska 2011). This fish is a poor swimmer, thriving in slow-moving waters with dense vegetation and muddy substrate and avoiding main river currents (Grabowska 2011). The Amur sleeper can live in poorly oxygenated water and can also survive in dried out or frozen water bodies by burrowing into and hibernating in the mud (Bogutskaya and Nasaka 2002, Grabowska 2011).

Although the Amur sleeper is a freshwater fish, there are limited reports of it appearing in saltwater environments (Bogutskaya and Naseka 2002). These reports seem to occur with flood events and are likely a consequence of these fish being carried downstream into these saltwater environments (Bogutskaya and Naseka 2002).

Nonnative Range and Habitat

This species' first known introduction was in western Russia. In 1912, Russian naturalist I.L. Zalivskii brought four Amur sleepers to the Lisiy Nos settlement (St. Petersburg, Russia) (Reshetnikov 2004, Grabowska 2011). These four fish were held in aquaria until 1916, when they were released into a pond, where they subsequently established a population before naturally dispersing into nearby waterbodies (Reshetnikov 2004, Grabowska 2011). In 1948, additional Amur sleepers were introduced to Moscow for use in ornamental ponds by members of an expedition (Bogutskaya and Naseka 2002, Reshetnikov 2004). These fish escaped the ponds into which they had been stocked and spread to nearby waters in the city of Moscow and Moscow Province (Reshetnikov 2004).

Additionally, Amur sleepers were introduced to new areas when they were unintentionally shipped to fish farms in fish stocks, such as silver carp (*Hypophthalmichthys molitrix*) and grass carp (*Ctenopharyngodon idella*). From these initial introductions, the Amur sleepers were able to expand from their native range through escape, release, and transfer between fish farms (Reshetnikov 2004). Additionally, Amur sleepers tolerate being transported and have been moved from one waterbody to another by anglers as bait (Reshetnikov 2004).

The Amur sleeper is an invasive species in western Russia and 16 additional countries: Mongolia, Belarus, Ukraine, Lithuania, Latvia, Estonia, Poland, Hungary, Romania, Slovakia, Serbia, Bulgaria, Moldova, Kazakhstan, Croatia, and recently Germany, where it is dispersing up the Danube River into western Europe (Reshetnikov and Schliewen 2013). The Amur sleeper is established within the Baikal, Baltic, and Volga water basins of Europe and Asia (Bogutskaya and Naseka 2002) and the Danube of Europe (Reshetnikov and Schliewen 2013). The occurrence of the Amur sleeper in a far-western region of Europe is highly troublesome because this invasive and hardy predator represents a major threat to European freshwater shallow lentic water-body ecosystems where the Amur sleeper is capable of depleting diversity in species of macroinvertebrates, amphibians, and fish (Reshetnikov and Schliewen 2013).

Biology

The Amur sleeper is a small- to medium-sized fish with a maximum body length of 25 cm (9.8 in) (Grabowska 2011) and weight of 250 g (0.6 lb) (Reshetnikov 2003). As with other fish species, both body length and weight vary with food supply, and larger Amur sleeper specimens have been reported from its nonnative range (Bogutskaya and Naseka 2002).

Body shape is fusiform with two dorsal fins, short pelvic fins, and rounded caudal fin (Grabowska 2011). The Amur sleeper has dark coloration of greenish olive, brownish gray, or dark green with dark spots and pale yellow to blue-green flecks (Grabowska 2011). Males are not easily discerned from females except during breeding season. Breeding males are darker (almost black) with bright blue-green spots (Grabowska 2011).

The Amur sleeper lifespan is from 7 to 10 years. Within native ranges, the fish rarely lives more than 4 years, whereas in nonnative ranges, the fish generally lives longer (Bogutskaya and Naseka 2002, Grabowska 2011). The fish reaches maturity between 2 and 3 years of age (Grabowska 2011) and has at least two spawning events per year.

The number of eggs per spawning event varies with female size. In the Wloclawski Reservoir, which is outside of the Amur sleeper's native range, the females produced an average of 7,766 eggs per female (range 1,963 to 23,479 eggs) (Grabowska *et al.* 2011). Male Amur sleepers are active in prenatal care by guarding eggs and aggressively defending the nest (Bogutskaya and Naseka 2002, Grabowska *et al.* 2011).

The Amur sleeper is a voracious, generalist predator that eats invertebrates (such as freshwater crayfish, shrimp, mollusks, and insects), amphibian tadpoles, and small fish (Bogutskaya and Naseka 2002). Reshetnikov (2003) found that the Amur sleeper significantly reduced species diversity of fishes and amphibians where it was introduced. In some small water bodies, Amur sleepers considerably decrease the number of species of aquatic macroinvertebrates, amphibian larvae, and fish species (Reshetnikov 2003, Pauly 2014, Kottelat and Freyhof 2007).

The predators of Amur sleepers include pike, perch, snakeheads (*Channa* spp.), and gulls (Laridae) (Bogutskaya and Naseka 2002). It is believed that this species is primarily controlled by snakeheads in their native range. Eggs and juveniles are fed on by a variety of insects (Bogutskaya and Naseka 2002).

The Amur sleeper reportedly has high parasitic burdens of more than 40 parasite species (Grabowska 2011). The host-specific parasites, including *Nippotaenia mogurndae* and *Gyrodactylus perccotti,* have been transported to new areas along with the introduced Amur sleeper (Košuthová *et al.* 2004, Grabowska 2011). The cestode (tapeworm) *Nippotaenia mogurndae* was first reported in Europe in the River Latorica in east Slovakia in 1998, after this same river was invaded by the Amur sleeper (Košuthová *et al.* 2004). This parasite may be able to infect other fish species (Košuthová *et al.* 2008). Thus, the potential for the Amur sleeper to function as a parasitic host could aid in the transmission of parasites to new environments and potentially to new species (Košuthová *et al.* 2008, Košuthová *et al.* 2009).

Invasiveness

The Amur sleeper is considered one of the most widespread, invasive fish in European freshwater ecosystems within the last several decades (Copp *et al.* 2005a, Grabowska 2011, Reshetnikov and Ficetola 2011). Reshetnikov and Ficetola (2011) indicate that there are 13 expansion centers for this fish outside of its native range. Once this species has been introduced, it has proven to be capable of establishing sustainable populations (Reshetnikov 2004). Within the Vistula River (Poland), the Amur sleeper has averaged an annual expansion of its range by 88 kilometers (km) (54.5 miles (mi) per year) (Grabowska 2011). A recent study (Reshetnikov and Ficetola 2011) suggests many other regions of Europe and Asia, as well as the northeastern United States and southeastern Canada, have suitable climates for the Amur sleeper and are at risk for an invasion.

The Amur sleeper demonstrates many of the strongest traits for invasiveness: It consumes a highly varied diet, is fast growing with a high reproductive potential, easily adapts to different environments, and has an expansive native range and proven history of increasing its nonnative range by itself and through human-mediated activities (Grabowska 2011). Where it is invasive, the Amur sleeper competes with native species for similar habitat and diet resources (Reshetnikov 2003, Kottelat and Freyhof 2007). This fish has also been associated with the decline in populations of the European mudminnow (*Umbra krameri*), crucian carp, and belica (*Leucaspius delineates*) (Grabowska 2011). This species hosts parasites that may be transmitted to native fish species when introduced outside of its native range (Košuthová *et al.* 2008, Košuthová *et al.* 2009)

European Perch (Perca fluviatilis)

The European perch was first described and cataloged by Linnaeus in 1758, and is part of the order Perciformes and family Percidae (ITIS 2014). European perch is the preferred common name, but this species may also be referred to as the Eurasian perch or redfin perch (Allen 2004, Froese and Pauly 2014).

Native Range and Habitat

The European perch inhabits a temperate climate (Riehl and Baensch 1991, Froese and Pauly 2014). This species' native range extends throughout Europe and regions of Asia, including Afghanistan, Armenia, Azerbaijan, Georgia, Iran, Kazakhstan, Mongolia, Turkey, and Uzbekistan (Froese and Pauly 2014k). The fish resides in a range of habitats that includes estuaries and freshwater lakes, ponds, rivers, and streams (Froese and Pauly 2014k).

Nonnative Range and Habitat

The European perch has been intentionally introduced to several countries for recreational fishing, including Ireland (in the 1700s), Australia (in 1862), South Africa (in 1915), Morocco (in 1939), and Cyprus (in 1971) (FAO 2014, Froese and Pauly 2014k). This species was introduced intentionally to Turkey for aquaculture (FAO 2004) and unintentionally to Algeria when it was included in the transport water with carp intentionally brought into the country (Kara 2012, Froese and Pauly 2014k). European perch have also been introduced to China (in the 1970s), Italy (in 1860), New Zealand (in 1867), and Spain (no date) for unknown reasons (FAO 2014). In Australia, this species was first introduced as an effort to introduce wildlife familiar to European colonizers (Arthington and McKenzie 1997). The European perch was first introduced to Tasmania in 1862, Victoria in 1868, and to southwest Western Australia in 1892 and the early 1900s (Arthington and McKenzie 1997). This species has now invaded western Victoria, New South Wales, Tasmania, Western Australia, and South Australian Gulf Coast (NSW DPI 2013). In the 1980s, the European perch invaded the Murray River in southwestern Australia (Hutchison and Armstrong 1993).

Biology

The European perch has an average body length of 25 cm (10 in) with a maximum length of 60 cm (24 in) (Kottelat and Freyhof 2007, Froese and Pauly 2014k) and an average body weight of 1.2 kg (2.6 lb) with a maximum weight of 4.75 kg (10.5 lb) (Froese and Pauly 2014k). European perch color varies with habitat. Fish in well-lit shallow habitats tend to be darker, whereas fish residing in poorly lit areas tend to be lighter. These fish may also absorb carotenoids (nutrients that cause color) from their diet (crustaceans), resulting in reddish-yellow color (Allen 2004). Male fish are not easily externally differentiated from female fish (Allen 2004).

The European perch lives up to 22 years (Froese and Pauly 2014k), although the average is 6 years (Kottelat and Freyhof 2007). This fish may participate in short migrations prior to spawning in February through July, depending on latitude and altitude (Kottelat and Freyhof 2007). Female fish are sexually mature at 2 to 4 years and males at 1 to 2 years (Kottelat and Freyhof 2007).

The European perch is a generalist predator with a diet of zooplankton, macroinvertebrates (such as copepods and crustaceans), and small fish (Kottelat and Freyhof 2007, Froese and Pauly 2014k).

The European perch can also carry the OIE-notifiable disease epizootic haematopoietic necrosis (EHN) virus (NSW DPI 2013). Several native Australian fish (including the silver perch (*Bidyanus bidyanus*) and Murray cod (*Maccullochella peelii*)) are extremely susceptible to the virus and have had significant population declines over the past decades with the continued invasion of European perch (NSW DPI 2013).

Invasiveness

The European perch has been introduced to many new regions through fish stocking for recreational use. The nonnative range has also expanded as the fish has swum to new areas through connecting waterbodies (lakes, river, and streams within the same watershed). In New South Wales, Australia, these fish are a serious pest and are listed as Class 1 noxious species (NSW DPI 2013). These predatory fish have been blamed for the local extirpation of the mudminnow (*Galaxiella munda*) (Moore 2008, ISSG 2010) and depleted populations of native invertebrates and fish (Moore 2008). This species reportedly consumed 20,000 rainbow trout (*Oncorhynchus mykiss*) fry from an Australian reservoir in less than 3 days (NSW DPI 2013). The introduction of these fish in New Zealand and China has severely altered native freshwater communities (Closs *et al.* 2003). European perch form dense populations, forcing them to compete amongst each other for a reduced food supply. This competition results in stunted fish that are less appealing to the recreational fishery (NSW DPI 2013).

Zander (Sander lucioperca)

The zander was first described and catalogued by Linnaeus in 1758, and belongs to the order Perciformes and family Percidae (ITIS 2014). Although its preferred common name in the United States is the zander, this fish species is also called the pike-perch and European walleye (Godard and Copp 2011, Froese and Pauly 2014l).

Native Range and Habitat

The zander's native range includes the Caspian Sea, Baltic Sea, Black Sea, Aral Sea, North Sea, and Aegean Sea basins. In Asia, this fish is native to Afghanistan, Armenia, Azerbaijan, Georgia, Iran, Kazakhstan, and Uzbekistan. In Europe, the zander is native to much of eastern Europe (Albania, Austria, Czech Republic, Estonia, Germany, Greece, Hungary, Latvia, Lithuania, Moldova, Poland, Romania, Russia, Serbia, Slovakia, Ukraine, and Serbia and Montenegro) and the Scandinavian Peninsula (Finland, Norway, and Sweden) (Godard and Copp 2011, Froese and Pauly 2014l). The northernmost records of native populations are in Finland up to 64 °N (Larsen and Berg 2014).

The zander resides in brackish coastal estuaries and freshwater rivers, lakes, and reservoirs. The species prefers turbid, slightly eutrophic waters with high dissolved oxygen concentrations (Godard and Copp 2011). The zander can survive in salinities up to 20 parts per thousand (ppt), but prefers environments with salinities less than 12 ppt and requires less than 3 ppt for reproduction (Larsen and Berg 2014).

Nonnative Range and Habitat

The zander has been repeatedly introduced outside of its native range for recreational fishing and aquaculture and also to control cyprinids (Godard and Copp 2011, Larsen and Berg 2014). This species has been introduced to much of Europe, parts of Asia (China, Kyrgyzstan, and Turkey), and northern Africa (Algeria, Morocco, and Tunisia). Within Europe, the zander has been introduced to Belgium, Bulgaria, Croatia, Cyprus, Denmark, France, Italy, the Netherlands, Portugal, the Azores, Slovenia, Spain, Switzerland, and the United Kingdom (Godard and Copp 2011, Froese and Pauly 2014l). In Denmark, although the zander is native, stocking is not permitted to prevent the species from being introduced into lakes and rivers where it is not presently found and where introduction is not desirable (Larsen and Berg 2014).

The zander has been previously introduced to the United States. Juvenile zanders were stocked into Spiritwood Lake (North Dakota) in 1989 for recreational fishing (Fuller *et al.* 1999, Fuller 2009, USGS NAS 2014). Although previous reports indicated that zanders did not become established in Spiritwood Lake, there have been documented reports of captured juvenile zanders from this lake (Fuller 2009). In 2009, the North Dakota Game and Fish Department reported a small, established population of zanders within Spiritwood Lake (Fuller 2009), and a zander caught in 2013 was considered the State record (North Dakota Game and Fish 2013).

Biology

The zander has an average body length of 50 cm (1.6 ft) and maximum body length of 100 cm (3.3 ft). The maximum published weight is 20 kg (44 lb) (Froese and Pauly 2014l). The zander has a long, slender body with yellow-gray fins and dark bands running from the back down each side (Godard and Copp 2011).

The zander's age expectancy is inversely correlated to its body growth rate. Slower-growing zanders may live up to 20 to 24 years, whereas faster-growing fish may live only 8 to 9 years (Godard and Copp 2011). Female zanders typically spawn in April and May and produce approximately 150 to 400 eggs per gram of body mass. After spawning, male zanders protect the nest and fan the eggs with their tails (Godard and Copp 2011).

The zander is piscivorous, and its diet includes smelt (*Osmerus eperlanus*), ruffe (*Gymnocephalus cernuus*), European perch, vendace (*Coregonus albula*), roach, and other zanders (Kangur and Kangur 1998).

Several studies have found that zanders can be hosts for multiple parasites (Godard and Copp 2011). The nematode *Anisakis,* which is known to infect humans through fish consumption, has been documented in the zander (Eslami and Mokhayer 1977, Eslami *et al.* 2011). A study in the Polish section of Vistula Lagoon found 26 species of parasites associated with the zander, which was more than any of the other 15 fish species studied (Rolbiecki 2002, 2006).

Invasiveness

The zander has been intentionally introduced numerous times for aquaculture, recreational fishing, and occasionally for biomanipulation to remove unwanted cyprinids (Godard and Copp 2011). Biomanipulation is the management of an ecosystem by adding or removing species. The zander migrates for spawning, which further expands its invasive range. It is a predatory fish that is well-adapted to turbid water and low-light habitats (Sandström and Karås 2002). The zander competes with and preys on native fish. The zander is also a vector for the trematode *Bucephalus polymorphus,* which has been linked to a decrease in native French cyprinid populations (Kvach and Mierzejewska 2011).

Wels Catfish (Silurus glanis)

The wels catfish was first described and cataloged by Linnaeus in 1758, and belongs to the order Siluriformes and family Siluridae (ITIS 2014). The preferred common name is the wels catfish, but this fish is also called the Danube catfish, European catfish, and sheatfish (Rees 2012, Froese and Pauly 2014m).

Native Range and Habitat

The wels catfish inhabits a temperate climate (Baensch and Riehl 2004). The species is native to eastern Europe and western Asia, including the North Sea, Baltic Sea, Black Sea, Caspian Sea, and Aral Sea basins (Rees 2012, Froese and Pauly 2014m). The species resides in slow-moving rivers, backwaters, shallow floodplain channels, and heavily vegetated lakes (Kottelat and Freyhof 2007). The wels catfish has also been found in brackish water of the Baltic and Black Seas (Froese and Pauly 2014m). The species is a demersal (bottom-dwelling) species that prefers residing in crevices and root habitats (Rees 2012).

Nonnative Range and Habitat

The wels catfish was introduced to the United Kingdom and western Europe during the 19th century. The species was first introduced to England in 1880 for recreational fishing at the private Bedford manor estate of Woburn Abbey. Since then, wels catfish have been stocked both legally and illegally into many lakes and are now widely distributed throughout the United Kingdom (Rees 2012). This species was introduced to Spain, Italy, and France for recreational fishing and aquaculture (Rees 2012). Wels catfish were introduced to the Netherlands as a substitute predator to control cyprinid fish populations (De Groot 1985) after the native pike were overfished. The wels catfish has also been introduced to Algeria, Belgium, Bosnia-Hercegovina, China, Croatia, Cyprus, Denmark, Finland, Portugal, Syria, and Tunisia, although they are not known to be established in Algeria or Cyprus (Rees 2012).

Biology

The wels catfish commonly grows to 3 m (9.8 ft) in body length with a maximum length of 5 m (16.4 ft) and is Europe's largest freshwater fish (Rees 2012). The maximum published weight is 306 kg (675 lb) (Rees 2012).

This species has a strong, elongated, scaleless, mucus-covered body with a flattened tail. The body color is variable but is generally mottled with dark greenish-black and creamy-yellow sides. Wels catfishes possess six barbels; two long ones on each side of the mouth, and four shorter ones under the jaw (Rees 2012).

Although the maximum reported age is 80 years (Kottelat and Freyhof 2007), the average lifespan of a wels catfish is 15 to 30 years. This species becomes sexually mature at 3 to 4 years of age. Nocturnal spawning occurs annually and aligns with optimal temperature and day length between April and August (Kottelat and Freyhof 2007, Rees 2012). The number of eggs produced per female, per year is highly variable, and depends on age, size, geographic location, and other factors. Studies in Asia have documented egg production of a range of approximately 8,000 to 467,000 eggs with the maximum reported being 700,000 eggs (Copp *et al.* 2009). Male fish will guard the nest, repeatedly fanning their tails to ensure proper ventilation until the eggs hatch 2 to 10 days later (Copp *et al.* 2009). Young catfish develop quickly and, on average, achieve a 38- to 48-cm (15- to 19-in) total length within their first year (Copp *et al.* 2009).

This species is primarily nocturnal and will exhibit territorial behavior (Copp *et al.* 2009). The wels catfish is a solitary ambush predator but is also an opportunistic scavenger of dead fish (Copp *et al.* 2009). Juvenile catfish typically eat invertebrates. Adult catfish are generalist predators with a diet that includes fish (at least 55 species), crayfish, small mammals (such as rodents), and waterfowl (Copp *et al.* 2009, Rees 2012). Wels catfish have been observed beaching themselves to prey on land birds located on river banks (Cucherousset 2012).

Juvenile wels catfish can carry the highly infectious SVC (Hickley and Chare 2004). This disease is recognized worldwide and is classified as a notifiable animal disease by the World Organisation for Animal Health (OIE 2014). The wels catfish is also a host to at least 52 parasites, including: *Trichodina siluri, Myxobolus miyarii, Leptorhynchoides plagicephalus* and *Pseudotracheliastes stellifer,* all of which may be detrimental to native fish survival (Copp *et al.* 2009).

Invasiveness

The wels catfish is a habitat-generalist that tolerates poorly oxygenated waters and has been repeatedly introduced to the United Kingdom and western Europe for aquaculture, research, pest control, and recreational fishing (Rees 2012). Although this species has been intentionally introduced for aquaculture and fishing, it has also expanded its nonnative range by escaping from breeding and stocking facilities (Rees 2012). This species is tolerant of a variety of warm-water habitats, including those with low dissolved oxygen levels. The invasive success of the wels catfish will likely be further enhanced with the predicted increase in water temperature with climate change (2 to 3 °C by 2050) (Rahel and Olden 2008, Britton *et al.* 2010a).

The major risks associated with invasive wels catfish to the native fish population include disease transmission (SVC) and competition for habitat and prey species (Rees 2012). This fish species also excretes large amounts of phosphorus and nitrogen (estimated 83- to 286-fold and 17- to 56-fold, respectively) (Boulêtreau *et al.* 2011) into the ecosystem and consequently greatly disrupts nutrient cycling and transport (Schaus *et al.* 1997, McIntyre *et al.* 2008, Boulêtreau *et al.* 2011). Because of their large size, multiple wels catfish in one location magnify these effects and can greatly increase algae and plant growth (Boulêtreau *et al.* 2011), which reduces water quality.

Common Yabby (Cherax destructor)

Unlike the 10 fish in this rule, the yabby is a crayfish. Crayfish are invertebrates with hard shells. They can live and breathe underwater, and they crawl along the substrate on four pairs of walking legs (Holdich and Reeve 1988); the pincers are considered another pair of walking legs. The common yabby was first described and cataloged by Clark in 1936 and belongs to the phylum Arthropoda, order Decapoda, and family Parastacidae (ITIS 2014). This freshwater crustacean may also be called the yabby or the common crayfish. The term "yabby" is also commonly used for crayfish in Australia.

Native Range and Habitat

The common yabby is native to eastern Australia and extends from South Australia, northward to southern parts of the Northern Territory, and eastward to the Great Dividing Range (Eastern Highlands) (Souty-Grosset *et al.* 2006, Gherardi 2012).

The common yabby inhabits temperate and tropical climates. In aquaculture, the yabby tolerates the wide range of water temperatures from 1 to 35 °C (34 to 95 °F), with an optimal water temperature range of 20 to 25 °C (68 to 77 °F) (Withnall 2000). Growth halts below 15 °C (59 °F) and above 34 °C (93 °F), partial hibernation (decreased metabolism and feeding) occurs below 16 °C (61 °F), and death occurs when temperatures rise above 36 °C (97 °F) (Gherardi 2012). The common yabby can also survive drought for several years by sealing itself in a deep burrow (burrows well over 5 m; 16.4 ft have been found) and aestivating (the crayfish's respiration, pulse, and digestion nearly cease) (NSW DPI 2015).

This species can tolerate a wide range of dissolved oxygen concentrations and salinities (Mills and Geddes 1980) but prefers salinities less than 8 ppt (Withnall 2000, Gherardi 2012). Growth ceases at salinities above 8 ppt (Withnall 2000). This correlates with Beatty's (2005) study where all yabbies found in waters greater than 20 ppt were dead. Yabbies have been found in ponds where the dissolved oxygen was below 1 percent saturation (NSW DPI 2015).

The common yabby resides in a variety of habitats, including desert mound springs, alpine streams, subtropical creeks, rivers, billabongs (small lake, oxbow lake), temporary lakes, swamps, farm dams, and irrigation channels (Gherardi 2012). The yabby is found in mildly turbid waters and muddy or silted bottoms. The common yabby digs burrows that connect to waterways (Withnall 2000). Burrowing can result in unstable and collapsed banks (Gherardi 2012).

Nonnative Range and Habitat

The common yabby is commercially valuable and is frequently imported by countries for aquaculture, aquariums, and research (Gherardi 2012); it is raised in aquaculture as food for humans (NSW DPI 2015). This species has spread throughout Australia, and its nonnative range extends to New South Wales east of the Great Dividing Range, Western Australia, and Tasmania. This crayfish species was introduced to Western Australia in 1932 for commercial aquaculture from where it escaped and established in rivers and irrigation dams (Souty-Grosset *et al.* 2006). Outside of Australia, this species has been introduced into Italy and Spain where it has become established (Gherardi 2012). The common yabby has been introduced to China, South Africa, and Zambia for aquaculture (Gherardi 2012) but has not become established in the wild in those countries. The first European introduction occurred in 1983, when common yabbies were transferred from a California farm to a pond in Girona, Catalonia, Spain (Souty-Grosset *et al.* 2006). This crayfish species became established in Zaragoza Province, Spain, after being introduced in 1984 or 1985 (Souty-Grosset *et al.* 2006).

Biology

The common yabby has been described as a "baby lobster" because of its relatively large body size for a crayfish and because of its unusually large claws. Yabbies have a total body length up to 15 cm (6 in) with a smooth external carapace (exoskeleton) (Souty-Grosset *et al.* 2006, Gherardi 2012). Body color can vary with geographic location, season, and water conditions (Withnall 2000). Most captive-cultured yabbies are blue-gray, whereas wild yabbies may be green-beige to black (Souty-Grosset *et al.* 2006, Withnall 2000). Yabbies in the aquarium trade can be blue or white and go by the names blue knight and white ghost (LiveAquaria.com 2014a, b).

Most common yabbies live 3 years with some living up to 6 years (Souty-Grosset *et al.* 2006, Gherardi 2012). Females can be distinguished from males by the presence of gonopores at the base of the third pair of walking legs; while males have papillae at the base of the fifth pair of walking legs (Gherardi 2012). The female yabby becomes sexually mature before it is 1 year old (Gherardi 2012). Spawning is dependent on day length and water temperatures. When water temperatures rise above 15 °C (59 °F), the common yabby will spawn from early spring to mid-summer. When the water temperature is consistently between 18 and 20 °C (64 to 68 °F) with daylight of more than 14 hours, the yabby will spawn up to five times a year (Gherardi 2012). Young females produce 100 to 300 eggs per spawning event, while older (larger) females can produce up to 1,000 eggs (Withnall 2000). Incubation is also dependent on water temperature and typically lasts 19 to 40 days (Withnall 2000).

The common yabby grows through molting, which is shedding of the old carapace and then growing a new one (Withnall 2000). A juvenile yabby will molt every few days, whereas, an adult yabby may molt only annually or semiannually (Withnall 2000).

The common yabby is an opportunistic omnivore with a carnivorous summer diet and herbivorous winter diet (Beatty 2005). The diet includes fish (*Gambusia holbrooki*), plant material, detritus, and zooplankton. The yabby is also cannibalistic, especially where space and food are limited (Gherardi 2012).

The common yabby is affected by at least ten parasites (Jones and Lawrence 2001), including the crayfish plague (caused by *Aphanomyces astaci*), burn spot disease, *Psorospermium* sp. (a parasite), and thelohaniasis (Jones and Lawrence 2001, Souty-Grosset *et al.* 2006, Gherardi 2012). The crayfish plague is an OIE-reportable disease. Twenty-three bacteria species have been found in the yabby as well (Jones and Lawrence 2001).

Invasiveness

The common yabby has a quick growth and maturity rate, high reproductive potential, and generalist diet. These attributes, in addition to the species' tolerance for a wide range of freshwater habitats, make the common yabby an efficient invasive species. Additionally, the invasive range of the common yabby is expected to expand with climate change (Gherardi 2012). Yabbies can also live on land and travel long distances by walking between water bodies (Gherardi 2011).

The common yabby may reduce biodiversity through competition and predation with native species. In its nonnative range, the common yabby has proven to out-compete native crayfish species for food and habitat (Beatty 2006, Gherardi 2012). Native freshwater crayfish species are also at risk from parasitic infections from the common yabby (Gherardi 2012).

Summary of the Presence of the 11 Species in the United States

Only one of the 11 species, the zander, is known to be present in the wild within the United States. There has been a small established population of zander within Spiritwood Lake (North Dakota) since 1989. Crucian carp were reportedly introduced to Chicago lakes and lagoons during the early 1900s. Additionally, Nile perch were introduced to Texas reservoirs between 1978 and 1985. However, neither the crucian carp nor the Nile perch established populations, and these two species are no longer present in the wild in U.S. waters. Although these species are not yet present in the United States (except for one species in one lake), all 11 species have a high climate match in parts of the United States and have been introduced, become established, spread, and been documented as causing harm in countries outside of their native ranges in habitats and ecosystems similar to those found in the United States. Acting now to prohibit both their importation and interstate transportation and thereby prevent the species' likely introduction, establishment, and spread in the wild and associated harm to the interests of agriculture or to wildlife or wildlife resources of the United States is critical.

Rapid Screening

The first step that the Service performed in selecting species to evaluate for listing as injurious was to prepare a rapid screen to assess which species out of thousands of foreign species not yet found in the United States should be categorized as high-risk of invasiveness. We compiled the information in Ecological Risk Screening Summaries (ERSS) for each species to determine the Overall Risk Assessment of each species.

The Overall Risk Assessment incorporates scores for the history of invasiveness, climate match between the species' range (native and invaded ranges) and the United States, and certainty of assessment.

The climate match analysis (Australian Bureau of Rural Sciences 2010) incorporates 16 climate variables (eight for rainfall and eight for temperature) to calculate climate scores that can be used to calculate a Climate 6 ratio. The Climate 6 score (or ratio) is determined by this formula: (Sum of the Counts for Climate Match Scores 6–10)/(Sum of all Climate Match Scores). This ratio was shown to be the best predictor of success of introduction of exotic freshwater fish (Bomford 2008). Using the Climate 6 ratio, species can be categorized as having a low (0.000 to 0.005), medium (greater than 0.005 to less than 0.103), or high (greater than 0.103) climate match (Bomford 2008; USFWS 2013b).

The climate match score is a calculation that ranges from 0 to 10. It compares the 16 climate variables as one point (source climate station) to another point (target station). The equation calculates a figurative "distance" between every source and target station, then selects the highest score (best match and closest "distance"). This distance is then normalized on a score from 0 to 10 to make it easier to understand and to calculate ratios. The 16 climate parameters used to estimate the extent of climatically matched habitat in the CLIMATE program are in Table 1 (Bomford *et al.* 2010).

TABLE 1—THE CLIMATE PARAMETERS USED IN THE CLIMATE PROGRAM

Temperature parameters (°C)	Rainfall parameters (mm)
Mean annual	Mean annual.
Minimum of coolest month.	Mean of wettest month.
Maximum of warmest month.	Mean of driest month.

TABLE 1—THE CLIMATE PARAMETERS USED IN THE CLIMATE PROGRAM—Continued

Temperature parameters (°C)	Rainfall parameters (mm)
Average range	Mean monthly coefficient of variation.
Mean of coolest quarter.	Mean of coolest quarter.
Mean of warmest quarter.	Mean of warmest quarter.
Mean of wettest quarter.	Mean of wettest quarter.
Mean of driest quarter	Mean of driest quarter.

We use Climate 6 scores because that system was peer reviewed (Bomford 2008). In Bomford's seminal risk assessment manual, she stated, "The generic model is based on Climate 6 (as opposed to Climate 5, 7 or 8), since Climate 6 was shown to be the best predictor of success of introduction," referring to exotic freshwater fish. We believe that the categorical system provided by generating and using the Climate 6 Ratio is effective for our current needs. For more information on how the climate match scores are derived, please see the revised Standard Operating Procedures (USFWS 2016).

As explained in the proposed rule, the Service expanded the source ranges (native and nonnative distribution) of several species for the climate match from those listed in the ERSSs. The revised source ranges included additional locations referenced in FishBase (Froese and Pauly 2014), the CABI ISC, and the *Handbook of European Freshwater Fishes* (Kottelat and Freyhof 2007). Additional source points were also specifically selected for the stone moroko's distribution within the United Kingdom (Pinder *et al.* 2005). There were no revisions to the climate match for the Nile perch, Amur sleeper, or common yabby. The target range for the climate match included the States, District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

The ERSS process was peer-reviewed in 2013 per OMB guidelines (OMB 2004). More information on the ERSS process and its peer review is posted online at *http://www.fws.gov/injuriouswildlife/Injurious_prevention.html, http://www.fws.gov/science/pdf/ERSS-Process-Peer-Review-Agenda-12-19-12.pdf,* and *http://www.fws.gov/science/pdf/ERSS-Peer-Review-Response-report.pdf.*

The Overall Risk Assessment was found to be high for all 11 species. All 11 species have a high risk for history of invasiveness. Overall climate match to the United States ranged from medium for the Nile perch to high for the remaining nine fish and one crayfish species. The certainty of assessment (with sufficient and reliable information) was high for all species.

Injurious Wildlife Evaluation Criteria

Once we determined that all 11 species were good candidates for further and more in-depth evaluation because of their overall invasive risk, we used the criteria below to evaluate whether each of these species qualifies as injurious under the Act. The analysis using these criteria serve as a general basis for the Service's injurious wildlife listing decisions. Biologists within the Service evaluate both the factors that contribute to and the factors that reduce the likelihood of injuriousness:

(1) Factors that contribute to being considered injurious:

- The likelihood of release or escape;
- Potential to survive, become established, and spread;
- Impacts on wildlife resources or ecosystems through hybridization and competition for food and habitats, habitat degradation and destruction, predation, and pathogen transfer;
- Impacts to endangered and threatened species and their habitats;
- Impacts to human beings, forestry, horticulture, and agriculture; and
- Wildlife or habitat damages that may occur from control measures.

(2) Factors that reduce the likelihood of the species being considered as injurious:

- Ability to prevent escape and establishment;
- Potential to eradicate or manage established populations (for example, making organisms sterile);
- Ability to rehabilitate disturbed ecosystems;
- Ability to prevent or control the spread of pathogens or parasites; and
- Any potential ecological benefits to introduction.

For this final rule, a hybrid is defined as any progeny (offspring) from any cross involving a parent from 1 of the 11 species. These progeny would likely have the same or similar biological characteristics of the parent species (Ellstrand and Schierenbeck 2000, Mallet 2007), which, according to our analysis, would indicate that they are injurious to the interests of agriculture, or to wildlife or wildlife resources of the United States.

Factors That Contribute to Injuriousness for Crucian Carp

Current Nonnative Occurrences

This species is not currently found within the United States. The crucian carp has been introduced and become established in Croatia, Greece, France, Italy, and England (Crivelli 1995, Kottelat and Freyhof 2007).

Potential Introduction and Spread

Potential pathways of introduction into the United States include stocking for recreational fishing and through misidentified shipments of ornamental fish (Wheeler 2000, Hickley and Chare 2004, Innal and Erk'ahan 2006, Sayer *et al.* 2011). Additionally, crucian carp may be misidentified as other carp species, such as the Prussian carp or common carp, and thus they are likely underreported (Godard and Copp 2012).

The crucian carp prefers a temperate climate (as found in much of the United States) and tolerates high summer air temperatures (up to 35 °C (95 °F)) and can survive in poorly oxygenated waters (Godard and Copp 2012). The crucian carp has an overall high climate match with a Climate 6 ratio of 0.355. This species has a high climate match throughout much of the Great Lakes region, southeastern United States, and southern Alaska and Hawaii. Low matches occur in the desert Southwest.

If introduced, the crucian carp is likely to spread and become established in the wild due to its ability to be a habitat and diet generalist and adapt to new environments, its long lifespan (maximum 10 years), and its ability to establish outside of the native range.

Potential Impacts to Native Species (including Threatened and Endangered Species)

As mentioned previously, the crucian carp can compete with native fish species, alter the health of freshwater habitats, hybridize with other invasive and injurious carp species, and serve as a vector of the OIE-reportable fish disease SVC (Ahne *et al.* 2002, Godard and Copp 2012). The introduction of crucian carp to the United States could result in increased competition with native fish species for food resources (Welcomme 1988). The crucian carp consumes a variety of food resources, including plankton, benthic invertebrates, plant materials, and detritus (Kottelat and Freyhof 2007). With this varied diet, crucian carp would directly compete with numerous native species.

The crucian carp has a broad climate match throughout the country, and thus its introduction and establishment could further stress the populations of numerous endangered and threatened amphibian and fish species through competition for food resources.

The ability of crucian carp to hybridize with other species of

Cyprinidae (including common carp) may exacerbate competition over limited food resources and ecosystem changes and, thus, further challenge native species (including native threatened or endangered fish species).

Crucian carp harbor the fish disease SVC and additional parasitic infections. Although SVC also infects other carp species, the virus causing this disease can also be transmitted through the water column to native fish species causing fish mortalities. Mortality rates from SVC have been documented up to 70 percent among juvenile fish and 30 percent among adult fish (Ahne *et al.* 2002). Therefore, as a vector of SVC, this fish species may also be responsible for reduced wildlife diversity. Crucian carp may outcompete native fish species, thus replacing them in the trophic scheme. Large populations of crucian carp can result in considerable predation on aquatic plants and invertebrates. Changes in ecosystem cycling and wildlife diversity may have negative effects on the aesthetic, recreational, and economic benefits of the environment.

Potential Impacts to Humans

We have no reports of the crucian carp being directly harmful to humans.

Potential Impacts to Agriculture

The introduction of crucian carp is likely to affect agriculture by contaminating commercial aquaculture. This fish species can harbor SVC, which can infect numerous fish species, including common carp, koi (*C. carpio*), crucian carp, bighead carp (*Hypophthalmichthys nobilis*), silver carp, and grass carp (Ahne *et al.* 2002). This disease can cause serious fish mortalities, and thus can detrimentally affect the productivity of several species in commercial aquaculture facilities, including grass carp, goldfish, koi, fathead minnows (*Pimephales promelas*), and golden shiner (*Notemigonus crysoleucas*) (Ahne *et al.* 2002, Goodwin 2002).

Factors That Reduce or Remove Injuriousness for Crucian Carp

Control

Lab experiments indicate that the piscicide rotenone (a commonly used natural fish poison) could be used to control a crucian carp population (Ling 2003). However, rotenone is not target-specific (Wynne and Masser 2010). Depending on the applied concentration, rotenone kills other aquatic species in the water body. Some fish species are more susceptible than others, and the use of this piscicide may kill native species. Control measures that would harm other wildlife are not recommended as mitigation plans to reduce the injurious characteristics of this species and, therefore, do not meet control measures under the Injurious Wildlife Evaluation Criteria.

No other control methods are known for the crucian carp, but several other control methods are currently being used or are in development for introduced and invasive carp species of other genera. For example, the U.S. Geological Survey (USGS) is developing a method to orally deliver a piscicide (Micromatrix) specifically to invasive bighead carp and silver carp (Luoma 2012). This developmental control measure is expensive and not guaranteed to prove effective for any carps.

Potential Ecological Benefits for Introduction

We are not aware of any documented ecological benefits for the introduction of crucian carp.

Factors That Contribute to Injuriousness for Eurasian Minnow

Current Nonnative Occurrences

This species is not currently found within the United States. The Eurasian minnow was introduced to new waterways in its native range of Europe and Asia (Sandlund 2008). This fish species also has been introduced outside of its native range to new locations within Norway (Sandlund 2008, Hesthagen and Sandlund 2010).

Potential Introduction and Spread

Likely pathways of introduction include release or escape when used as live bait, unintentional inclusion in the transport water of intentionally stocked fish (often with salmonids), and intentional introduction for vector (insect) management (Sandlund 2008). Once introduced, this species can spread and establish in nearby waterways.

The Eurasian minnow prefers a temperate climate (Froese and Pauly 2014e). This minnow is capable of establishing in a variety of aquatic ecosystems ranging from freshwater to brackish water (Sandlund 2008). The Eurasian minnow has an overall high climate match to the United States with a Climate 6 ratio of 0.397. The highest climate matches are in the northern States, including Alaska. The lowest climate matches are in the Southeast and Southwest.

If introduced to the United States, the Eurasian minnow is highly likely to spread and become established in the wild due to this species' traits as a habitat generalist and generalist predator, with adaptability to new environments, high reproductive potential, long lifespan, extraordinary mobility, social nature, and proven invasiveness outside of the species' native range.

Potential Impacts to Native Species (including Endangered and Threatened Species)

Introduction of the Eurasian minnow can affect native species through several mechanisms, including competition over resources, predation, and parasite transmission. Introduced Eurasian minnows have a more serious effect in waters with fewer species than those waters with a more developed, complex fish community (Museth *et al.* 2007). In Norway, dense populations of the Eurasian minnow have resulted in an average 35 percent reduction in recruitment and growth rates in native brown trout (Museth *et al.* 2007). In the United States, introduced Eurasian minnow populations would likely compete with and adversely affect Atlantic salmon, State-managed brown trout, and other salmonid species.

Eurasian minnow introductions have also disturbed freshwater benthic invertebrate communities (Næstad and Brittain 2010). Increased predation by Eurasian minnows has led to shifts in invertebrate populations and changes in benthic diversity (Hesthagen and Sandlund 2010). Many of the invertebrates consumed by the Eurasian minnow are also components of the diet of the brown trout, thus exacerbating competition between the introduced Eurasian minnow and brown trout (Hesthagen and Sandlund 2010). Additionally, Eurasian minnows have been shown to consume vendace (a salmonid) larvae (Huusko and Sutela 1997). If introduced, the Eurasian minnow's diet may include the larvae of U.S. native salmonids, including salmon and trout species (*Oncorhynchus* and *Salvelinus* spp.).

The Eurasian minnow serves as a host to parasites, such as *Gyrodactylus aphyae,* that it can transmit to other fish species, including salmon and trout (Zietara *et al.* 2008). Once introduced, these parasites would likely spread to native salmon and trout species. Depending on pathogenicity, parasites of the *Gyrodactylus* species may cause high fish mortality (Bakke *et al.* 1992).

Potential Impacts to Humans

We have no reports of the Eurasian minnow being harmful to humans.

Potential Impacts to Agriculture

The Eurasian minnow may impact agriculture by affecting aquaculture. This species harbors a parasite that may infect other fish species and can cause high fish mortality (Bakke *et al.* 1992). Eurasian minnow populations can adversely impact both recruitment and growth of brown trout. Reduced recruitment and growth rates can reduce the economic value associated with brown trout aquaculture and recreational fishing.

Factors That Reduce or Remove Injuriousness for Eurasian Minnow

Control

Once introduced, it is difficult and costly to control a Eurasian minnow population (Sandlund 2008). Eradication may be possible from small waterbodies in cases where the population is likely to serve as a center for further spread, but no details are given on how to accomplish such eradication (Sandlund 2008). Control may also be possible using habitat modification or biocontrol (introduced predators); however, we know of no published accounts of long-term success by either method. Both control measures of habitat modification and biocontrol cause wildlife or habitat damages and are expensive mitigation strategies and, therefore, are not recommended or considered appropriate under the Injurious Wildlife Evaluation Criteria as a risk management plan for this species.

Potential Ecological Benefits for Introduction

There has been one incidence where the Eurasian minnow was introduced as a biocontrol for the Tune fly (Simuliidae) (Sandlund 2008). However, we do not have information on the success of this introduction. We are not aware of any other documented ecological benefits associated with the Eurasian minnow.

Factors That Contribute to Injuriousness for Prussian Carp

Current Nonnative Occurrences

This species is not found within the United States. However, it was recently reported to be established in waterways in southern Alberta, Canada, which is the first confirmed record in the wild in North America (Elgin *et al.* 2014). The Prussian carp has been introduced to many countries of central and Western Europe. This species' current nonnative range includes the Asian countries of Armenia, Turkey, and Uzbekistan and the European countries of Belarus, Belgium, Czech Republic, Denmark, Estonia, France, Germany, Poland, and Switzerland (Britton 2011); it also includes the Iberian Peninsula (Ribeiro *et al.* 2015).

Potential Introduction and Spread

Potential pathways of introduction include stocking for recreational fishing and aquaculture. Once introduced, the Prussian carp will naturally disperse to new waterbodies.

The Prussian carp prefers a temperate climate and resides in a variety of freshwater environments, including those with low dissolved oxygen concentrations and increased pollution (Britton 2011). The Prussian carp has an overall high climate match with a Climate 6 ratio of 0.414. This fish species has a high climate match to the Great Lakes region, northern Plains, some western mountain States, and parts of California. The Prussian carp has a medium climate match to much of the United States, including southern Alaska and regions of Hawaii. This species has a low climate match to the southeastern United States, especially Florida and along the Gulf Coast. This species is not found within the United States but has been recently discovered as established in Alberta, Canada (Elgin *et al.* 2014); the climate match was run prior to this new information, so the results do not include any actual locations in North America.

If introduced, the Prussian carp is likely to spread and establish as a consequence of its tolerance to poor-quality environments, rapid growth rate, very rare ability to reproduce from unfertilized eggs (gynogenesis), and proven invasiveness outside of the native range.

Potential Impacts to Native Species (including Threatened and Endangered Species)

The Prussian carp is closely related and behaviorally similar to the crucian carp (Godard and Copp 2012). As with crucian carp, introduced Prussian carp may compete with native fish species, alter freshwater ecosystems, and serve as a vector for parasitic infections. Introduced Prussian carp have been responsible for the decreased biodiversity and overall populations of native fish (including native Cyprinidae), invertebrates, and plants (Anseeuw *et al.* 2007, Lusk *et al.* 2010). Thus, if introduced to the United States, the Prussian carp will likely affect numerous native Cyprinid species, including chub, dace, shiner, and minnow fish species (Froese and Pauly 2014c). Several of these native Cyprinids, such as the laurel dace (*Chrosomus saylori*) and humpback chub (*Gila cypha*), are listed as endangered or threatened under the Endangered Species Act.

Prussian carp can alter freshwater habitats. This was documented in Lake Mikri Prespa (Greece), where scientists correlated increased turbidity with increased numbers of Prussian carp (Crivelli 1995). This carp species increased turbidity levels by disturbing sediment during feeding. These carp also intensively fed on zooplankton, thus resulting in increased phytoplankton abundance and phytoplankton blooms (Crivelli 1995). Increased turbidity results in imbalances in nutrient cycling and ecosystem energetics. If introduced to the United States, Prussian carp could cause increased lake and pond turbidity, increased phytoplankton blooms, imbalances to ecosystem nutrient cycling, and altered freshwater ecosystems.

Several different types of parasitic infections, such as black spot disease (Posthodiplostomatosis) and from the parasite *Thelohanellus,* are associated with the Prussian carp (Ondračková *et al.* 2002, Markovíc *et al.* 2012). Black spot disease particularly affects young fish and can cause physical deformations, decreased growth, and decrease in body condition (Ondračková *et al.* 2002). These parasites and the respective diseases may infect and decrease native fish stocks.

Prussian carp may compete with native fish species and may replace them in the trophic scheme. Large populations of Prussian carp can cause heavy predation on aquatic plants and invertebrates (Anseeuw *et al.* 2007). Changes in ecosystem cycling and wildlife diversity may have negative effects on the aesthetic, recreational, and economic benefits of the environment.

Potential Impacts to Humans

We have no reports of the Prussian carp being harmful to humans.

Potential Impacts to Agriculture

The Prussian carp may impact agriculture by affecting aquaculture. As mentioned in the *Potential Impacts to Native Species* section, Prussian carp harbor several types of parasites that may cause physical deformations, decreased growth, and decrease in body condition (Ondračková *et al.* 2002). Impaired fish physiology and health detract from the productivity and value of commercial aquaculture.

Factors That Reduce or Remove Injuriousness for Prussian Carp

Control

We are not aware of any documented control methods for the Prussian carp. The piscicide rotenone has been used to control the common carp and crucian carp population (Ling 2003) and may be effective against Prussian carp. However, rotenone is not target-specific (Wynne and Masser 2010). Depending on the applied concentration, rotenone kills other aquatic species in the water body. Some fish species are more susceptible than others, and, even if effective against Prussian carp, the use of this piscicide may kill native species (Allen *et al.* 2006). Control measures that would harm other wildlife are not recommended as mitigation to reduce the injurious characteristics of this species and, therefore, do not meet control measures under the Injurious Wildlife Evaluation Criteria.

Potential Ecological Benefits for Introduction

We are not aware of any documented ecological benefits for the introduction of the Prussian carp.

Factors That Contribute to Injuriousness for Roach

Current Nonnative Occurrences

This species is not found in the United States. The roach has been introduced and become established in England, Ireland, Italy, Madagascar, Morocco, Cyprus, Portugal, the Azores, Spain, and Australia (Rocabayera and Veiga 2012).

Potential Introduction and Spread

Potential introduction pathways include stocking for recreational fishing and use as bait fish. Once introduced, released, or escaped, the roach naturally disperses to new waterways within the watershed.

This species prefers a temperate climate and can reside in a variety of freshwater habitats (Riehl and Baensch 1991). Hydrologic changes, such as weirs and dams that extend aquatic habitats that are otherwise scarce, enhance the potential spread of the roach (Rocabayera and Veiga 2012). The roach has an overall high climate match to the United States with a Climate 6 ratio of 0.387. Particularly high climate matches occurred in southern and central Alaska, the Great Lakes region, and the western mountain States. The Southeast and Southwest have low climate matches.

If introduced, the roach is likely to spread and establish due to its highly adaptive nature toward habitat and diet choice, high reproductive potential, ability to reproduce with other cyprinid species, long lifespan, and extraordinary mobility. This species has also proven invasive outside of its native range.

Potential Impacts to Native Species (including Endangered and Threatened Species)

Potential effects to native species from the introduction of the roach include competition over food and habitat resources, hybridization, altered ecosystem nutrient cycling, and parasite and pathogenic bacteria transmission. The roach is a highly adaptive species and will switch between habitats and food sources to best avoid predation and competition from other species (Winfield and Winfield 1994). The roach consumes an omnivorous generalist diet, including benthic invertebrates (especially mollusks), zooplankton, plants, and detritus (Rocabayera and Veiga 2012). With such a varied diet, the roach would be expected to compete with numerous native fish species from multiple trophic levels. The trophic level is the position an organism occupies in a food chain. Such species may include shiners, daces, chubs, and stonerollers, several of which are federally listed as endangered or threatened.

Likewise, introduction of the roach would be expected to detrimentally affect native mollusk species (including mussels and snails), some of which may be federally endangered or threatened. One potentially affected species is the endangered Higgins' eye pearly mussel (*Lampsilis higginsii*), which is native to the upper Mississippi River watershed, where there is high climate match for the roach species. Increased competition with and predation on native species may alter trophic cycling and diversity of native aquatic species.

The roach can hybridize with other fish species of its subfamily (Leuciscinae), including rudd and bream (Pitts *et al.* 1997, Kottelat and Freyhof 2007). In Ireland, the roach has hybridized with the rudd (*Scardinius erythrophthalmus*) and the bream (*Abramis brama*); all three are in the subfamily Leuciscinae. Although the bream is not found in the United States, the rudd is already considered invasive in the Great Lakes (Fuller *et al.* 1999, Kapuscinski *et al.* 2012). Hybrids of roaches and rudds could exacerbate the potential adverse effects (competition) of each separate species (Rocabayera and Veiga 2012). Furthermore, the roach will likely be able to hybridize with some U.S. native species in the same subfamily, which includes minnows.

Large populations of the roach may alter nutrient cycling in lake ecosystems. Increased populations of roach may prey heavily on zooplankton, thus resulting in increased phytoplankton communities and algal blooms (Rocabayera and Veiga 2012). These changes alter nutrient cycling and can consequently affect native aquatic species that depend on certain nutrient balances.

Several parasitic infections, including worm cataracts, black spot disease, and tapeworms, have been associated with the roach (Rocabayera and Veiga 2012). The pathogenic bacterium *Aeromonas salmonicida* also infects the roach, causing furunculosis (Wiklund and Dalsgaard 1998). This disease causes skin ulcers and hemorrhaging. The disease can be spread through a fish's open sore. This disease affects both farmed and wild fish. The causative bacteria *A. salmonicida* has been isolated from fish in U.S. freshwaters (USFWS 2011). The roach may spread these parasites and bacteria to new environments and native fish species.

Potential Impacts to Humans

We have no reports of the roach being harmful to humans.

Potential Impacts to Agriculture

The roach may affect agriculture by decreasing aquaculture productivity if they are unintentionally introduced into aquaculture operations in the United States, such as when invaded watersheds flood aquaculture ponds or by accidentally being included in a shipment of fish, then outcompeting and preying on the aquacultured fish, spreading pathogens, or hybridizing with farmed fish. Hybridization can reduce the reproductive success and productivity of the commercial fisheries and aquaculture facilities.

Roaches harbor several parasitic infections (Rocabayera and Veiga 2012) that can impair fish physiology and health. The pathogenic bacterium *Aeromonas salmonicida* infects the roach, causing furunculosis (Wiklund and Dalsgaard 1998). The disease can be spread through a fish's open sore when the bacteria is shed from the ulcerated skin and survives in water to infect another fish. Introduction and spread of parasites and pathogenic bacterium to an aquaculture facility can result in increased incidence of fish disease and mortality and decreased productivity and value.

Factors That Reduce or Remove Injuriousness for Roach

Control

An introduced roach population would be difficult to control (Rocabayera and Veiga 2012). Application of the piscicide rotenone may be effective for limited populations of small fish. However, rotenone is not target-specific (Wynne and Masser 2010). Depending on the applied concentration, rotenone kills other aquatic species in the water body. Some fish species are more susceptible than others, and the use of this piscicide may kill native species. Control measures that would harm other wildlife are not recommended as mitigation to reduce the injurious characteristics of this species and, therefore, do not meet control measures under the Injurious Wildlife Evaluation Criteria.

Potential Ecological Benefits for Introduction

We are not aware of any documented ecological benefits for the introduction of the roach.

Factors That Contribute to Injuriousness for Stone Moroko

Current Nonnative Occurrences

This fish species is not found within the United States. The stone moroko has been introduced and become established throughout Europe and Asia. Within Asia, this fish species is invasive in Afghanistan, Armenia, Iran, Kazakhstan, Laos, Taiwan, Turkey, and Uzbekistan (Copp 2007). In Europe, this fish species' nonnative range includes Albania, Austria, Belgium, Bulgaria, Czech Republic, Denmark, France, Germany, Greece, Hungary, Italy, Lithuania, Moldova, Montenegro, the Netherlands, Poland, Romania, Russia, Serbia, Slovakia, Spain, Sweden, Switzerland, Ukraine, and the United Kingdom (Copp 2007). The stone moroko's nonnative range also includes Algeria and Fiji (Copp 2007).

Potential Introduction and Spread

The primary introduction pathways are as unintentional inclusion in the transport water of intentionally stocked fish shipments for both recreational fishing and aquaculture, released or escaped bait, and released or escaped ornamental fish. Once introduced, the stone moroko naturally disperses to new waterways within a watershed. Since the 1960s, this fish has invaded nearly every European country and many Asian countries (Copp *et al.* 2005).

The stone moroko inhabits a temperate climate (Baensch and Riehl 1993) and a variety of freshwater habitats, including those with poor dissolved oxygen concentrations (Copp 2007). The stone moroko has an overall high climate match to the United States with a Climate 6 ratio of 0.557. This species has a high or medium climate match to most of the United States. The highest matches are in the Southeast, Great Lakes, central plains, and West Coast.

If introduced, the stone moroko is highly likely to establish and spread. This fish species is a habitat generalist and diet generalist and is quick growing, highly adaptable to new environments, and highly mobile. Additionally, the stone moroko has proven invasive outside of its native range (Copp 2007, Kottelat and Freyhof 2007, Witkowski 2011, Yalçın-Özdilek *et al.* 2013).

Potential Impacts to Native Species (including Endangered and Threatened Species)

In much of the stone moroko's nonnative range, the introduction of this species has been linked to the decline of native freshwater fish species (Copp 2007). The stone moroko could potentially adversely affect native species through predation, competition, disease transmission, and altering freshwater ecosystems (Witkowski 2011).

Stone moroko introductions have mostly originated from unintentional inclusion in the transport water of intentionally stocked fish species. In many stocked ponds, the stone moroko actually outcompetes the farmed fish species for food resources, which results in decreased production of the farmed fish (Witkowski 2011). The stone moroko's omnivorous diet includes insects, fish, fish eggs, molluscs, planktonic crustaceans, algae (Froese and Pauly 2014g), and plants (Kottelat and Freyhof 2007). With this diet, the stone moroko would compete with many native U.S. freshwater fish, including minnow, dace, sunfish, and darter species.

In the United Kingdom, Italy, China, and Russia, the introduction of the stone moroko correlates with dramatic declines in native fish populations and species diversity (Copp 2007). The stone moroko first competes with native fish for food resources and then predates on the eggs, larvae, and juveniles of these same native fish species (Pinder 2005, Britton *et al.* 2007). In England, where stone morokos were introduced, they dominated the fish community quickly, and the other fish species exhibited decreased growth rates and reproduction, as well as shifts in their trophic levels (Britton *et al.* 2010b).

The stone moroko is a vector of the pathogenic, rosette-like agent *Sphaerothecum destruens* (Gozlan *et al.* 2005, Pinder *et al.* 2005), which is a documented pathogen of farmed and wild European fish. The stone moroko is a healthy host for this nonspecific pathogen that could threaten aquaculture trade, including that of salmonids (Gozlan *et al.* 2009). This pathogen infects a fish's internal organs causing spawning failure, organ failure, and death (Gozlan *et al.* 2005). This pathogen has been documented as infecting the sunbleak (*Leucaspius delineatus*), which are native to eastern Europe, and Chinook salmon (*Oncorhynchus tshawytscha*), Atlantic salmon, and the fathead minnow (*Pimephales promelas*), all three of which are native to the United States (Gozlan *et al.* 2005).

The stone moroko consumes large quantities of zooplankton. The declines in zooplankton population results in increased phytoplankton populations, which in turn causes algal blooms and unnaturally high nutrient loads (eutrophication). These changes can cause imbalanced nutrient cycling, decrease dissolved oxygen concentrations, and adversely impact the health of native aquatic species.

Potential Impacts to Humans

We have no reports of the stone moroko being harmful to humans.

Potential Impacts to Agriculture

The stone moroko may affect agriculture by decreasing aquaculture productivity. This species often contaminates farmed fish stocks and competes with the farmed species for food resources, resulting in decreased aquaculture productivity (Witkowski 2011). The stone moroko is an unaffected carrier of the pathogenic, rosette-like agent *Sphaerothecum destruens* (Gozlan *et al.* 2005, Pinder *et al.* 2005). This pathogen is transmitted through water and causes reproductive failure, disease, and death to farmed fish. This pathogen is not species-specific and has been known to infect cyprinid and salmonid fish species. *Sphaerothecum destruens* is responsible for disease outbreaks in North American salmonids and causes mortality in both juvenile and adult fish (Gozlan *et al.* 2009). If this pathogen was introduced to an aquaculture facility, it is likely to spread and infect numerous fish, resulting in high mortality. Further research is needed to ascertain this pathogen's prevalence in the wild environment (Gozlan *et al.* 2009).

Factors That Reduce or Remove Injuriousness for Stone Moroko

Control

An established, invasive stone moroko population would be both difficult and costly to control (Copp 2007). Additionally, this fish species has a higher tolerance for the piscicide rotenone than most other fish belonging to the cyprinid group (Allen *et al.* 2006). Application of rotenone for stone moroko control may kill native aquatic fish species. Control measures that would harm other wildlife are not recommended as mitigation to reduce the injurious characteristics of this species and, therefore, do not meet control measures under the Injurious Wildlife Evaluation Criteria.

Potential Ecological Benefits for Introduction

We are not aware of any documented ecological benefits for the introduction of the stone moroko.

Factors That Contribute to Injuriousness for Nile Perch

Current Nonnative Occurrences

This species is not currently found within the United States. The Nile perch is invasive in the Kenyan, Tanzanian, and Ugandan watersheds of Lake Victoria and Lake Kyoga (Africa). This species has also been introduced to Cuba (Welcomme 1988).

Potential Introduction and Spread

This species was stocked in Texas reservoirs, although this population failed to establish (Fuller *et al.* 1999, Howells 2001). However, with continued release events, we anticipate that the Nile perch is likely to establish in parts of the United States, including the Southeast, Southwest, Hawaii, Puerto Rico, and U.S. Virgin Islands. Likely introduction pathways include use for aquaculture and recreational fishing. Over the past 60 years, the Nile perch has invaded, established, and become the dominant fish species within this species' nonnative African range (Witte 2013).

The Nile perch prefers a tropical climate and can inhabit a variety of freshwater and brackish habitats (Witte 2013). The Nile perch has an overall medium climate match to the United States with a Climate 6 ratio of 0.038. Of the 11 species in this rule, the Nile perch has the only overall medium climate match. However, this fish species has a high climate match to the Southeast (Florida and Gulf Coast), Southwest (California), Hawaii, Puerto Rico, and the U.S. Virgin Islands.

If introduced into the United States, the Nile perch is likely to establish and spread due to this species' nature as a habitat generalist and generalist predator, long lifespan, quick growth rate, high reproductive potential, extraordinary mobility, and proven invasiveness outside of the species' native range (Witte 2013, Asila and Ogari 1988, Ribbinick 1982).

Potential Impacts to Native Species (including Endangered and Threatened Species)

Potential impacts of introduction of the Nile perch include outcompeting and preying on native species, altering habitats and trophic systems, and disrupting ecosystem nutrient cycling. The Nile perch can produce up to 15 million eggs per breeding cycle (Asila and Ogari 1988), likely contributing to this species' efficiency and effectiveness in establishing an introduced population.

Historical evidence from the Lake Victoria (Africa) basin indicate that the Nile perch outcompeted and preyed on at least 200 endemic fish species, leading to their extinction (Kaufman 1992, Snoeks 2010, Witte 2013). Many of the affected species were haplochromine cichlid fish species, and the populations of native lung fish (*Protopterus aethiopicus*) and catfish species (*Bagrus docmak, Xenoclarias eupogon, Synodontis victoria*) also witnessed serious declines (Witte 2013). By the late 1980s, only three fish species, including the cyprinid *Rastrineobolas argentea* and the introduced Nile perch and Nile tilapia (*Oreochromis niloticus*), were common in Lake Victoria (Witte 2013).

The haplochromine cichlid species comprised 15 subtrophic groups with varied food (detritus, phytoplankton, algae, plants, mollusks, zooplankton, insects, prawns, crabs, fish, and parasites) and habitat preferences (Witte and Van Oijen 1990, Van Oijen 1996). The depletion of so many fish species has drastically altered the Lake Victoria ecosystem's trophic-level structure and biodiversity. These changes resulted in abnormally high lake eutrophication and frequency of algal blooms (Witte 2013).

The depletion of the native fish species in Lake Victoria by Nile perch led to the loss of income and food for local villagers. Nile perch was not a suitable replacement for traditional fishing. Fishing for this larger species required equipment that was prohibitively more expensive, required processing that could not be done by the wife and children, required the men to be away for extended periods, and decreased the availability of fish for household consumption (Witte 2013).

If introduced to the United States, Nile perch are expected to prey on small native fish species, such as mudminnows, cyprinids, sunfishes, and darters. Nile perch would likely prey on, compete with, and decrease the species diversity of native cyprinid fish. Nile perch are expected to compete with larger native fish species, including largemouth bass (*Micropterus salmoides*) and smallmouth bass (*Micropterus dolomieu*), blue catfish (*Ictalurus furcatus*), channel catfish (*Ictalurus punctatus*), and flathead catfish (*Pyodictis olivaris*). These native fish species are not only economically important to both commercial and recreational fishing, but are integral components of freshwater ecosystems.

Potential Impacts to Humans

We have no reports of the Nile perch being harmful to humans.

Potential Impacts to Agriculture

We are not aware of any reported effects to agriculture. However, Nile perch may affect aquaculture if they are unintentionally introduced into aquaculture operations in the United States, such as when invaded watersheds flood aquaculture ponds or by accidentally being included in a shipment of fish, by outcompeting and preying on the aquacultured fish.

Factors That Reduce or Remove Injuriousness for Nile Perch

Control

Nile perch grow to be large fish with a body length of 2 m (6 ft) and maximum weight of 200 kg (440 lb) (Ribbinick 1987). Witte (2013) notes that this species would be difficult and costly to control. We are not aware of any documented reports of successfully controlling or eradicating an established Nile perch population.

Potential Ecological Benefits for Introduction

We are not aware of any documented ecological benefits for the introduction of the Nile perch.

Factors That Contribute to Injuriousness for the Amur Sleeper

Current Nonnative Occurrences

This species has not been reported within the United States. The Amur sleeper is invasive in Europe and Asia in the countries of Belarus, Bulgaria, Croatia, Estonia, Hungary, Latvia, Lithuania, Moldova, Poland, Romania, Serbia, Slovakia, Ukraine, Russia, and

Mongolia (Froese and Pauly 2014j, Grabowska 2011).

Potential Introduction and Spread

Although the Amur sleeper has not yet been introduced to the United States, the likelihood of introduction, release, or escape is high as evidenced by the history of introduction over a broad geographic region of Eurasia. Since its first introduction outside of its native range in 1916, the Amur sleeper has invaded 15 Eurasian countries and become a widespread, invasive fish throughout European freshwater ecosystems (Copp *et al.* 2005, Grabowska 2011). The introduction of the Amur sleeper has been attributed to release and escape of aquarium and ornamental fish, unintentional and intentional release of Amur sleepers used for bait, and the unintentional inclusion in the transport water of intentionally stocked fish (Reshetnikov 2004, Grabowska 2011, Reshetnikov and Ficetola 2011).

Once this species has been introduced, it has proven to be capable of establishing (Reshetnikov 2004). The established populations can have rapid rates of expansion. Upon introduction into the Vistula River in Poland, the Amur sleeper expanded its range by 44 km (27 mi) the first year and up to 197 km (122 mi) per year thereafter (Grabowska 2011).

Most aquatic species are constrained in distribution by temperature, dissolved oxygen levels, and lack of flowing water. However, the Amur sleeper has a wide water temperature preference (Baensch and Riehl 2004), can live in poorly oxygenated waters, and may survive in dried-out or frozen water bodies by burrowing into and hibernating in the mud (Grabowska 2011). The Amur sleeper has an overall high climate match to the United States with a Climate 6 ratio of 0.376. The climate match is highest in the Great Lakes region (Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota), central and high Plains (Iowa, Nebraska, and Missouri), western mountain States (South Dakota, North Dakota, Montana, Wyoming, and Colorado), and central to eastern Alaska.

If introduced, the Amur sleeper would be expected to establish and spread in the wild due to this species' ability as a habitat generalist, generalist predator, rapid growth, high reproductive potential, adaptability to new environments, extraordinary mobility, and a history of invasiveness outside of the native range.

Potential Impacts to Native Species (including Endangered and Threatened Species)

The Amur sleeper is a voracious generalist predator whose diet includes crustaceans, insects, and larvae of mollusks, fish, and amphibian tadpoles (Bogutskaya and Naseka 2002, Reshetnikov 2008). Increased predation with the introduction of the Amur sleeper has resulted in decreased species richness and decreased population of native fish (Grabowska 2011). In some areas, the Amur sleeper's eating habits have been responsible for the dramatic decline in juvenile fish and amphibian species (Reshetnikov 2003). Amur sleepers prey on juvenile stages and can cause decreased reproductive success and reduced populations of the native fish and amphibians (Mills *et al.* 2004). Declines in lower trophic-level populations (invertebrates) also result in increased competition among native predatory fish, including the European mudminnow (*Umbra krameri*) (Grabowska 2011).

Two species similar to the European mudminnow, the eastern mudminnow (*Umbra pygmaea*) and the central mudminnow (*Umbra limi*), are native to the eastern United States. Both of these species are integral members of freshwater ecosystems, with the eastern mudminnow ranging from New York to Florida (Froese and Pauly 2014n), and the central mudminnow residing in the freshwater of the Great Lakes, Hudson Bay, and Mississippi River basins (Froese and Pauly 2014o). Introduced Amur sleepers could prey on and reduce the population of native U.S. mudminnow species.

The introduction or establishment of the Amur sleeper is also expected to reduce native wildlife biodiversity. In the Selenga River (Russia), the Amur sleeper competes with the native Siberian roach (*Rutilus rutilus lacustris*) and Siberian dace (*Leuciscus leuciscus baicalensis*) for food resources. This competition results in decreased populations of native fish species, which may result in economic losses and negative effects on commercial fisheries (Litvinov and O'Gorman 1996, Grabowska 2011).

Species similar to Siberian roach and Siberian dace that are native to the United States include those of the genus *Chrosomus,* such as the blackside dace (*Chrosomus cumberlandensis*), northern redbelly dace (*C. eos*), southern redbelly dace (*C. erythrogaster*), and Tennessee dace (*C. tennesseensis*). Like with the Siberian roach and the Siberian dace, introduced populations of the Amur sleeper may compete with native dace fish species, resulting in population declines of these native species.

Additionally, the Amur sleeper harbors parasites, including *Nippotaenia mogurndae* and *Gyrodactylus perccotti.* The introduction of the Amur sleeper has resulted in the simultaneous introduction of both parasites to the Amur sleeper's nonnative range. These parasites have expanded their own nonnative range and successfully infected new hosts of native fish species (Košuthová *et al.* 2008).

Potential Impacts to Humans

We have no reports of Amur sleeper being harmful to humans.

Potential Impacts to Agriculture

The Amur sleeper may affect agriculture by decreasing aquaculture productivity. This fish species hosts parasites, including *Nippotaenia mogurndae* and *Gyrodactylus perccotti.* These parasites may switch hosts (Košuthová *et al.* 2008) and infect farmed species involved in aquaculture. Increased parasite load impairs a fish's physiology and general health, and consequently may decrease aquaculture productivity.

Factors That Reduce or Remove Injuriousness for Amur Sleeper

Control

Once introduced and established, it would be difficult, if not impossible, to control or eradicate the Amur sleeper. All attempts to eradicate the Amur sleeper once it had established a reproducing population have been unsuccessful (Litvinov and O'Gorman 1996). Natural predators include pike, snakeheads, and perch (Bogutskaya and Naseka 2002). Not all freshwater systems have these or similar predatory species, and thus would allow the Amur sleeper population to be uncontrolled.

Some studies have indicated that the Amur sleeper may be eradicated by adding calcium chloride ($CaCl_2$) or ammonium hydroxide (NH_4OH) to the water body (Grabowska 2011). However, this same study found that the Amur sleeper was one of the most resistant fish species to either treatment. Thus, the use of either treatment would likely negatively affect many other native organisms and is not considered a viable option. Control measures that would harm other wildlife are not recommended as mitigation to reduce the injurious characteristics of this species and, therefore, do not meet control measures under the Injurious Wildlife Evaluation Criteria.

Potential Ecological Benefits for Introduction

We are not aware of any documented ecological benefits for the introduction of the Amur sleeper.

Factors That Contribute to Injuriousness for European Perch

Current Nonnative Occurrences

This fish species is not found within the United States. The European perch has been introduced and become established in several countries, including Ireland, Italy, Spain, Australia, New Zealand, China, Turkey, Cyprus, Morocco, Algeria, and South Africa.

Potential Introduction and Spread

The main pathway of introduction is through stocking for recreational fishing. Once stocked, this fish species has expanded its nonnative range by swimming through connecting waterbodies to new areas within the same watershed.

The European perch prefers a temperate climate (Riehl and Baensch 1991, Froese and Pauly 2014k). This species can reside in a wide variety of aquatic habitats ranging from freshwater to brackish water (Froese and Pauly 2014k). The European perch has an overall high climate match to the United States, with a Climate 6 ratio of 0.438, with locally high matches to the Great Lakes region, central Texas, western mountain States, and southern and central Alaska. Hawaii ranges from low to high matches. Much of the rest of the country has a medium climate match.

If introduced to the United States, the European perch is likely to spread and establish in the wild as a generalist predator that is able to adapt to new environments and outcompete native fish species. Additionally, this species has proven to be invasive outside of its native range.

Potential Impacts to Native Species (including Threatened and Endangered Species)

The European perch can impact native species through outcompeting and preying on them and by transmitting disease. This introduced fish species competes with other European native species for both food and habitat resources (Closs *et al.* 2003) and has been implicated in the local extirpation (in Western Australia) of the mudminnow (*Galaxiella munda*) (Moore 2008, ISSG 2010).

In addition to potentially competing with the native yellow perch (*Perca flavescens*), the European perch may also hybridize with this native species, resulting in irreversible changes to the genetic structure of this important native species (Schwenk *et al.* 2008). Hybridization can reduce the fitness of the native species and, in some cases, has resulted in drastic population declines causing endangered classification and even extinction (Mooney and Cleland 2001). Furthermore, the yellow perch has value for both commercial and recreational fishing and is also an important forage fish in many freshwater ecosystems (Froese and Pauly 2014p). Thus, declines in yellow perch populations can result in serious consequences for upper trophic-level piscivorous fish. Additionally, European perch can form dense populations competing with each other to the extent that they stunt their own growth (NSW DPI 2013).

European perch prey on zooplankton, macroinvertebrates, and fish; thus, the introduction of this species can significantly alter trophic-level cycling and affect native freshwater communities (Closs *et al.* 2003). European perch are reportedly voracious predators that consume small Australian fish (pygmy perch *Nannoperca spp.*, rainbowfish (various species), and carp gudgeons *Hypseleotris spp.*); and the eggs and fry of silver perch (*Bidyanus bidyanus*), golden perch (*Macquaria ambigua*), Murray cod (*Maccullochella peelii*), and introduced trout species (rainbow, brook (*Salvelinus fontinalis*), and brown trout (NSW DPI 2013)). In one instance, European perch consumed 20,000 newly released nonnative rainbow trout fry from a reservoir in southwestern Australia in less than 72 hours (NSW DPI 2013). Rainbow trout are native to the western United States. If introduced into U.S. freshwaters, European perch would be expected to prey on rainbow trout and other native fish.

The European perch can also harbor and spread the viral disease Epizootic Haematopoietic Necrosis (EHN) (NSW DPI 2013). This virus can cause mass fish mortalities and affects silver perch, Murray cod, *Galaxias* fish, and Macquarie perch (*Macquaria australasica*) in their native habitats. The continued spread of this virus (with the introduction of the European perch) has been partly responsible for declining populations of native Australian fish species (NSW DPI 2013). This virus is currently restricted to Australia but could expand its international range with the introduction of European perch to new waterways where native species would have no natural resistance.

Potential Impacts to Humans

We have no reports of the European perch being harmful to humans.

Potential Impacts to Agriculture

The European perch may affect agriculture by decreasing aquaculture productivity. The European perch may potentially spread the viral disease EHN (NSW DPI 2013) to farmed fish in aquaculture facilities. Although this virus is currently restricted to Australia, this disease can cause mass fish mortalities and is known to affect other fish species (NSW DPI 2013).

Factors That Reduce or Remove Injuriousness for European Perch

Control

It would be extremely difficult to control or eradicate a population of European perch. However, Closs *et al.* (2003) examined the feasibility of physically removing (by netting and trapping) European perch from small freshwater environments. Although these researchers were able to reduce population numbers through repeated removal efforts, European perch were not completely eradicated from any of the freshwater lakes. Biological controls or chemicals might be effective; however, they would also have lethal effects on native aquatic species. Control measures that would harm other wildlife are not recommended as mitigation to reduce the injurious characteristics of this species and, therefore, do not meet control measures under the Injurious Wildlife Evaluation Criteria.

Potential Ecological Benefits for Introduction

We are not aware of any documented ecological benefits for the introduction of the European perch.

Factors That Contribute to Injuriousness for Zander

Current Nonnative Occurrences

The zander was intentionally introduced into Spiritwood Lake (North Dakota) in 1989 for recreational fishing. The North Dakota Game and Fish Department reports that a small, established population occurs in this lake (Fuller 2009) and that a 32-in (81.3-cm) zander was caught by an angler in 2013 (North Dakota Game and Fish 2013). This was the largest zander in the lake reported to date, which could indicate that the species is finding suitable living conditions. We are not aware of any other occurrences of zanders within the United States. This fish species has been introduced and become established through much of

Europe, regions of Asia (China, Kyrgyzstan, and Turkey), and Africa (Algeria, Morocco, and Tunisia). Within Europe, zanders have established populations in Belgium, Bulgaria, Croatia, Cyprus, Denmark, France, Italy, the Netherlands, Portugal, the Azores, Slovenia, Spain, Switzerland, and the United Kingdom.

Potential Introduction and Spread

The zander has been introduced to the United States, and a small population exists in Spiritwood Lake, North Dakota. Primary pathways of introduction have originated with recreational fishing and aquaculture stocking. The zander has also been introduced to control unwanted cyprinids (Godard and Copp 2011). Additionally, the zander disperse unaided into new waterways.

The zander prefers a temperate climate (Froese and Pauly 2014l). This species resides in a variety of freshwater and brackish environments, including turbid waters with increased nutrient concentrations (Godard and Copp 2011). The overall climate match to the United States is high with a Climate 6 ratio of 0.374. The zander has high climate matches in the Great Lakes region, northern Plains, western mountain States, and Pacific Northwest. Medium climate matches include southern Alaska, western mountain States, central Plains, and mid-Atlantic and New England regions. Low climate matches occur in Florida, along the Gulf Coast, and desert Southwest regions.

If introduced, the zander would likely establish and spread as a consequence of its nature as a generalist predator, ability to hybridize with multiple fish species, extraordinary mobility, long lifespan (maximum 24 years) (Godard and Copp 2011), and proven invasiveness outside of the native range.

Potential Impacts to Native Species (including Endangered and Threatened Species)

The zander may affect native fish species by outcompeting and preying on them, transferring pathogens to them, and hybridizing with them. The zander is a top-level predator and competes with other native piscivorous fish species. In Western Europe, increased competition from introduced zanders resulted in population declines of native northern pike and European perch (Linfield and Rickards 1979). If introduced to the United States, the zander is projected to compete with native top-level predators such as the closely related walleye (*Sander vitreus*), sauger (*Sander canadensis*), and northern pike.

The zander's diet includes juvenile smelt, ruffe, European perch, vendace, roach, and other zanders (Kangur and Kangur 1998). The zander also feeds on juvenile brown trout and Atlantic salmon (Jepsen *et al.* 2000; Koed *et al.* 2002). Increased predation on juvenile and young fish disrupts the species' life cycle and reproductive success. Decreased reproductive success results in decreased populations (and sometimes extinction) (Crivelli 1995) of native fish species. If introduced, zander could decrease native populations of cyprinids (minnows, daces, and chub species), salmonids (Atlantic salmon and species of Pacific salmon (*Oncorhynchus* spp.), and yellow perch.

The zander is a vector for the trematode parasite *Bucephalus polymorphus* (Poulet *et al.* 2009), which has been linked to decreased native cyprinid populations in France (Lambert 1997, Kvach and Mierzejewska 2011). This parasite may infect native cyprinid species and result in their population declines.

The zander can hybridize with both the European perch and Volga perch (*Sander volgensis*) (Godard and Copp 2011). Our native walleye and sauger also hybridize (Hearn 1986, Van Zee *et al.* 1996, Fiss *et al.* 1997), providing further evidence that species of this genus can readily hybridize. Hence, there is concern that zander may hybridize with walleye (Fuller 2009) and sauger (P. Fuller, pers. comm. 2015). Zander hybridizing with native species could result in irreversible changes to the genetic structure of native species (Schwenk *et al.* 2008). Hybridization can reduce the fitness of a native species and, in some cases, has resulted in drastic population declines leading to endangered classification and, in rare cases, even extinction (Mooney and Cleland 2001).

Potential Impacts to Humans

We are not aware of any documented reports of the zander being harmful to humans.

Potential Impacts to Agriculture

The zander may impact agriculture by affecting aquaculture. This species is a vector for the trematode parasite *Bucephalus polymorphus* (Poulet *et al.* 2009), which has been linked to decreased native cyprinid populations in France (Lambert 1997, Kvach and Mierzejewska 2011). This parasite may infect and harm native U.S. cyprinid species involved in the aquaculture industry.

Factors That Reduce or Remove Injuriousness for Zander

Control

An established population of zanders would be both difficult and costly to control (Godard and Copp 2011). In the United Kingdom (North Oxford Canal), electrofishing was unsuccessful at eradicating localized populations of zander (Smith *et al.* 1996).

Potential Ecological Benefits for Introduction

Zanders have been stocked for biomanipulation of small planktivorous fish (cyprinid species) in a small, artificial impoundment in Germany to improve water transparency with some success (Drenner and Hambright 1999). However, in their discussion on using zanders for biomanipulation, Mehner *et al.* (2004) state that the introduction of nonnative predatory species, which includes the zander in parts of Europe, is not recommended for biodiversity and bioconservation purposes. We are not aware of any other documented ecological benefits of a zander introduction.

Factors That Contribute to Injuriousness for Wels Catfish

Current Nonnative Occurrences

This fish species is not found in the wild in the United States. The wels catfish has been introduced and become established in China; Algeria, Syria, and Tunisia; and the European countries of Belgium, Bosnia-Herzegovina, Croatia, Cyprus, Denmark, Finland, France, Italy, Portugal, Spain, and the United Kingdom (Rees 2012).

Potential Introduction and Spread

The wels catfish has not been introduced to U.S. ecosystems. Potential pathways of introduction include stocking for recreational fishing and aquaculture. This catfish species has also been introduced for biocontrol of cyprinid species in Belgium and through the aquarium and pet trade (Rees 2012). Wels catfish were introduced as a biocontrol for cyprinid fish in the Netherlands, where it became invasive (Rees 2012). Once introduced, this fish species can naturally disperse to connected waterways.

The wels catfish prefers a temperate climate. This species inhabits a variety of freshwater and brackish environments. This species has an overall high climate match in the United States with a Climate 6 ratio of 0.302. High climate matches occur in the Great Lakes, western mountain States, West Coast, and southern Alaska. All other regions had a medium or low climate match.

If introduced, the wels catfish is likely to establish and spread. This species is a generalist predator and fast growing, with proven invasiveness outside of the native range. Additionally, this species has a long lifespan (15 to 30 years, maximum of 80 years) (Kottelat and Freyhof 2007). This species has an extremely high reproductive rate (30,000 eggs per kg of body weight), with the maximum recorded at 700,000 eggs (Copp *et al.* 2009). The wels catfish is highly adaptable to new warmwater environments, including those with low dissolved oxygen levels (Rees 2012). The invasive success of this species is likely to be further enhanced by increases in water temperature expected to occur with climate change (Rahel and Olden 2008, Britton *et al.* 2010a).

Potential Impacts to Native Species (including Threatened and Endangered Species)

The wels catfish may affect native species through outcompeting and preying on native species, transferring diseases to them, and altering their habitats. This catfish is a giant predatory fish (maximum 5 m (16.4 ft), 306 kg (675 lb)) (Copp *et al.* 2009; Rees 2012) that will likely compete with other top trophic-level, native predatory fish for both food and habitat resources. Stable isotope analysis, which assesses the isotopes of carbon and nitrogen from food sources and consumers to determine trophic-level cycling, suggests that the wels catfish has the same trophic position as the northern pike (Syväranta *et al.* 2010). Thus, U.S. native species at risk of competition with the wels catfish are top predatory piscivores and may include species such as the northern pike, walleye, and sauger. Additionally, the wels catfish can be territorial and unwilling to share habitat with other fish (Copp *et al.* 2009).

Typically utilizing an ambush technique but also known to be an opportunistic scavenger (Copp *et al.* 2009), the wels catfish are generalist predators and may consume native invertebrates, fish, crayfish, eels, small mammals, birds (Copp *et al.* 2009), and amphibians (Rees 2012). In France, the stomach contents of wels catfish revealed a preference for cyprinid fish, mollusks, and crayfish (Syväranta *et al.* 2010). Birds, amphibians, and small mammals also contributed to the diet of these catfish (Copp *et al.* 2009). This species has been observed beaching itself to prey on land birds on a river bank (Cucherousset 2012). Native cyprinid fish potentially affected include native chub, dace, and minnow fish species, some of which are federally endangered or threatened. Native freshwater mollusks and amphibians may also be affected, some of which are also federally endangered or threatened. Increased predation on native cyprinids, mollusks, crustaceans, and amphibians can result in decreased species diversity and increased food web disruption.

The predatory nature of the wels catfish may also lead to species extirpation (local extinction) or the extinction of native species. In Lake Bushko (Bosnia), the wels catfish is linked to the extirpation of the endangered minnow-nase (*Chondrostoma phoxinus*) (Froese and Pauly 2014m). Although nase species are native to Europe, the subfamily Leuciscinae includes several native U.S. species, such as dace and shiner species, which may be similar enough to serve as prey for the catfish.

The wels catfish is a carrier of the virus that causes SVC and may transmit this virus to native fish (Hickley and Chare 2004). The spread of SVC can deplete native fish stocks and disrupt the ecosystem food web. SVC transmission would further compound adverse effects of both competition and predation by adding disease to already-stressed native fish.

Additionally, this catfish species excretes large amounts of phosphorus and nitrogen to the freshwater environment (Schaus *et al.* 1997, McIntyre *et al.* 2008). In France, where wels catfish are invasive, this large species aggregates in groups averaging 25 individuals, thus creating the highest biogeochemical hotspots ever reported for freshwater systems for phosphorus and nitrogen (Boulêtreau *et al.* 2011). Excessive nutrient input can disrupt nutrient cycling and transport (Boulêtreau *et al.* 2011) that can result in increased eutrophication, increased frequency of algal blooms, and decreased dissolved oxygen levels. These decreases in water quality can affect both native fish and mollusks.

Potential Impacts to Humans

Wels catfish can achieve a giant size, have large mouths, and are able to beach themselves to hunt and return to the water. There are anecdotal reports of exceptionally large wels catfish biting or dragging people into the water, as well as reports of a human body in a wels catfish's stomach, although it is not known if the person was attacked or scavenged after drowning (Der Standard 2009; Stephens 2013; National Geographic 2014). However, we have no documentation to confirm harm to humans and thus do not consider that wels catfish are injurious to humans.

Potential Impacts to Agriculture

The wels catfish could impact agriculture by affecting aquaculture. The wels catfish may transmit the fish disease SVC to other cyprinids (Hickley and Chare 2004, Goodwin 2009). An SVC outbreak could result in mass mortalities among farmed fish stocks at an aquaculture facility.

Factors That Reduce or Remove Injuriousness for Wels Catfish

Control

An invasive wels catfish population would be difficult to control or manage (Rees 2012). We know of no effective methods of control once this species is introduced because of its ability to spread into connected waterways, high reproductive potential, generalist diet, and longevity.

Potential Ecological Benefits for Introduction

We are not aware of any documented ecological benefits for the introduction of the wels catfish.

Factors That Contribute to Injuriousness for the Common Yabby

Current Nonnative Occurrences

The common yabby has moved throughout Australia, and its nonnative range extends to New South Wales east of the Great Dividing Range, Western Australia, and Tasmania. This crayfish species was introduced to Western Australia in 1932, for commercial farming for food from where it escaped and established in rivers and irrigation dams (Souty-Grosset *et al.* 2006). Outside of Australia, this species has been introduced to China, South Africa, Zambia, Italy, Spain, and Switzerland (Gherardi 2012) for aquaculture and fisheries (Gherardi 2012). The first European introduction occurred in 1983, when common yabbies were transferred from a California farm to a pond in Girona, Catalonia (Spain) (Souty-Grosset *et al.* 2006). This crayfish species became established in Spain after repeated introduction to the Zaragoza Province in 1984 and 1985 (Souty-Grosset *et al.* 2006).

Potential Introduction and Spread

The common yabby has not established a wild population within the United States. Souty-Grosset *et al.* (2006) indicated that the first introduction of the common yabby to Europe occurred with a shipment from a California farm. However, there is no recent information that indicates that the common yabby is present or established in the wild within California. Primary pathways of introduction include importation for aquaculture, aquariums, bait, and research. Once it is found in the wild, the yabby can disperse on its own in water or on land.

The common yabby prefers a tropical climate but tolerates a wide range of water temperatures from 1 to 35 °C (34 to 95 °F) (Withnall 2000). This crayfish can also tolerate both freshwater and brackish environments with a wide range of dissolved oxygen concentrations (Mills and Geddes 1980). The overall climate match to the United States was high, with a Climate 6 ratio of 0.209 with a high climate match to the central Appalachians and Texas.

If introduced, the common yabby is likely to establish and spread within U.S. waters. This crayfish species is a true diet generalist with a diet of plant material, detritus, and zooplankton that varies with seasonality and availability (Beatty 2005). Additionally, this species has a quick growth (Beatty 2005) and maturity rate, high reproductive potential, and history of invasiveness outside of the native range. The invasive range of the common yabby is expected to expand with climate change (Gherardi 2012). The yabby can also hide for years in burrows up to 5 m (16.4 ft) deep during droughts, thus essentially being invisible to anyone looking to survey or control them (NSW DPI 2015).

Potential Impacts to Native Species (including Endangered and Threatened Species)

Potential impacts to native species from the common yabby include outcompeting native species for habitat and food resources, preying on native species, transmitting disease, and altering habitat. Competition between crayfish species is often decided by body size and chelae (pincer claw) size (Lynas 2007, Gherardi 2012). The common yabby has large chelae (Austin and Knott 1996) and quick growth rate (Beatty 2005), allowing this species to outcompete smaller, native crayfish species. This crayfish species will exhibit aggressive behavior toward other crayfish species (Gherardi 2012). In laboratory studies, the common yabby successfully evicted the smooth marron (*Cherax cainii*) and gilgie (*Cherax quinquecarinatus*) crayfish species from their burrows (Lynas *et al.* 2007). Thus, introduced common yabbies may compete with native crustaceans for burrowing space and, once established, aggressively defend their territory.

The common yabby consumes a similar diet to other crayfish species, resulting in competition over food resources. However, unlike most other crayfish species, the common yabby switches to an herbivorous, detritus diet when preferred prey is unavailable (Beatty 2006). This prey-switching allows the common yabby to outcompete native species (Beatty 2006). If introduced, the common yabby could affect macroinvertebrate richness, remove surface sediment deposits resulting in increased benthic algae, and compete with native crayfish species for food, space, and shelter (Beatty 2006). Forty-eight percent of U.S. native crayfish are considered imperiled (Taylor *et al.* 2007, Johnson *et al.* 2013). The yabby's preference for small fishes, such as eastern mosquitofish *Gambusia holbrooki* (Beatty 2006), could pose a potential threat to small native fishes.

The common yabby eats plant detritus, algae and macroinvertebrates (such as snails) and small fish (Beatty 2006). Increased predation pressure on macroinvertebrates and fish may reduce populations to levels that are unable to sustain a reproducing population. Reduced populations or the disappearance of certain native species further alters trophic-level cycling. For instance, species of freshwater snails are food sources for numerous aquatic animals (fish, turtles) and also may be used as an indicator of good water quality (Johnson 2009). However, in the past century, more than 500 species of North American freshwater snails have become extinct or are considered vulnerable, threatened, or endangered by the American Fisheries Society (Johnson *et al.* 2013). The most substantial population declines have occurred in the southeastern United States (Johnson 2009), where the common yabby has a medium to high climate match. Introductions of the common yabby could further exacerbate population declines of snail species.

In laboratory simulations, this crayfish species also exhibited aggressive and predatory behavior toward turtle hatchlings (Bradsell *et al.* 2002). These results spurred concern about potential aggressive and predatory interactions in Western Australia between the invasive common yabby and that country's endangered western swamp turtle (*Pseudemydura umbrina*) (Bradsell *et al.* 2002). There are six freshwater turtle species that are federally listed in the United States (USFWS Final Environmental Assessment 2016), all within the yabby's medium or high climate match.

The common yabby is susceptible to the crayfish plague (*Aphanomyces astaci*), which affects European crayfish stocks (Souty-Grosset *et al.* 2006). North American crayfish are known to be chronic, unaffected carriers of the crayfish plague (Souty-Grosset *et al.* 2006). However, the common yabby can carry other diseases and parasites, including burn spot disease *Psorospermium* sp. (Jones and Lawrence 2001), *Cherax destructor* bacilliform virus (Edgerton *et al.* 2002), *Cherax destructor* systemic parvo-like virus (Edgerton *et al.* 2002), *Pleistophora* sp. microsporidian (Edgerton *et al.* 2002), *Thelohania* sp. (Jones and Lawrence 2001, Edgerton *et al.* 2002, Moodie *et al.* 2003), *Vavraia parastacida* (Edgerton *et al.* 2002), *Microphallus minutus* (Edgerton *et al.* 2002), *Polymorphus biziurae* (Edgerton *et al.* 2002), and many others (Jones and Lawrence 2001, Longshaw 2011). If introduced, the common yabby could spread these diseases among native crayfish species, resulting in decreased populations and changes in ecosystem cycling.

The common yabby digs deep burrows (Withnall 2000). This burrowing behavior has eroded and collapsed dam walls for yabby farmers (Withnall 2000). Increased erosion or bank collapse results in increased sedimentation, which increases turbidity and decreases water quality.

Potential Impacts to Humans

The common yabby's burrowing behavior undermines levees, berms, and earthen dams (Withnall 2000). Several crayfish species, including the common yabby, can live in contaminated waters and accumulate high heavy-metal contaminants within their tissues (King *et al.* 1999, Khan and Nugegoda 2003, Gherardi 2012, Gherardi 2011). The contaminants can then pass on to humans if they eat these crayfish. Heavy metals vary in toxicity to humans, ranging from no or little effect to causing skin irritations, reproductive failure, organ failure, cancer, and death (Hu 2002, Martin and Griswold 2009). While the common yabby may directly impact human health by transferring metal contaminants through consumption (Gherardi 2012) and may require consumption advisories, these advisories are not expected to be more stringent than those for crayfish species that are not considered injurious and, thus, we do not find that common yabby are injurious to humans.

Potential Impacts to Agriculture

The common yabby may affect agriculture by decreasing aquaculture productivity. The common yabby can be host to a variety of diseases and parasitic infections, including the crayfish plague, burn spot disease, *Psorospermium* sp., and thelohaniasis (Jones and Lawrence 2001, Souty-Grosset *et al.* 2006). These diseases and parasitic infections can be contagious to other crayfish species (Vogt 1999), resulting in impaired physiological functions and death. Crayfish species (such as red swamp crayfish (*Procambarus clarkii*)) are involved in commercial aquaculture, and increased incidence of death and disease would reduce this industry's productivity and value.

Factors That Reduce or Remove Injuriousness for the Common Yabby

Control

In Europe, two nonnative populations of the common yabby have been eradicated by introducing the crayfish plague. Since this plague is not known to affect North American crayfish species (although they are carriers), this tactic may be effective against an introduced common yabby population (Souty-Grosset *et al.* 2006). However, this control method is not recommended because it could introduce the pathogen that causes this disease into the environment and has the potential to mutate and harm native crayfish. Control measures that would harm native wildlife are not recommended as mitigation to reduce the injurious characteristics of this species and, therefore, do not meet control measures under the Injurious Wildlife Evaluation Criteria.

Potential Ecological Benefits for Introduction

We are not aware of any potential ecological benefits for introduction of the common yabby.

Conclusions for the 11 Species

Crucian Carp

The crucian carp is highly likely to survive in the United States. This fish species prefers a temperate climate and has a native range that extends through north and central Europe. The crucian carp has a high climate match throughout much of the continental United States, Hawaii, and southern Alaska. If introduced, the crucian carp is likely to become established and spread due to its ability as a habitat generalist, diet generalist, and adaptability to new environments, long lifespan, and proven invasiveness outside of its native range.

The Service finds the crucian carp to be injurious to agriculture and to wildlife and wildlife resources of the United States because the crucian carp:

- Is likely to escape or be released into the wild;
- is able to survive and establish outside of its native range;
- is successful at spreading its range;
- has negative impacts of competition, hybridization, and disease transmission on native wildlife (including endangered and threatened species);
- has negative impacts on humans by reducing wildlife diversity and the benefits that nature provides; and
- has negative impacts on agriculture by affecting aquaculture.

In addition, preventing, eradicating, or reducing established populations of crucian carp, controlling its spread to new locations, or recovering ecosystems affected by this species would be difficult.

Eurasian Minnow

The Eurasian minnow is highly likely to survive in the United States. This fish species prefers a temperate climate and has a current range (native and nonnative) throughout Eurasia. In the United States, the Eurasian minnow has a high climate match to the Great Lakes region, coastal New England, central and high Plains, West Coast, and southern Alaska. If introduced, the Eurasian minnow is likely to establish and spread due to its traits as a habitat generalist, generalist predator, adaptability to new environments, high reproductive potential, long lifespan, extraordinary mobility, social nature, and proven invasiveness outside of its native range.

The Service finds the Eurasian minnow to be injurious to agriculture and to wildlife and wildlife resources of the United States because the Eurasian minnow:

- Is likely to escape or be released into the wild;
- is able to survive and establish outside of its native range;
- is successful at expanding its range;
- has negative impacts of competition, predation, and pathogen or parasite transmission on native wildlife (including endangered and threatened species);
- has negative impacts on humans by reducing wildlife diversity and the benefits that nature provides; and
- has negative impacts on agriculture by affecting aquaculture.

In addition, preventing, eradicating, or reducing established populations of the Eurasian minnow, controlling its spread to new locations, or recovering ecosystems affected by this species would be difficult.

Prussian Carp

The Prussian carp is highly likely to survive in the United States. This fish species prefers a temperate climate and has a current range (native and nonnative) that extends throughout Eurasia. In the United States, the Prussian carp has a high climate match to the Great Lakes region, central Plains, western mountain States, and California. This fish species has a medium climate match to much of the continental United States, southern Alaska, and regions of Hawaii. Prussian carp have already established in southern Canada near the U.S. border, validating the climate match in northern regions. If introduced, the Prussian carp is likely to establish and spread due to its tolerance to poor-quality environments, rapid growth rate, ability to reproduce from unfertilized eggs, and proven invasiveness outside of its native range.

The Service finds the Prussian carp to be injurious to agriculture and to wildlife and wildlife resources of the United States because the Prussian carp:

- Is likely to escape or be released into the wild;
- is able to survive and establish outside of its native range;
- is successful at spreading its range;
- has negative impacts of competition, habitat alteration, hybridization, and disease transmission on native wildlife (including threatened and endangered species);
- has negative impacts on humans by reducing wildlife diversity and the benefits that nature provides; and
- has negative impacts on agriculture by affecting aquaculture.

In addition, preventing, eradicating, or reducing established populations of the Prussian carp, controlling its spread to new locations, or recovering ecosystems affected by this species would be difficult.

Roach

The roach is highly likely to survive in the United States. This fish species prefers a temperate climate and has a current range (native and nonnative) throughout Europe, Asia, Australia, Morocco, and Madagascar. The roach has a high climate match to southern and central Alaska, regions of Washington, the Great Lakes region, and western mountain States, and a medium climate match to most of the United States. If introduced, the roach is likely to establish and spread due to its highly adaptive nature toward habitat and diet choice, high reproductive potential, ability to reproduce with other cyprinid species, long lifespan, mobility, and proven invasiveness outside of its native range.

The Service finds the roach to be injurious to agriculture and to wildlife and wildlife resources of the United States because the roach:

- Is likely to escape or be released into the wild;
- is able to survive and establish outside of its native range;
- is successful at spreading its range;
- has negative impacts of competition, predation, hybridization, altered habitat resources, and disease transmission on native wildlife (including endangered and threatened species);
- has negative impacts on humans by reducing wildlife diversity and the benefits that nature provides; and
- has negative impacts on agriculture by affecting aquaculture.

In addition, preventing, eradicating, or reducing established populations of the roach, controlling its spread to new locations, or recovering ecosystems affected by this species would be difficult.

Stone Moroko

The stone moroko is highly likely to survive in the United States. This fish species prefers a temperate climate and has a current range (native and nonnative) throughout Eurasia, Algeria, and Fiji. The stone moroko has a high climate match to the southeastern United States, Great Lakes region, central Plains, northern Texas, desert Southwest, and West Coast. If introduced, the stone moroko is likely to establish and spread due to its traits as a habitat generalist, diet generalist, rapid growth rate, adaptability to new environments, extraordinary mobility, high reproductive potential, high genetic variability, and proven invasiveness outside of its native range.

The Service finds the stone moroko to be injurious to agriculture and to wildlife and wildlife resources of the United States because the stone moroko

- Is likely to escape or be released into the wild;
- is able to survive and establish outside of its native range;
- is successful at spreading its range;
- has negative impacts of competition, predation, disease transmission, and habitat alteration on native wildlife (including threatened and endangered species);
- has negative impacts on humans by reducing wildlife diversity and the benefits that nature provides; and
- has negative impacts on agriculture by affecting aquaculture.

In addition, preventing, eradicating, or reducing established populations of the stone moroko, controlling its spread to new locations, or recovering ecosystems affected by this species would be difficult.

Nile Perch

The Nile perch is highly likely to survive in the United States. This fish species is a tropical invasive, and its current range (native and nonnative) includes much of central, western, and eastern Africa. In the United States, the Nile perch has an overall medium climate match to the United States. However, this fish species has a high climate match to the Southeast, California, Hawaii, Puerto Rico, and the U.S. Virgin Islands. If introduced, the Nile perch is likely to establish and spread due to its nature as a habitat generalist, generalist predator, long lifespan, quick growth rate, high reproductive potential, extraordinary mobility, and proven invasiveness outside of its native range.

The Service finds the Nile perch to be injurious to the interests of wildlife and wildlife resources of the United States because the Nile perch:

- Is likely to escape or be released into the wild;
- is able to survive and establish outside of its native range;
- is successful at spreading its range;
- has negative impacts of competition, predation, and habitat alteration on native wildlife (including endangered and threatened species); and
- has negative impacts on humans by reducing wildlife diversity and the benefits that nature provides (including through fisheries).

In addition, preventing, eradicating, or reducing established populations of the Nile perch, controlling its spread to new locations, or recovering ecosystems affected by this species would be difficult.

Amur Sleeper

The Amur sleeper is highly likely to survive in the United States. Although this fish species' native range only includes the freshwaters of China, Russia, North and South Korea, the species has a broad invasive range that extends throughout much of Eurasia. The Amur sleeper has a high climate match to the Great Lakes region, central and high plains, western mountain States, Maine, northern New Mexico, and southeast to central Alaska. If introduced, the Amur sleeper is likely to establish and spread due to its nature as a habitat generalist, generalist predator, rapid growth rate, high reproductive potential, adaptability to new environments, extraordinary mobility, and history of invasiveness outside of its native range.

The Service finds the Amur sleeper to be injurious to agriculture and to wildlife and wildlife resources of the United States because of the Amur sleeper's:

- Past history of being released into the wild;
- ability to survive and establish outside of its native range;
- success at spreading its range;
- negative impacts of competition, predation, and disease transmission on native wildlife (including endangered and threatened species);
- negative impacts on humans by reducing wildlife diversity and the benefits that nature provides; and
- negative impacts on agriculture by affecting aquaculture.

In addition, preventing, eradicating, or reducing established populations of the Amur sleeper, controlling its spread to new locations, or recovering ecosystems affected by this species would be difficult.

European Perch

The European perch is highly likely to survive in the United States. This fish species prefers a temperate climate and has a current range (native and nonnative) throughout Europe, Asia, Australia, New Zealand, South Africa, and Morocco. In the United States, the European perch has a medium to high climate match to the majority of the United States except the desert Southwest. This species has especially high climate matches in the southeastern United States, Great Lakes region, central to southern Texas, western mountain States, and southern to central Alaska. If introduced, the European perch is likely to establish and spread due to its nature as a generalist predator, ability to adapt to new environments, ability to outcompete native species, and proven invasiveness outside of its native range.

The Service finds the European perch to be injurious to agriculture and to wildlife and wildlife resources of the United States because the European perch:

- Is likely to escape or be released into the wild;
- is able to survive and establish outside of its native range;
- is successful at spreading its range;
- has negative impacts of competition, predation, and disease transmission on native wildlife (including endangered and threatened species);
- has negative impacts on humans by reducing wildlife diversity and the benefits that nature provides; and

- has negative impacts on agriculture by affecting aquaculture.

In addition, preventing, eradicating, or reducing established populations of the European perch, controlling its spread to new locations, or recovering ecosystems affected by this species would be difficult.

Zander

The zander is highly likely to survive in the United States. This fish species prefers a temperate climate and has a current range (native and nonnative) throughout Europe, Asia, and northern Africa. In the United States, the zander has a high climate match to the Great Lakes region, northern Plains, western mountain States, and Pacific Northwest. Medium climate matches extend from southern Alaska, western mountain States, central Plains, and mid-Atlantic, and New England regions. If introduced, the zander is likely to establish and spread due to its nature as a generalist predator, ability to hybridize with other fish species, extraordinary mobility, long lifespan, and proven invasiveness outside of its native range.

The Service finds the zander to be injurious to agriculture and to wildlife and wildlife resources of the United States because the zander:

- Is likely to escape or be released into the wild;
- is able to survive and establish outside of its native range;
- is successful at spreading its range;
- has negative impacts of competition, predation, parasite transmission, and hybridization with native wildlife (including endangered and threatened species);
- has negative impacts on humans by reducing wildlife diversity and the benefits that nature provides; and
- has negative impacts on agriculture by affecting aquaculture.

In addition, preventing, eradicating, or reducing established populations of the zander, controlling its spread to new locations, or recovering ecosystems affected by this species would be difficult.

Wels Catfish

The wels catfish is highly likely to survive in the United States. This fish species prefers a temperate climate and has a current range (native and nonnative) throughout Europe, Asia, and northern Africa. This fish species has a high climate match to much of the United States. Very high climate matches occur in the Great Lakes region, western mountain States, and the West Coast. If introduced, the wels catfish is likely to establish and spread due to its traits as a generalist predator, quick growth rate, long lifespan, high reproductive potential, adaptability to new environments, and proven invasiveness outside of its native range.

The Service finds the wels catfish to be injurious to agriculture and to wildlife and wildlife resources of the United States because the wels catfish:

- Is likely to escape or be released into the wild;
- is able to survive and establish outside of its native range;
- is successful at spreading its range;
- has negative impacts of competition, predation, disease transmission, and habitat alteration on native wildlife (including endangered and threatened species);
- has negative impacts on humans by reducing wildlife diversity and the benefits that nature provides; and
- has negative impacts on agriculture by affecting aquaculture.

In addition, preventing, eradicating, or reducing established populations of the wels catfish, controlling its spread to new locations, or recovering ecosystems affected by this species would be difficult.

Common Yabby

The common yabby is highly likely to survive in the United States. This crustacean species prefers a subtropical climate and has a current range (native and nonnative) that extends to Australia, Europe, China, South Africa, and Zambia. The common yabby has a high climate match to the eastern United States, Texas, and parts of Washington. If introduced, the common yabby is likely to establish and spread due to its traits as a diet generalist, quick growth rate, high reproductive potential, and proven invasiveness outside of its native range.

The Service finds the common yabby to be injurious to the interests of agriculture, and to wildlife and the wildlife resources of the United States because the common yabby:

- Is likely to escape or be released into the wild;
- is able to survive and establish outside of its native range;
- is successful at spreading its range;
- has negative impacts of competition, predation, and disease transmission on native wildlife (including endangered and threatened species);
- has negative impacts on humans by reducing wildlife diversity and the benefits that nature provides; and
- has negative impacts on agriculture by affecting aquaculture.

In addition, preventing, eradicating, or reducing established populations of the common yabby, controlling its spread to new locations, or recovering ecosystems affected by this species would be difficult.

Summary of Injurious Wildlife Factors

Based on the Service's evaluation of the criteria for injuriousness, substantive information we received during the public comment period and from the peer reviewers, along with other available information regarding the 11 species, the Service concludes that all 11 species should be added to the list of injurious species under the Lacey Act.

The Service used the injurious wildlife evaluation criteria (see Injurious Wildlife Evaluation Criteria) and found that all 11 species are injurious to wildlife and wildlife resources of the United States and 10 are injurious to agriculture. Because all 11 species are injurious, the Service is adding these 11 species to the list of injurious wildlife under the Act. Table 2 shows a summary of the evaluation criteria for the 11 species.

TABLE 2—SUMMARY OF INJURIOUS WILDLIFE EVALUATION CRITERIA FOR 11 AQUATIC SPECIES

Species	Factors that contribute to being considered injurious					Factors that reduce the likelihood of being injurious	
	Nonnative occurrences	Potential for introduction and spread	Impacts to native species[1]	Direct impacts to humans	Impacts to agriculture[2]	Control[3]	Ecological benefits for introduction
Crucian Carp	Yes	Yes	Yes	No	Yes	No	No.
Eurasian Minnow	Yes	Yes	Yes	No	Yes	No	Negligible.
Prussian Carp	Yes	Yes	Yes	No	Yes	No	No.
Roach	Yes	Yes	Yes	No	Yes	No	No.

TABLE 2—SUMMARY OF INJURIOUS WILDLIFE EVALUATION CRITERIA FOR 11 AQUATIC SPECIES—Continued

Species	Factors that contribute to being considered injurious					Factors that reduce the likelihood of being injurious	
	Nonnative occurrences	Potential for introduction and spread	Impacts to native species [1]	Direct impacts to humans	Impacts to agriculture [2]	Control [3]	Ecological benefits for introduction
Stone Moroko	Yes	Yes	Yes	No	Yes	No	No.
Nile Perch	Yes	Yes	Yes	No	No	No	No.
Amur Sleeper	Yes	Yes	Yes	No	Yes	No	No.
European Perch	Yes	Yes	Yes	No	Yes	No	No.
Zander	Yes	Yes	Yes	No	Yes	No	Negligible.
Wels Catfish	Yes	Yes	Yes	No	Yes	No	No.
Common Yabby	Yes	Yes	Yes	No	Yes	No	No.

[1] Includes endangered and threatened species and wildlife and wildlife resources.
[2] Agriculture includes aquaculture.
[3] Control—"No" if wildlife or habitat damages may occur from control measures being proposed as mitigation.

Summary of Comments Received on the Proposed Rule

Peer Review Summary

In accordance with peer review guidance of the Office of Management and Budget "Final Information Quality Bulletin for Peer Review," released December 16, 2004 (OMB 2004), and Service guidance, we solicited expert opinion on information contained in the October 30, 2015 (80 FR 67026), proposed rule for 11 species and supplemental documents from knowledgeable individuals selected from specialists in the relevant taxonomic group and ecologists with scientific expertise that includes familiarity with one or more of the disciplines of invasive species biology, invasive species risk assessment, aquatic species biology, aquaculture, and fisheries. In 2015, we posted our peer review plan on the Service's Headquarters Science Applications Web site (*http://www.fws.gov/science/peer_review_agenda.html*), explaining the peer review process and providing the public with an opportunity to comment on the peer review plan. We received no comments regarding the peer review plan. The Service solicited independent scientific reviewers who submitted individual comments in written form. We avoided using individuals who might have strong support for or opposition to the subject and individuals who were likely to experience personal gain or loss (such as financial or prestige) because of the Service's decision. Department of the Interior employees were not used as peer reviewers.

We received responses from the three peer reviewers we solicited:

- All three answered "yes" to the following two questions of a general nature that we posed to them: Did the Service provide an accurate and adequate review and analysis of the potential effects from the 11 species as categorized under the injurious wildlife evaluation criteria? Is the Service's analysis of the criteria logical and supported by evidence?
- The three reviewers also answered "yes" to the following two questions with one reviewer having one or more comments on each: Does the science used and assumptions made support the conclusions? Did the Service cite necessary and pertinent literature to support their scientific analyses?
- Finally, two reviewers answered "yes" to these two questions, while one answered "no" and provided comments: Are the uncertainties and assumptions clearly identified and characterized? Are the potential implications of the uncertainties for the technical conclusions clearly identified?

We also requested that the reviewers provide comments that were specific to the proposed rule, the economic analysis, and the environmental assessment. We reviewed all comments for substantive issues and any new information they provided. We consolidated the comments and responses into key issues in this section. We provided comments and responses specifically regarding the environmental assessment at the end of the final environmental assessment. We revised the final rule, economic analysis, and environmental assessment to reflect peer reviewer comments and new scientific information where appropriate.

Peer Review Comments—General (Some Also Apply to the Environmental Assessment)

(PR1) Comment: Selection for 11 freshwater animals is directly related to ERSS output, which is detailed and defendable. However, several other species meet the same criteria as those selected. Was there other criteria used to select the 11 species for this proposed rule? Based upon these criteria, I would expect to see many other fish species proposed for listing as Injurious Wildlife Species.

Our Response: We agree that other species are high risk that we did not evaluate in this rule. Because of the amount of work required to evaluate each species and prepare the documentation, we are not able to evaluate all the species at one time. We chose many species in this rule because of their risk to the Great Lakes region and Mississippi River Basin, which face a widespread ecosystem crisis if native aquatic populations collapse due to invasions of nonnative fish, mollusks, or crustaceans, as well as a corresponding economic crisis if the commercial fishing industries collapse due to the same. We plan to evaluate and then propose for injurious listing more of the high-risk species as appropriate and as our resources allow.

(PR2) Comment: What significant impact could crucian carp have in the United States? Hybridization with nonnatives, such as goldfish and common carp, may not be concerning to resource managers. Increased turbidity is a negative impact, but habitat types that these fish could live in likely have highly turbid water currently. The largest concern and the one that makes me support listing this species is the documented movement of these fish as hitchhikers in fish shipments.

Our Response: The crucian carp possesses many of the strongest traits for invasiveness. It is a temperate-climate species, so it has a high climate match in much of the United States, and it is adaptable to different environments. The species is capable of securing a wide range of food, such as plankton, benthic invertebrates, and plants. With this varied diet, crucian carp would directly compete with numerous native species. Habitat degradation is projected to be high, with the greatest degradation in lakes, rivers, and streams with soft bottom sediments. Reduced light levels in habitats with submerged aquatic vegetation would probably cause major alterations in habitat. Infected crucian carp may spread SVC to cultured fish stocks or other cyprinids in U.S. waters (ERSS 2014 Crucian carp). We summarized these threats in the draft environmental assessment (under the Direct Effects section of Environmental Consequences for the No Action alternative). The ability of crucian carp to hybridize with other cyprinids may be more of a threat to aquacultured fish than to native fish, but we also consider that possibility. Because of these combined threats we consider the crucian carp as injurious.

(PR3) Comment: It should be mentioned that the Prussian carp is similar to the crucian carp and they are also known to hybridize. Such a situation creates added problems, so listing both under the Lacey Act reduces confusion with regulations or prohibitions.

Our Response: Prussian carp are closely related to crucian carp and goldfish, and it is likely that they also would hybridize with closely related species if given the opportunity. One paper that documents *Carassius* hybridization discovered that the species identified as gibel (or Prussian) carp were really crucian carp (Hanfling and Harley 2003). We are listing the Prussian carp for other threats, and while the listing of both species may indeed reduce confusion with regulations, that is not a criteria for listing.

(PR4) Comment: A more recent paper on the Amur sleeper that includes mention of its introduction in more countries than listed in the draft environmental assessment is Reshetnikov and Schliewen (2013).

Our Response: We have incorporated into the rule and the final environmental assessment the information of the additional countries and spread from Reshetnikov and Schliewen (2013).

(PR5) Comment: Regarding LEMIS (LEMIS 2016) import records (which are used in the economic analysis), based on my own research some species recorded as being imported are wrongly identified. Some of the 11 species targeted here for Lacey Act listing may be coming into this country from foreign sources but identified under an incorrect name. It would be worthwhile to mention which of the species have the greatest chance of being misidentified.

Our Response: We agree that many species of fish, including some we are listing with this final rule, are similar in appearance to others and could be misidentified on import. This could mean that a species listed as injurious by this rule is imported under a name of a species that is not regulated. For example, Crucian and Prussian carp could be mistaken for goldfish. In fact, one commenter noted a case where crucian carp were advertised for sale in Chicago's Chinatown, but they were live goldfish. Nile perch is similar to barramundi (*Lates calcarifer*). The Eurasian minnow superficially resembles many other cyprinids or minnows, as do the stone moroko and the roach. Small wels catfish may be mistaken for walking catfish (*Clarias* spp.). The Amur sleeper may be confused with other species of its own family, as well as many species in the families Eleotridae and Gobiidae. There are more than 30 species in the genus Cherax, and they have similar descriptions. This comment was made regarding the draft economic analysis, and therefore, we looked at the effect of misidentifications on the economic results. However, the total numbers of imports of any of the 11 species were so small that misidentification is likely insignificant for the economic impact. With regard to the listing effectiveness, there will be an increased risk that a species will be introduced, established, and spread if an injurious species is misidentified and still brought into the U.S. or transported across State lines, Finally, the fact that a species we are evaluating for listing resembles another species (listed or not) does not affect our final determination. Under the Lacey Act, we do not have the authority to list a species due to the similarity of appearance.

(PR6) Comment: It is the responsibility of the authors to provide clear documentation regarding the biology and known or potential impacts of these species. I went to one link that took me to a home page (*www.cabi.org/isc*), and I had to search for the paper. At a minimum, a link should go directly to the Web site that provides the supporting information. I prefer citations of peer-reviewed scientific journal articles or books. The only reason to cite a web source is if the information is not provided in any published source.

Our Response: The Service has been searching for several years for a more efficient method to locate information that was not published by Americans or English-speaking authors (and, thus, not easy for the Service to locate) on species that are not native to the United States. Papers may be published in journals and reports around the world and in many languages. One organization, CAB International (CABI), has helped solve this problem for us and others by soliciting an expert to prepare a full datasheet (report) on a particular invasive species. This expert gathers the available papers internationally; CABI will professionally translate relevant papers. The resulting datasheet is reviewed by three other experts. Then CABI makes the datasheet accessible worldwide at no cost at *http://www.cabi.org/isc*. We used the full datasheets on all 11 species for basic information and for leads to find primary sources. We did verify with the primary sources that we were able to locate and that were in English. We provided the direct links to all 11 of the CABI datasheets to the peer reviewers. In the Draft Environmental Assessment, we provided the link to the CABI Web site, but we will link directly to the species for the final rule. Although we are not required to provide links to all of the sources we use, we provided a list of references on *www.regulations.gov* for this docket (FWS–HQ–FAC–2013–0095). We also must maintain a copy of each source for our records.

(PR7) Comment: Two reviewers noted that the economic analysis was redundant with the environmental assessment. One suggested that the economic analysis was unnecessary because of the lack of quantitative information.

Our Response: The economic analysis is a stand-alone document developed to support determinations that are required for this rulemaking. The analysis addresses specific topics required by Executive Order 12866, the Small Business Regulatory Enforcement Fairness Act (SBREFA), and other mandates. We prepared the environmental assessment in accordance with the criteria of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*). The two documents have different purposes, but the findings are based on some of the same information. The economic analysis interprets the impacts in terms of benefit-cost analysis and economic welfare measures. The environmental assessment describes impacts on the human environment from the listing action and other alternatives. At this time, the actual injury to the United States from these species is minimal, if any, so only a qualitative discussion is possible.

(PR8) Comment: Some sentences are convoluted, and a few are potentially

misleading. Clarity could be improved by simply writing more concisely and breaking up larger sentences.

Our Response: The commenter gave no specific examples, but we have strived to improve the clarity of our sentences in the rule and supplemental documents.

(PR9) Comment: Although not a major problem, it should be noted that more and more ichthyologists and fish biologists capitalize the common names of fishes.

Our Response: The Service chooses to capitalize only the proper names used to name species in rulemaking documents, as we do for all other classes of animals.

(PR10) Comment: The wels catfish is a large catfish. Its adult and maximum size should be emphasized, since it is a predator with a very large mouth. The subsection relating to potential harm to humans borders on sensationalism. Neither of the supporting citations are scientific publications.

Our Response: We can find no scientific documentation of human attacks. However, we mention the species' potentially giant size, large mouth, predatory nature, and ability to beach itself and then return to the water as traits that collectively provide the means to harm humans. While we mention the anecdotal reports, we have no documentation to confirm harm to humans and thus do not consider wels catfish injurious to humans.

Peer Review Comments—Ecological Risk Screening Summaries

(PR11) Comment: A reviewer expressed difficulty in finding more information in the rule and supplemental documents regarding the rapid screening (ERSS) method. The reviewer located the standard operating procedures for the rapid screening as cited in the draft environmental assessment but found it not sufficiently informative. For example, the 16 climate variables were not explained. The authors should explain what a Climate 6 ratio is.

Our Response: We have added the 16 climate variables in Table 1 under the heading "Rapid Screening" above, as well as other information on the rapid screening method, particularly on climate matching (Climate 6 ratio). In addition, we revised the "Standard Operating Procedures: Rapid Screening of Species Risk of Establishment and Impact in the U.S." (USFWS 2014) to be more complete and comprehensible (USFWS 2016).

(PR12) Comment: The authors cite Bomford (2008) with regard to climate match. Did they use the adjustments Bomford mentions for evaluating fish or aquatic organisms?

Our Response: We assume that the reviewer is talking about Bomford's algorithm for Australia (Bomford 2008). We did not use that algorithm, which includes the raw Climate 6 score, along with other factors. Instead, we use only the Climate 6 score, which Bomford said was shown to be the best predictor of success of introduction (Howeth *et al.* 2016).

(PR13) Comment: It would be worthwhile to mention for any of the 11 species which native species are most closely related or similar and thus may be impacted or even replaced.

Our Response: A species does not need to be closely related or similar to affect or even replace another. However, in response to this comment, we have added relevant information in the rule and in the environmental assessment wherever we had such information available.

Public Comments Summary

We reviewed all 20 comments we received during the 60-day public comment period (80 FR 67026; October 30, 2015) for substantive issues and new information regarding the proposed designation of the 11 species as injurious wildlife.

We received comments from State agencies, regional and U.S.–Canada governmental alliances, commercial businesses, industry associations, conservation organizations, nongovernmental organizations, and private citizens. One comment came from Zambia, and two were anonymous. Comments received provided a range of opinions on the proposed listing: (1) Unequivocal support for the listing with no additional information included; (2) unequivocal support for the listing with additional information provided; (3) equivocal support for the listing with or without additional information included; and (4) unequivocal opposition to the listing with additional information included. One comment was about an unrelated subject and beyond the scope of this rulemaking.

We received public comments specifically on the rule, but no comments specifically addressing the environmental assessment or the economic analysis. Some commenters addressed the eight questions we posed in the proposed rule. We consolidated comments and responses into key issues in this section.

Public Comments—General

(1) Comment: Comments from several alliances and governmental organizations representing the Great Lakes States and the Canadian Province of Ontario strongly support the listing of the 11 species. In addition, the States of Michigan and New York also support the listing as proposed. New York DEC states, "A unified approach between state, regional and federal actions is the most effective way to protect the Great Lakes Basin from AIS." The State of Louisiana also supports the listing.

Our Response: The Service appreciates the affirmation that listing the 11 species will benefit these widespread and cross-border jurisdictions.

(2) Comment: A representative of public zoos and aquaria requests to continue working with the Service's permitting office to ensure that members can obtain injurious wildlife permits for educational and scientific purposes in a timely fashion for these species.

Our Response: The Service will continue to work with this organization and others in the permitting process for educational and scientific purposes, and in accordance with our regulations, as we have in the past.

(3) Comment: A commenter suggests more information could be provided on the level of additional assessment beyond the ERSS report that is required for a national management action, such as injurious wildlife listing. For example, a strong and explicit risk management component, particularly one involving stakeholders, is lacking.

Our Response: Injurious wildlife listing is a regulatory action (adds to or changes an existing regulation). The Service's regulatory decision is based on our injurious wildlife listing criteria, which include components of risk assessment and risk management. By using these criteria, the Service evaluates factors that contribute to or remove the likelihood of a species becoming injurious to the interests identified under 18 U.S.C. 42.

(4) Comment: A commenter requests additional explanation of the types of species that warrant injurious species listing be added to the Service's Web site with careful evaluation of the proposed criteria to avoid the potential to set unwarranted precedent or generate other unintended consequences.

Our Response: The types of species we may list as injurious under our authority are wild mammals, wild birds, fish, mollusks, crustaceans, amphibians, reptiles, and the offspring, eggs, or hybrids of any of the aforementioned, which are injurious to human beings, to the interests of agriculture, horticulture, forestry, or to the wildlife or wildlife resources of the United States. The Service uses its Injurious Wildlife

Evaluation Criteria to evaluate whether a species does or does not qualify as injurious under the Act. This information is posted on *http://www.fws.gov/injuriouswildlife/index.html.*

(5) Comment: A commenter states that many regulations involving aquatic species already exist with individual States. The State of Florida, for example, has been conducting risk assessments on species of concern for decades. These studies have produced significant data that may be useful in the Federal process.

Our Response: The Service welcomes any such risk assessment from the States. The public comment period is an excellent time to submit such documents because the information can be used to develop the final rule. However, we received no risk assessments for the 11 species during this public comment period.

(6) Comment: A commenter states that the barramundi was selected for aquaculture in Iowa, Florida, and Massachusetts despite being a high-risk species as defined in the "Generic Nonindigenous Aquatic Organisms Risk Analysis Review Process" (ANSTF 1996). They justified this action by explaining that the species is a sustainable seafood choice and that the production facilities must be indoors. The organization offers assistance to the Service to obtain information for other species that could be cultured in the United States.

Our Response: The Service understands the need for the aquaculture industry to provide sustainable seafood choices. The species mentioned in the comment is not one of the proposed species and will not be affected by this final rule. We selected the 11 proposed species because they were high-risk for invasiveness and because they are not yet cultured in the United States or, in the case of the Nile perch (a relative of the barramundi), in very limited culture. Therefore, the economic effect on the industry would be negligible if any. We developed the ERSS process to assist the industry with selecting species for culturing that are low-risk to the environment, and we encourage any entity that has a need to import a species not yet commonly in U.S. trade to select low-risk species to help avoid unforeseen consequences.

(7) Comment: The Service recently sought public comment on changes to the procedures used by the public to develop and submit petitions to list species under the authority granted by the Endangered Species Act. A proposed change was to require a petitioner to identify and evaluate State regulations and programs that protect and conserve species within their boundaries for the explicit purpose of providing information that encompasses Federal, State and private conservation efforts. We recommend that the Service adopt a similar approach in evaluating nonnative species risk.

Our Response: None of the 11 species in the proposed rule was petitioned for listing, so this comment is beyond the scope of this rulemaking. In general, the public, including State agencies, can submit this type of information during the public comment period. We posed several questions in our proposed rule that seek this type of information, including:

(1) What regulations does your State or Territory have pertaining to the use, possession, sale, transport, or production of any of the 11 species in this proposed rule? What are relevant Federal, State, or local rules that may duplicate, overlap, or conflict with the proposed Federal regulation?

(4) What would it cost to eradicate individuals or populations of any of the 11 species, or similar species, if found in the United States? What methods are effective?

(5) What State-protected species would be adversely affected by the introduction of any of the 11 species?

(7) How could the proposed rule be modified to reduce any costs or burdens for small entities consistent with the Service's requirements?

Public Comments—Ecological Risk Screening Summaries

(8) Comment: Two State agencies commented that they utilized the Service's ERSSs for supporting information to assist them in developing restrictions on potentially invasive species.

- With support from Michigan's Governor, Rick Snyder, and the Michigan Legislature, Public Act 537 of 2014 was passed requiring the development of a permitted species list in Michigan. Additionally, this public act requires the review of all species that the Service lists as an injurious wildlife species. Four of the 11 species proposed as injurious are currently listed as prohibited in Michigan (stone moroko, zander, wels catfish, and the common yabby). If all 11 species proposed are approved for listing as injurious, Michigan will respond by reviewing the 7 species not currently regulated in Michigan to consider a prohibition or restriction.
- New York State Department of Environmental Conservation's invasive species experts reviewed 25 of the 63 high-risk species identified by the Service during the assessment process as posing an ecological risk to New York State. Many of these species were included on the 6 NYCRR Part 575 list, Prohibited and Regulated Invasive Species, which became effective March 2015. NYDEC plans to evaluate the remaining high-risk species identified by the Service for future updates to the regulations.

Our Response: We are pleased that our efforts to produce the ERSSs are specifically useful to the States of Michigan and New York.

(9) Comment: A commenter understood that the [ERSS] methodology would be directed at species not in trade.

Our Response: The ERSSs were not intended to be specifically for species not in trade. We do not often know whether a species is in trade or not in trade at the time the ERSS is prepared; that information is discovered during the rapid screening process itself. We posted the purpose and uses of the ERSSs in late 2012 in several places on the Service's public Web site, such as:

- The peer review plan for the ERSSs ("Rapid Screening of Species Risk of Establishment and Impact in the United States") posted on the Service's Science Web site (*http://www.fws.gov/science/pdf/ERSS-Process-Peer-Review-Agenda-12-19-12.pdf*) has been continuously available since December 2012 and states that the "The Fish and Wildlife Service has developed a rapid risk screening process to determine a high, low, or uncertain level of risk for imported nonnative species."
- The Invasive Species Prevention page (*http://www.fws.gov/injuriouswildlife/Injurious_prevention.html*) has been continuously available since December 2012 and states that "Some species that we assess may already be in trade in the United States but are considered low risk because they have not become invasive over a long period. Others may be in trade and we do not have enough information to know whether they have become invasive (these would likely be uncertain risk). In addition, due to the large number of species in trade, some species may be in trade in this country that we do not know are in trade. Thus, we are seeking information from the public as to what species are in trade or are otherwise present in the United States."
- The Species Ecological Risk Screening Summaries page (*http://www.fws.gov/fisheries/ANS/species_erss.html*) was posted on November 2, 2015, and gives many examples of ERSSs of species already in trade in the United States, so that an agency from an

as-yet unaffected State may determine if the climate match would support that agency taking restrictive action. Those examples also show species that are low risk because they have been in U.S. trade for decades and have not established.

(10) Comment: Several commenters stated that a Federal regulatory decision should not be solely based on the ERSS model.

Our Response: We agree, and our determinations are based on more than the ERSS reports. Our determinations are based on the ERSS reports, the Service's evaluation of the criteria for injuriousness, substantive information we received during the public comment period and from the peer reviewers, along with other available information regarding the 11 species. We stated in the proposed rule under "*How the 11 Species Were Selected for Consideration as Injurious Species*" (80 FR 67027; October 30, 2015) that "[t]he Service selected 11 species with a rapid screen result of "high risk" to consider for listing as injurious," explaining how we prioritized which species to evaluate further. Only species with high-risk conclusions from ERSSs were considered for further evaluation in this rulemaking. In our proposed rule, we further explained how we got the information that we used for our determination (80 FR 67030; October 30, 2015): "We obtained our information on a species' biology, history of invasiveness, and climate matching from a variety of sources, including the U.S. Geological Survey Nonindigenous Aquatic Species (NAS) database, Centre for Agricultural Bioscience International's Invasive Species Compendium (CABI ISC), ERSS reports, and primary literature * * *. The Service contracted with CABI for many of the species-specific datasheets that we used in preparation of this proposed rule. The datasheets were prepared by world experts on the species, and each datasheet was reviewed by expert peer reviewers. The datasheets served as sources of compiled information that allowed us to prepare this proposed rule efficiently."

We further explained how we used the compiled information in the evaluation process that we developed specifically for evaluating species for listing as injurious (80 FR 67039; October 30, 2015; see "Injurious Wildlife Evaluation Criteria") and have used for previous rules. We used primary literature extensively, and those sources are cited in the proposed rule and listed in the supporting document "References for Proposed Rule of 11 Species" posted on *www.regulations.gov.*

(11) Comment: Clear errors are present in many of the ERSS reports regarding climate matching, especially for tropical species (the commenter gives the examples of the guppy (*Poecilia reticulata*) and the black acara (*Cichlasoma bimaculatum*)). Taking database information at face value, while often done during rapid screens, is clearly not appropriate for a risk analysis that would support national regulatory decisions.

Our Response: The ERSS process is a risk screening process that is designed to be quick and simple. Data are reviewed and compiled to help us decide whether a species should be evaluated more closely. We acknowledge that an ERSS may miss or misinterpret data on a species being assessed. We agree that, for national regulatory decisions, we should not take rapid screen information at face value only. That is why we use many other sources of information for the subsequent injurious evaluation utilizing our injurious wildlife listing criteria. These results are published in our rules and often utilize additional sources of information that may rectify any errors in the ERSS.

(12) Comment: The ERSS tool has a methodological bias to return an overall high-risk assignment due to the combination of history of invasion and climate match, while there is only one combination that will result in a low-risk designation. With the ease of obtaining a medium climate match using this tool, this is an unacceptable precedent that could lead to proposed listings of numerous ornamental species that have been in production in Florida for decades and are vital to the Florida aquaculture industry.

Our Response: About 2,000 species have been assessed for risk using the ERSS approach; currently most are in draft needing final review. Only about 10 percent of those 2,000 species are characterized as high risk. Therefore, ERSS results are rarely characterizing species risk as high, even with either medium or high climate-match scores for the United States. Unlike some semi-quantitative scoring systems that characterize risk without climate mapping (such as Fish Invasiveness Screening Kit (FISK)), the ERSS system relies on climate-matching that gives a national score and maps the climate match for all U.S. States. Maps of climate match for species whose scores are medium show locations where climate match is high. Thus, we do not rely only on climate scores. Instead, we rely on climate scores and maps that show locations where climate match is high. Also, the ERSS system is designed not to classify any species, regardless of the climate match score and associated category, as high risk without a scientifically defensible history of invasiveness. For example, the Nile perch is one of the 10 percent of species out of the 2,000 species that have been assessed as high. Although the climate match score for this species is medium, the climate match is high in portions of several U.S. jurisdictions.

An ERSS indicating a high risk for a species does not mean that the species will be listed as injurious wildlife. The ERSS is a way to prioritize species on which the Service should focus its regulatory, nonregulatory risk management, or management actions. The commenter is correct that a high history of invasiveness and a high climate match equals high risk, and that a high history of invasiveness and a medium climate match also equals high risk. The former is clearly reasonable. However, a high history of invasiveness and a medium climate match also produces a high overall risk because the climate match is conservative for two reasons. One is that factors other than climate may limit a species distribution in its native land, such as the existence of predators, diseases, and major terrain barriers that may not be present in the newly invaded land. Therefore, the areas at risk of invasion may span a climate range greater than that extracted mechanically from the native range boundaries (Rodda *et al.* 2011). The second reason is to err on the side of protection of natural resources, especially when the effects of introduced species are disputed or unknown. Accepting the higher risk rating reflects a "precautionary" or conservative approach and counteracts the uncertainty often associated with biological invasions (ANSTF 1996).

The commenter's concern about setting a precedent for ornamental species in production in Florida is unfounded because the ERSSs merely provide a way for the Service to focus its limited resources and regulatory efforts on species at greatest risk of adversely affecting human beings, the interests of agriculture, horticulture, forestry, or wildlife, or the wildlife resources of the United States. We will continue to use more detailed risk analyses by utilizing the injurious wildlife listing criteria. These analyses can be found in this final rule.

(13) Comment: Although the Ecological Risk Screen Standard Operating Procedures have been reviewed by several experts in the field, some methodological issues could be

evaluated to improve the effectiveness of the tool. It is not clear if this tool has been thoroughly tested and validated using a wide range of species across a continuum of risk such as has been done with other risk screening tools (such as Fish Invasiveness Screening Kit (FISK)). For example, it is common to test and validate the method by answering the questions: What percentage of species considered invasive does the tool correctly identify as high risk, and what percentage of species that are not invasive does it correctly identify as low risk?

Our Response: The ERSS process is based on scientific literature and risk screening approaches, as well as peer review of those approaches per OMB policies for influential science. We also measured the approach in postdiction on a number of species, including bighead carps, grass carps, silver carps, green swordtails, and several species of snakeheads. Although we did not compile the postdiction testing into a final report, the positive results ultimately led to the Service developing the ERSS process. The practice of using history of invasiveness and climate match to determine risk has been validated in peer-reviewed studies over the years. The following are some examples: Kolar and Lodge (2002) found that discriminant analysis revealed that successful fishes in the establishment stage grew relatively faster, tolerated wider ranges of temperature and salinity, and were more likely to have a history of invasiveness than were failed fishes. Hayes and Barry (2008) found that climate and habitat match, history of successful invasion, and number of arriving and released individuals are consistently associated with successful establishment. Bomford (2003) recommended that, because a history of establishing exotic populations elsewhere is a significant predictor of establishment success for exotic mammals and birds introduced to Australia, this variable should be considered as a key factor when assessing the risk that other exotic species could establish there. Bomford *et al.* (2010) later found that "Relative to failed species, established species had better climate matches between the country where they were introduced and their geographic range elsewhere in the world. Established species were also more likely to have high establishment success rates elsewhere in the world." Recently, Howeth *et al.* (2016) showed that climate match between a species' native range and the Great Lakes region predicted establishment success with 75 to 81 percent accuracy.

(14) Comment: A commenter cites the risk assessment framework used by the U.S. Department of Agriculture–Animal and Plant Health Inspection Service–Plant Protection and Quarantine (USDA–APHIS–PPQ) for determining the risk of nonnative plants. The method and variants of it have been tested by many entities. Additional expert review and testing of the Service's method as well as the generated ERSS reports would provide valuable information on the performance, uses, and limitations of Ecological Risk Screening.

Our Response: The Service has conducted its risk analysis (80 FR 67039; October 30, 2015; see "Injurious Wildlife Evaluation Criteria") based on factors that are specific to injurious wildlife listing. The ERSSs are rapid screens and are used as a way to prioritize which species to evaluate further (see our response to Comment 10).

(15) Comment: A commenter opines that stakeholders from the public and private sectors with expertise in aquatic biology and ecology, natural resource management, biology, and aquaculture should further analyze screening results through a comprehensive regulatory risk analysis. The commenter also encourages the Service to have the ERSS reports reviewed by subject matter experts prior to their release and use in management decisions.

Our Response: Well before the publication of the proposed rule for these 11 species, this commenter had requested by letter to the Service in 2012 that the Service conduct peer review under the OMB Peer Review Guidelines (OMB 2004) on the ERSS process. We completed that peer review in 2013. No substantive changes were needed to the ERSS process. Because the ERSSs are rapid screens, we believe that having a good foundation for the process is sufficient, and that a detailed peer-review process of individual ERSSs is not required. These reports are also publically available, and comments can be submitted on individual reports at *prevent_invasives@fws.gov.*

Public Comments—Nile Perch

(16) Comment: Currently, Florida Department of Agriculture and Consumer Services (FDACS) has certified aquaculture facilities culturing Nile perch (*Lates niloticus*). These farms are in compliance with current Federal and State laws. Listing *L. niloticus* as injurious species would not further prevent escapement of these species in Florida

Our Response: The Service commends the State of Florida for exemplary regulations designed "to prevent the escape of all life stages of nonnative aquatic species into waters of the State" (quoted from the comment by FDACS, December 22, 2015). While we agree that Florida's laws may indeed be sufficient to prevent escape of Nile perch into Florida's ecosystems, the Service must look at a national scale to ensure that none of the 11 species is introduced into, becomes established, or spreads across the United States.

(17) Comment: There may be a substantial impact to the emerging food fish aquaculture industry in Florida by prohibiting the import and interstate movement of live *Lates niloticus* (Nile perch) or their gametes.

Our Response: Neither this commenter nor the other commenters that mentioned culturing of Nile perch in Florida stated how many facilities are currently raising Nile perch, how many Nile perch they raise, or their market value. In fact, the Florida Fish and Wildlife Conservation Commission stated in their public comment (December 29, 2015), "Food production in Florida is primarily limited to four species of tilapia * * *. The number of aquaculture facilities currently raising Nile perch is limited at this time." Another commenter stated, "The Nile perch [*Lates niloticus*] is not cultured in the United States * * *." A third commenter from Florida discussed the Nile perch ERSS at length but did not state whether Nile perch are currently being cultured in Florida or any State. We do note that live culturing will not be prohibited by this rulemaking nor will the transportation of dead Nile perch to other States. Export of live fish directly from a designated port in Florida will remain unaffected by this rulemaking as well.

(18) Comment: A commenter with a national focus states that Nile perch is not cultured in the United States, and a Federal rule effectively eliminates any opportunity to culture this species in regions where it has little or no chance of successfully surviving in the wild. Nile perch is already regulated in the States and regions of the nation where it might survive in nature, and, therefore, a Federal rule is redundant.

Our Response: The commenter did not provide information on what regulations currently exist or what States the commenter thinks species cannot survive in. In our internet search for regulations in southern tier States, we found these States regulate the Nile perch in some way: Mississippi (MDAC 2016), Arizona (AGFD 2013), and Texas (TPWD 2016); these States apparently do not regulate Nile perch: Alabama (ADCNR 2015), California (CDFW 2013), Georgia (Justia 2015; not confirmed), Hawaii (HDOA 2006), Louisiana (Louisiana 2015), and New Mexico (NMDGF 2010). Based on this information, we do not believe that this Federal rule is redundant.

(19) Comment: Several commenters disagree with our conclusion that the Nile perch is highly likely to survive in the United States and could successfully reproduce and thrive to yield similar ecological effects as those in Lake Victoria (Africa). The ERSS report and the analysis completed for the **Federal Register** notice for this species should be reviewed and revised. Another commenter stated that Nile perch is unlikely to survive outside of captivity in the United States except in warm areas, such as southern Florida, Hawaii, Puerto Rico, and more questionably interior portions of southern California. The ERSS report overestimates the climate match of this species to include States along the Gulf of Mexico coast and central and northern Florida. It is difficult to visualize the climate match because climate match maps are on a global scale.

Our Response: We have checked the sources we used previously and other sources for the native and introduced range of the Nile perch. The Nile perch is widespread in Africa from approximately 30° N. in Egypt to approximately 15° S. in Zambia and in countries from the Atlantic to the Indian oceans and the Mediterranean Sea (Azeroual *et al.* 2010). The climate match supports our determination that the Nile perch is likely to survive in warmer areas, such as Hawaii and the insular islands, as well as some southern States. We also note that some introduced species have defied the expected physiological tolerances, such as the red swamp crayfish, which is native to the Gulf coastal plain from New Mexico to the western panhandle of Florida and north through the southern Mississippi River drainage to southern Illinois. The species has been reported in Alaska, Washington, Maine, Michigan, Hawaii, and many other States (Nagy *et al.* 2016). As a generalization among taxa, introduced ranges often reflect a greater climatic range than was found in the native range because other dispersal barriers (biotic and abiotic) may be absent in the introduced range (Rodda *et al.* 2011).

(20) Comment: A commenter stated that the historic claims on our summary of the Nile perch, that it has decimated the species of East African lakes to extinction, are out of date and unproven and are more likely due to immigration of large numbers of people, causing deforestation, eutrophication, and pollution. Another commenter stated that many of the impacts to African lakes discussed in the Nile perch ERSS are confounded by other elements of environmental change and are highly unlikely to occur in the United States.

Our Response: The former commenter gave no supporting documentation that is more recent and "proven" to show that Nile perch are not the cause of the changes in Lake Victoria. We looked for more recent studies than in our proposed rule and found that Gophen's plankton and fish community study (2015) states, "The concept of the Nile Perch predation impact and its ecological implications is also confirmed by the elimination of the Haplochromines's planktivory. * * * The Lake Victoria ecosystem was unique included above [*sic*] 400 endemic species of Haplochromine fishes. The food web structure was naturally balanced during that time with short periods of anoxia in deep waters and dominance of diatomides algal species. Nile Perch (*Lates niloticus*) was introduced and during the 1980's became the dominant fish. The Haplochromine species were deleted and the whole ecosystem was modified. Algal assemblages were changed to Cyanobacteria, anoxia became more frequent and in shallower waters." This statement supports, if not enhances, our claim that the Nile perch caused the local extinction of at least 200 haplochromine cichlid fish species, thereby altering the plankton balance. We do not dispute that other factors were also acting on the health of Lake Victoria in the last few decades, thus exacerbating the effects of losing so many native fishes. However, the fact that so many species' local extirpation are directly linked to the Nile perch meets one of the injurious listing factors.

The latter commenter states that the elements of environmental change (referring to land use changes and cultural practices) are highly unlikely to occur in the United States. We agree with this statement but believe that the United States also has land use changes and cultural practices that may be different but that also lead to adverse ecological disturbance.

(21) Comment: The distribution of Nile Perch in its native and introduced range is primarily within the tropics of sub-Saharan Africa, a tropical equatorial rainforest climate zone, with the exception of the Nile River, which flows primarily through a hot, desert climate, and some East African lakes. The conterminous United States lacks the tropical equatorial rainforest zone. The commenter's own CLIMATCH analysis indicated that almost none of the many stations distributed across tropical West Africa and the central tropics contributed to match in the United States.

Our Response: Climate match is not an exact predictor. Factors other than climate may limit a species' native distribution, including the existence of predators, diseases, and other local factors (such as major terrain barriers), which may not be present when a species is released in a new country. Therefore, the areas at risk of invasion often span a climate range greater than that extracted mechanically from the native range boundaries. For example, an aquatic species that was historically confined to a small watershed may be able to thrive in larger, dissimilar watersheds if transported there. For the Nile perch, the historic range covers a large area of Africa, in countries from the western to the eastern coast and north to the Mediterranean Sea. Habitats include rivers and lakes of varying sizes and brackish as well as fresh water. In our methodology, weather stations within 50 km (31 mi) of an occurrence are used in the analysis. We recognize that this is an unusual circumstance with the elevated plateau being located very close to the east African Rift Lakes and possibly skewing the results.

(22) Comment: The State of Texas stocked Nile perch in the late 1970s and early 1980s into reservoirs receiving heated effluents from power plants. At least two of the reservoirs were in southern Texas where the ERSS report states that there is a good climate match. These fish failed to establish, and at least some were thought to have succumbed to cold temperatures during plant shutdowns, calling into question the suitability of the northern Gulf Coast for Nile Perch.

Our Response: We mentioned the Nile perch stockings that took place in Texas in our proposed rule (80 FR 67033, October 30, 2015). To elaborate, the State of Texas stocked a mixture of approximately 70,000 larvae of *Lates* spp. (which could be *L. angustifrons, L. maria,* or *L. niloticus*) from 1978 to 1984 in one reservoir (Howells and Garrett 1992). Larvae are very susceptible to predation or changes in water chemistry. It is not surprising that they did not survive. Although there are many factors to consider, expected survivorship of stocked larvae is generally 0.1 percent to 0.001 percent (pers. comm., Gary Whelan, Program Manager, Michigan Department of Natural Resources). A mixture of 1,500 juvenile and adult *Lates* spp. was introduced to two reservoirs in Texas over 6 years (Howells and Garrett 1992).

When the State abandoned the project in 1985, the remaining 14 individuals (including 6 Nile perch) were stocked in a third reservoir with no public access. One was found dead in 1992 after a cold snap of 5–6 °C (Howells and Garrett 1992). The 14-year-old fish weighed approximately 27 kg (59.5 lb), up from 5.9 kg (13 lb) when released in 1985 (*ibid.*). This occurrence does not constitute establishment of the species, but it does show that with even a small number of individuals released, some can survive. We do not know why the larvae failed; there may be some other factor besides the water temperature of the artificial reservoir, such as water quality or food supply, or the larvae may have not been acclimated. As we stated in the proposed rule and again in this final rule (see *Introduction Pathways for the 11 Species*), propagule pressure (the frequency of release events and the numbers of individuals released) is a major factor in the 11 species establishing in the wild by increasing the odds of both genders being released and finding mates and of those individuals being healthy, vigorous, and fit (able to leave behind reproducing offspring). Therefore, a larger propagule pressure of Nile perch could be expected to have a higher chance of establishment.

(23) Comment: It is unclear why the original CLIMATCH in the ERSS for Nile Perch included Hawaii and Puerto Rico, regions that would increase the Climate 6 match, but did not include Alaska, a region that would decrease the match. The supplemental CLIMATCH map posted online subsequently has Alaska but was not used to determine climate match in the proposed rule. The other species on the proposed list were evaluated originally for the conterminous United States in their ERSS reports but had online supplemental maps including Alaska that were used for the climate match in the proposed rule.

Our Response: We are not clear why the commenter believes that the supplemental map was not used to determine climate match in the proposed rule. The original Climate 6 match in the ERSSs for all 11 species were run without Alaska for a different purpose. We ran the climate matches again with Alaska, because we needed to include all States (and we updated some information), and we used those scores in the proposed rule. We posted the revised maps in the docket on *www.regulations.gov* and on our Web site at *http://www.fws.gov/injuriouswildlife/11-freshwater-species.html.* We utilized the other ERSS information because it was appropriate for our purpose. The Climate 6 score in the ERSS is 0.068. With Alaska added, the Climate 6 score is 0.038, which is lower as the commenter correctly predicted, and this score is what we used in the proposed and final rule.

(24) Comment: A commenter is concerned that the ERSS for Nile perch did not utilize more primary literature. Information mainly came from secondary or tertiary source databases that summarize information on Nile Perch, and that is what the listing is based on.

Our Response: The ERSSs are rapid screens that may use primary, secondary, or other literature. That setup serves the purpose of a rapid screen. The injurious wildlife evaluations are not based entirely on the ERSSs. The ERSSs are used as an initial filter for the Service to decide if a species warrants further evaluation. The Service uses that result to prioritize species that we should put through the subsequent injurious evaluation process. As we proceed through the injurious wildlife evaluation process, we do utilize primary literature to support our justification, as is evidenced by our citations and "Literature Cited 2015" reference list posted with the docket on *www.regulations.gov.* Through the injurious wildlife evaluation process, we theoretically could find a discrepancy with the ERSS that leads us to remove that species from evaluation for listing, but that situation did not happen with this rulemaking. The primary literature that we have used supports the ERSSs.

(25) Comment: A commenter has concerns with listing the Nile perch because it sets a potential precedent for listing tropical species, including important aquaculture and aquarium fishes.

Our Response: Nile perch would not be the first tropical-climate fish species in aquaculture or aquarium trade that the Service has listed as injurious. In 1969, we listed the entire family Clariidae (34 FR 19030; November 29, 1969), which includes the walking catfish (*Clarias batrachus*) and the whitespotted clarias (*C. fuscus*), both of tropical origin and of food-source value. It is likely that others of the 100 species that we listed then also fall into that category, but the two mentioned were already in U.S. trade. More recently, we listed the entire family of snakeheads as injurious (67 FR 62193; October 4, 2002) (28 species at the time of listing). All snakehead species are valued as food fish in their native lands, and many are valued as pets outside of their native lands. At least 10 snakehead species are of tropical origin (Courtenay and Williams 2004).

Public Comments—Zander

(26) Comment: The zander has existed and even exhibited limited natural reproduction and recruitment in Spiritwood Lake, ND, for over two decades, but it has hardly been injurious. No hybridization with walleye has been documented, and no negative impacts on native species have occurred. Given their preferred habitats, zanders would be more suited farther south in manmade, warm, turbid, eutrophic reservoirs prevalent across much of the Great Plains. If State fish and wildlife agencies want to provide quality fishing experiences, they could choose to import eggs and treat them for pathogens and create triploids to prevent natural reproduction.

Our Response: We use the term "injurious" specifically for species that have been through the injurious listing evaluation process in accordance with the Act. The commenter's description of the zander in Spiritwood Lake not being injurious likely means the more common usage of "injurious" that no specific harms have been detected in that lake. However, the commenter states that the zander would be more suited to warmer waters across much of the Great Plains, and this statement supports our determination, assisted by the climate match, that the zander is likely to survive, become established, and spread if introduced across a large part of the United States.

Triploidy is used for control of other invasive species and for market production (such as farmed salmon), but it is risky as a tool for introducing an injurious species to new ecosystems. Because treatments to produce triploids seldom result in 100 percent triploid fish, each individual must be verified triploid before they can be stocked (Rottman et al. 1991). Some may be diploids and, therefore, able to reproduce. Also, triploid fish may grow larger because the energy normally needed for reproduction can be redirected to body growth (Tiwary *et al.* 2004). Larger growth, especially for a species that may live up to 20 to 24 years, could have a major negative effect on aquatic food webs. To our knowledge, triploidy in zanders has not been done, and we do not know if there are approved treatments for pathogens on zander eggs.

Public Comments—Yabby

(27) Comment: The proposed rule presents the yabby as a vector for crayfish plague (*Aphanomyces astaci*)

because the fungal disease has the potential to cause large-scale mortality of freshwater crayfish in Australia. This fungus is endemic to the United States, and crayfish native to the United States are carriers resistant to the disease. Because European crayfish are not resistant to the plague, it is not highly likely that the yabby will survive in the United States and very unlikely that the yabby poses an invasion risk to the United States.

Our Response: We noted in the proposed rule that the crayfish plague is not known to affect North American crayfish species. We acknowledged the plague's potential role as a biological control of yabbies if the species does become invasive in the United States. We also mentioned other pathogens that yabbies can carry that are more likely to be problematic for native crayfish. If yabbies are introduced into ecosystems with native crayfish, it is possible that some individuals will succumb to the crayfish plague. However, yabbies that do not contract or succumb to the disease are likely to spread and establish due to the species' traits of a general diet, quick growth rate, high reproductive potential, and proven invasiveness outside of its native range. Because of the injuriousness of the species, we believe yabbies should be listed.

Required Determinations

Regulatory Planning and Review

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order (E.O.) 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that the regulatory system must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these principles.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act [SBREFA] of 1996) (5 U.S.C. 601, *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (that is, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule would not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)).

The Service has determined that this final rule will not have a significant economic impact on a substantial number of small entities. Of the 11 species, only one population of one species (zander) is found in the wild in one lake in the United States. Of the 11 species, four (crucian carp, Nile perch, wels catfish, and yabby) have been imported in only small numbers since 2011; and seven species are not in U.S. trade. To our knowledge, the total number of importation events of those 4 species from 2011 to 2015 is 25, with a declared total value of $5,789. Therefore, businesses derive little or no revenue from the sale of the 11 species, and the economic effect in the United States of this final rule is negligible for 4 species and nil for 7. The final economic analysis that the Service prepared supports this conclusion (USFWS Final Economic Analysis 2016). In addition, none of the species requires control efforts, and the rule would not impose any additional reporting or recordkeeping requirements. Therefore, we certify that this final rulemaking will not have a significant economic effect on a substantial number of small entities, as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) does not apply to this final rule since it would not produce a Federal mandate or have a significant or unique effect on State, local, or tribal governments or the private sector.

Takings

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), the final rule does not have significant takings implications. Therefore, a takings implication assessment is not required since this rule would not impose significant requirements or limitations on private property use.

Federalism

In accordance with E.O. 13132 (Federalism), this final rule does not have significant federalism effects. A federalism summary impact statement is not required since this rule would not have substantial direct effects on the States, in the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform

In accordance with E.O. 12988, the Office of the Solicitor has determined that this final rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the E.O. The rulemaking has been reviewed to eliminate drafting errors and ambiguity, was written to minimize litigation, provides a clear legal standard for affected conduct rather than a general standard, and promotes simplification and burden reduction.

Paperwork Reduction Act of 1995

This final rule does not contain any collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This final rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

The Service has reviewed this final rule in accordance with the criteria of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), Department of the Interior NEPA regulations (43 CFR part 46), and the Departmental Manual in 516 DM 8. This rulemaking action is being taken to protect the natural resources of the United States. A final environmental assessment and a finding of no significant impact (FONSI) have been prepared and are available for review by written request (see **FOR FURTHER INFORMATION CONTACT**) or at *http://www.regulations.gov* under Docket No. FWS–HQ–FAC–2013–0095. By adding the 11 species to the list of injurious wildlife, the Service intends to prevent their introduction and establishment into the natural areas of the United States, thus having no significant impact on the human environment. The final environmental assessment was based on the proposed listing of the 11 species as injurious and was revised based on comments from peer reviewers and the public.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. We have evaluated potential effects on federally recognized Indian tribes and have determined that there are no potential effects. This final rule involves the prevention of importation and interstate transport of 10 live fish species and 1 crayfish, as well as their gametes, viable eggs, or hybrids, that are not native to the United States. We are unaware of trade in these species by tribes as these species are not currently in U.S. trade, or they have been imported in only small numbers since 2011.

Effects on Energy

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, or use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This final rule is not expected to affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

References Cited

A complete list of all references used in this rulemaking is available from *http://www.regulations.gov* under Docket No. FWS–HQ–FAC–2013–0095 or from *http://www.fws.gov/injuriouswildlife/.*

Authors

The primary authors of this final rule are the staff of the Branch of Aquatic Invasive Species at the Service's Headquarters (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 16

Fish, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

Final Regulation Promulgation

For the reasons discussed within the preamble, the U.S. Fish and Wildlife Service amends part 16, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 16—INJURIOUS WILDLIFE

■ 1. The authority citation for part 16 continues to read as follows:

Authority: 18 U.S.C. 42.

■ 2. Amend § 16.13 by revising paragraph (a)(2)(v) and adding paragraphs (a)(2)(vi) through (x) to read as follows:

§ 16.13 Importation of live or dead fish, mollusks, and crustaceans, or their eggs.

(a) * * *

(2) * * *

(v) Any live fish, gametes, viable eggs, or hybrids of the following species in family Cyprinidae:

(A) *Carassius carassius* (crucian carp).

(B) *Carassius gibelio* (Prussian carp).

(C) *Hypophthalmichthys harmandi* (largescale silver carp).

(D) *Hypophthalmichthys molitrix* (silver carp).

(E) *Hypophthalmichthys nobilis* (bighead carp).

(F) *Mylopharyngodon piceus* (black carp).

(G) *Phoxinus phoxinus* (Eurasian minnow).

(H) *Pseudorasbora parva* (stone moroko).

(I) *Rutilus rutilus* (roach).

(vi) Any live fish, gametes, viable eggs, or hybrids of *Lates niloticus* (Nile perch), family Centropomidae.

(vii) Any live fish, gametes, viable eggs, or hybrids of *Perccottus glenii* (Amur sleeper), family Odontobutidae.

(viii) Any live fish, gametes, viable eggs, or hybrids of the following species in family Percidae:

(A) *Perca fluviatilis* (European perch).

(B) *Sander lucioperca* (zander).

(ix) Any live fish, gametes, viable eggs, or hybrids of *Silurus glanis* (wels catfish), family Siluridae.

(x) Any live crustacean, gametes, viable eggs, or hybrids of *Cherax destructor* (common yabby), family Parastacidae.

* * * * *

Dated: September 13, 2016.

Karen Hyun,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2016–22778 Filed 9–29–16; 8:45 am]

BILLING CODE 4333–15–P

Reader Aids

Federal Register

Vol. 81, No. 190

Friday, September 30, 2016

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6050**
Public Laws Update Service (numbers, dates, etc.)	**741–6043**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.fdsys.gov.**

Federal Register information and research tools, including Public Inspection List, indexes, and Code of Federal Regulations are located at: **www.ofr.gov.**

E-mail

FEDREGTOC (Daily Federal Register Table of Contents Electronic Mailing List) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new**, enter your email address, then follow the instructions to join, leave, or manage your subscription.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html** and select *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

CFR Checklist. Effective January 1, 2009, the CFR Checklist no longer appears in the Federal Register. This information can be found online at **http://bookstore.gpo.gov/.**

FEDERAL REGISTER PAGES AND DATE, SEPTEMBER

60235–60580	1
60581–61098	2
61099–61582	6
61583–61972	7
61973–62352	8
62353–62602	9
62603–62808	12
62809–63050	13
63051–63360	14
63361–63670	15
63671–64048	16
64049–64344	19
64345–64758	20
64759–65168	21
65169–65530	22
65531–65852	23
65853–66178	26
66179–66486	27
66487–66790	28
66791–67090	29
67091–67900	30

CFR PARTS AFFECTED DURING SEPTEMBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

2 CFR

1400	65853
2800	61981
2998	67091
Proposed Rules:	
2998	67217

3 CFR

Proclamations:	
9479	61973
9480	61975
9481	61977
9482	61979
9483	62347
9484	62349
9485	62351
9486	62599
9487	63351
9488	63353
9489	63355
9490	63357
9491	63359
9492	63671
9493	64049
*	
9495	64757
9496	65161
9497	65169
9498	65171
9499	65173
9500	66785
9501	66787
9502	66789
9503	67089
Executive Orders:	
12473 (amended by 13740)	65175
13396 (revoked by 13739)	63673
13739	63673
13740	65175
Administrative Orders:	
Notices:	
Notice of August 30, 2016	60579
Notice of September 15, 2016	64343
Presidential Determinations:	
No. 2016–10 of September 12, 2016	64749
No. 2016–11 of September 13, 2016	64047

5 CFR

870	60235
2417	63361
2640	61099
Proposed Rules:	
1800	60649
9801	61628

6 CFR

27	62353
Proposed Rules:	
5	60297

7 CFR

56	63675
210	66487
215	66487
220	66487
225	66487
226	66487
227	66487
235	66487
240	66487
246	66487
247	66487
248	66487
249	66487
253	66487
272	66487
273	66487
274	66487
276	66487
277	66487
906	67091
930	63676
983	63679
987	64759
1150	62809
1493	65510
1499	62603
1599	62614
1780	63051
1940	66500
Proposed Rules:	
271	66866
274	66866
923	64785
981	62668
982	67217
984	63718, 63721
989	63723
999	63723

8 CFR

214	60581
236	62353
238	62353
239	62353
240	62353
241	62353
270	62353
274a	62353
280	62353
287	62353

9 CFR

Proposed Rules:	
11	65307

10 CFR

171 61100
430 61982
900 66500

Proposed Rules:

429 .... 60784, 64580, 65720
430 .... 60784, 65720, 67219
431 .... 62980, 64580
951 66199

12 CFR

30 66791
217 63682
602 63365

Proposed Rules:

7 63428
51 62835
217 67220
225 .... 67220, 67229
252 67239
1231 64357
1263 66545

13 CFR

121 67093
123 63366
125 67093

Proposed Rules:

107 64075
121 66199
311 64787
312 64805

14 CFR

23 67093
25 .... 60236, 60240, 60241, 63051, 67097
39 .... 60243, 60246, 60248, 60252, 60582, 61102, 61983, 61985, 61987, 61990, 61993, 61996, 61999, 63367, 63370, 63374, 63688, 63691, 64051, 64053, 64057, 65265, 65857, 65860, 65864, 65872, 66513, 66516, 66518, 66524, 66801, 67098, 67100, 67102
61 61583
71 .... 62002, 62003, 62807, 62810, 65267, 65269, 65270, 65274, 65276, 65278, 65531, 65532, 65533, 65535, 66179, 66180, 67104
91 61583
93 .... 62802, 62811
97 .... 67105, 67107, 67110, 67112
135 61583
145 65874

Proposed Rules:

25 64360
39 .... 62022, 62024, 62026, 62029, 62031, 62035, 62037, 62668, 62672, 62676, 62679, 62845, 63433, 63725, 64080, 64083, 65307, 65577, 65579, 65581, 65980, 66553, 66872, 66874
71 .... 62040, 62041, 62044, 65583, 66221
73 62847
91 66877
193 64085
382 61145

15 CFR

730 .... 60254, 64656
732 60254
734 .... 60254, 64656
736 60254
738 .... 60254, 64656
740 .... 60254, 64656
742 .... 60254, 64656
743 .... 60254, 64656
744 .... 61595, 64694
746 60254
747 60254
748 .... 60254, 61104, 64656
750 60254
754 60254
756 60254
758 60254
760 60254
762 60254
764 60254
766 60254
768 60254
770 .... 60254, 64656
772 .... 60254, 64656
774 .... 60254, 64656
902 67113

Proposed Rules:

2004 .... 65309, 65586

16 CFR

305 63634
701 63664
702 63664
803 60257

Proposed Rules:

Ch. II 60298
305 62681
314 61632
682 63435
1112 66881
1235 66881
1500 61146

17 CFR

37 64272
38 64272
39 64312
49 64272
Ch. I 63376
232 67118
240 60585
275 .... 60418, 66526
279 60418

Proposed Rules:

4 61147
Ch. II 64364
210 66898
229 .... 62689, 66898
230 66898
232 62689
239 .... 62689, 66898
240 66898
249 .... 62689, 66898
274 66898
275 .... 60651, 60653

18 CFR

40 67120

Proposed Rules:

40 66555
806 64812
808 64812

19 CFR

12 67140
165 62004
220 67144

Proposed Rules:

111 63049

20 CFR

404 .... 64060, 65536, 66138
416 .... 64060, 65536, 66138

Proposed Rules:

404 62560
416 62560

21 CFR

17 62358
20 62004
25 62004
101 66527
117 64060
170 62004
184 62004
186 62004
310 61106
507 64060
510 67149
520 67149
522 67149
524 67149
529 67149
558 .... 63053, 67149
570 62004
573 67153
878 64761
882 67154
886 65279
1308 .... 61130, 66181

Proposed Rules:

15 60299
73 63728
101 66562
573 67260
1300 63576
1301 63576
1302 63576
1303 63576
1304 63576
1308 .... 61636, 63576, 66224
1309 63576
1310 63576
1312 63576
1313 63576
1314 63576
1315 63576
1316 63576
1321 63576

22 CFR

42 63694
51 .... 60608, 66184, 67156
120 .... 62004, 66804
125 62004
126 .... 62004, 66804
130 62004
240 65281

Proposed Rules:

22 64088
96 62322
212 66227

23 CFR

1270 67158
1275 67158

Proposed Rules:

Ch. 1 63153
450 65592

24 CFR

5 64763
100 63054

Proposed Rules:

35 60304
203 66565
234 66565

26 CFR

1 .... 60609, 62359, 64061, 65541, 65542
20 60609
25 60609
26 60609
31 60609
301 60609
602 65542

Proposed Rules:

1 .... 63154, 65983, 66576
301 .... 63154, 65983

27 CFR

9 62626

Proposed Rules:

4 62046
9 .... 62047, 64368
24 62046

28 CFR

66 61981
70 61981
104 60617

Proposed Rules:

0 63155
16 64092
44 63155

29 CFR

13 67598
95 67091
98 67091
1910 60272
1915 60272
1926 60272
1986 63396
4007 65542
4022 63414
4044 63414

Proposed Rules:

95 67217
98 67217
1915 62052
2520 65594
2590 65594
4000 64700
4001 64700
4003 64700
4041 64700
4041A 64700
4050 64700

30 CFR

250 61834
800 61612

31 CFR

34 66529

32 CFR

66 64061
103 66185
105 66424
199 .... 61068, 63695
252 61615
269 62629
553 65875
706 62008

1909	64063
2002	63324

Proposed Rules:

50	60655

33 CFR

27	62353
100	62365, 63075, 63695, 63697, 63698, 64345
117	60620, 60621, 61615, 62366, 62367, 62368, 63700, 64347, 65283, 65545, 65548, 65888, 66807, 66808, 67170
165	61133, 61616, 62010, 62368, 62371, 63075, 63098, 63416, 63418, 64266, 64268, 65284, 65549, 65889, 66530, 66810, 66813, 67170

Proposed Rules:

100	61148, 63437
110	61639
165	60663, 63728

34 CFR

Ch. I	63099
222	64728
Ch. III	62631

Proposed Rules:

200	61148

36 CFR

223	65891

37 CFR

202	62373
387	62812

Proposed Rules:

201	63440
204	63440

38 CFR

17	62631, 66815
36	65551
38	65286
42	65551

Proposed Rules:

3	62419
38	65313

39 CFR

20	66821
111	66822, 67171

Proposed Rules:

501	61159
3015	63445
3060	63445

40 CFR

50	66823
52	60274, 62373, 62375, 62378, 62381, 62387, 62390, 62813, 63102, 63104, 63106, 63107, 63701, 63704, 63705, 64070, 64072, 64347, 64349, 64350, 64354, 65286, 65897, 65859, 66189, 66332, 66532, 66538, 66823, 66826, 67171, 67179, 67186
55	62393
63	63112
70	62387
81	61136, 62390, 65289
97	67190
127	62395
130	65901
180	60621, 61617, 63131, 63707, 63710, 65289, 65552, 65917
228	61619
300	62397
435	67191
711	65924

Proposed Rules:

52	60329, 62066, 62426, 62849, 63156, 63448, 63732, 63734, 64372, 64377, 65286, 65595, 66578, 66591, 66596, 66602, 66899, 67261
55	62427
63	67062
70	62426
81	66240, 66578, 66602, 66617
97	63156
131	63158, 66900
300	62428, 65315
435	67266

41 CFR

102–74	63134
102–117	65296
102–118	65296
Ch. 109	63262
301–11	63134
301–51	63137
301–70 (2 documents)	63134, 63137

42 CFR

3	61538
8	62403, 66191
11	64982
73	63138
102	62817
402	61538
403	61538, 63860
411	61538
412	61538
416	63860
418	63860
422	61538
423	61538
441	63860
460	61538, 63860
482	63860
483	61538, 63860
484	63860
485	63860
486	63860
488	61538
491	63860
493	61538
494	63860
1003	61538

Proposed Rules:

59	61639
88	60329
455	64383
1007	64383

43 CFR

10	64356
3000	65558

Proposed Rules:

2	64401, 67267
100	65319

44 CFR

64	66829

Proposed Rules:

9	64403

45 CFR

79	61538
93	61538
98	67438
102	61538
147	61538
150	61538
155	61538
156	61538
158	61538
160	61538
303	61538
Ch. XIII	61294

Proposed Rules:

144	61456
146	61456
147	61456
148	61456
153	61456
154	61456
155	61456
156	61456
157	61456
158	61456

46 CFR

106	63420

47 CFR

1	65926
2	66830
20	60625
51	62632
63	62632
64	62818, 65948
73	62657, 65304
90	63714, 66538, 66830

Proposed Rules:

1	65597
73	62433
90	64825, 65597, 65984

48 CFR

Ch. 1	67726, 67781
1	67728, 67731, 67732, 67781
2	67735, 67736, 67763
4	67728, 67735, 67736, 67781
5	67763
6	67735
7	67763
8	67763
9	67728, 67736
10	67763
12	67728, 67736, 67763
15	67763
16	67763
17	67773
18	67735
19	67735, 67736, 67763
22	67731, 67732, 67774, 67781
23	67781
25	67774, 67776
26	67781
31	67778
52	67728, 67731, 67732, 67735, 67736, 67763, 67774, 67776, 67781
53	67736
210	65563
212	65563
213	65563
216	65563
227	65563
236	65565
252	65563, 65565, 65567
1816	63143
1832	63143
1842	63143
1852	63143

Proposed Rules:

Appendix I to Ch. 2	65610
49	63158
211	65606
212	61646
215	65606
219	65606, 65610
227	61646
242	65606
252	61646, 65606
501	62434
511	62434
515	62445
517	62434
532	62434
536	62434
538	62445
543	62434
546	62434
552	62434, 62445

49 CFR

Appendix G to Subchapter B of Ch. III	60633
393	60633, 65568, 65574
395	65574
543	66833
661	60278
1503	62353

Proposed Rules:

107	61742
171	61742
172	61742
173	61742
175	61742
176	61742
178	61742
180	61742
390	66243
391	62448
393	61942
541	64405
571	61942
577	60332
613	65592
Ch. X	61647
1201	65987
1242	65987

50 CFR

16	67862
17	62657, 62826, 65466, 66842, 67193, 67786
20	62404
216	62010, 62018
223	62018, 62260
224	62018, 62260
424	66462
622	60285, 67215
635	60286
648	60635, 60636, 65305, 66197, 66865
660	60288
665	61625, 63145, 64356
679	60295, 60648, 61142, 61143, 62659, 62833, 63716, 64782, 64784, 65305, 67113, 67215

Proposed Rules:

17 ....61658, 62450, 62455, 63160, 63454, 64414, 64829, 64843, 64857, 65324, 67270

217 61160

223 ....64094, 64110

224 64110

226 66911

622 ....62069, 66244, 66912

635 65988

648 ....60666, 64426, 66245

660 ....61161, 67282

680 ....62850, 65615

* **Editorial Note:** Proclamation number 9494 will not be used because a proclamation numbered 9494 appeared on the Public Inspection List on Friday September 16, 2016, but was withdrawn by the issuing agency before publication in the **Federal Register**.

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List September 27, 2016

Public Laws Electronic Notification Service (PENS)

PENS is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

Note: This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.